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ESSAY

THE NO-CITATION RULE FOR UNPUBLISHED OPINIONS: DO THE ENDS OF EXPEDIENCY FOR OVERLOADED APPELLATE COURTS JUSTIFY THE MEANS OF SECRECY?

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I. THE VOLUME CRISIS HAS SPAWNED A SECRET OPINION RULE

In the last thirty years, the volume crisis has brought radical changes to the structure and process of United States appellate courts. One controversial change is the increase in unpublished opinions, which is aggravated by its sometime companion, the no-citation rule. The appellate courts' adoption of the no-citation rule for unpublished opinions raises a number of serious, fundamental concerns. These concerns include: (1) secrecy in the judicial branch of government, (2) judicial precedent as a foundation of the common law, (3) quality of analysis in deciding cases, (4) the creation of a "shadow body of law",[1] (5) the accountability of appellate courts to the bar and the public, (6) the accountability of trial courts to the appellate courts, the bar, and the public, (7) equal access to the common law, (8) freedom of speech, (9) the right to petition the judicial branch for redress of grievances, (10) the nature and function of the appellate judge, (11) Article III of the United States Constitution, and (12) consistency in deciding cases.

What else, but a secret, is an unpublished opinion wrapped up in a no-citation rule? The process itself is a secret, and now the decision, the decision makers, and their reasons are a secret to everyone but the parties. Moreover, if a decision cannot be concealed within a no-citation rule, then the parties face the danger of a court simply affirming or reversing, keeping its reasoning safely hidden in the judicial vault. This does not sound like the customary click and clack of American courthouse machinery; it sounds more like the clang of a door being closed.

The whole purpose of appellate courts is to provide judicial review—re-

1. *See* discussion *infra* Part VIII.C.1.

view—a second independent look—of alleged errors made by a very powerful, single-judge court. Assume a citizen has lost a dispute and believes that the outcome is not based on a legally legitimate process or that there was an error of law. The loser is entitled to judicial review and a meaningful answer from the reviewing court. Future litigants and the public are entitled to know the judicial reasoning behind the decision as well. When an unpublished opinion is cloaked within a no-citation rule, the parties will not know who has decided the case or why they won or lost. Furthermore, the decision does not count; nobody can rely on the decision in another case.

What is the purpose of a secret? Nations keep secrets for reasons of national security. A nation needs to hide its points of vulnerability and withhold knowledge of power to prevent others from seeking parity or superiority. In a free society, the people skeptically tolerate such secrecy only for purposes of national security, and even then only when a number of their elected officials, independent from those who make the secrets, have access to the concealed information and the responsibility of oversight. People are intolerant of government secrets because they know their own motives for keeping secrets: secrets are usually based on fear, shame, or embarrassment.

Of course, circumstances arise where people must respect secrets. The law recognizes these circumstances as privileges. Privileges are often based on privacy rights or the importance for certain secrets to be revealed to selected groups such as doctors, lawyers, and priests.

What, then, is the chief goal of the no-citation rule for unpublished appellate opinions? Is it really to save penmanship efforts or library and research costs, or does the defensiveness of the defenders suggest something more? With the development of the no-citation rule, a blackout curtain has descended across the appellate bench. Who is behind that curtain doing the screening, deciding, and writing, and why is it that the people and the lawyers cannot know or tell? Is it really to save time and expense in low cost-benefit writing and research? Are the reasons given really worth the savings? And are these the real reasons, or does something else explain it?

In the past, the decision-making process has been appropriately shielded from public view. Human nature suggests that judges, as well as jurors and others, perform best when given a private opportunity to think, deliberate candidly, and test ideas with colleagues. Traditionally, public judges whose identities were known carried out this private decision-making process. These public judges had traceable histories and were experienced both in the law and in life. When they completed their work in privacy, the judges produced their opinions publicly, in writing, and subjected them to the crucible of publicity. The judges, the parties, and the public considered them law.

The increase in case volume has not brought an increase in appellate judges. Instead, it has brought forth an increase in the number and tenure of law clerks and the number of staff attorneys. The selection methods, the qualifications, and the experience of law clerks and staff attorneys are different than judges. The clerks and attorneys have no relevant traceable history. While

they do much of the work of the appellate courts, they are generally silent, unseen, and unknown.

Accompanying this large, parajudicial staff comes the unpublished opinion with its enabler, the no-citation rule. Why should the court's final decision also be silent, unseen, and unknown? Why do unknown people work privately to produce decisions known only to private parties? What drives this desire for anonymity? Perhaps embarrassment about having law clerks and staff attorneys supervising the work of district and trial court judges drives this desire.

Could there be something less than pride in a system in which law clerks and staff attorneys screen cases, recommend decisions, and draft opinions? In the past, the bar and the public did not know how appellate judges reached a final decision, but everyone knew who the judges were, what the final decision was, that the decision constituted the common law, and that the decision was subject to public scrutiny. Now, however, the system has changed radically. The public often does not know the identity of the decision makers, and the decision-making process has become private. Moreover, the final decision is not common law, is not citable authority, and is not subject to public scrutiny. This change is not a question of editorial niceties, nor is it a question of proper citation. Rather, it is part of the fundamental questions about how appellate courts should decide appeals and who should occupy appellate court benches.[2]

This discussion is not meant to direct criticism of any kind toward appellate judges; in fact, the contrary is true. Appellate judges generally are well chosen and do excellent work, publishing well-reasoned opinions. The legislative bodies should appoint more judges so that the judges themselves can handle appeals without having to resort to aides and adjutants who must be camouflaged behind a veil of unpublished, uncitable opinions.

II. THE RECENT MANIFESTATION OF THE NO-CITATION RULE AS AN ETHICS ISSUE

Whether unpublished opinions should be cited is an issue that has recently arisen in a quaint way. In 1995, the American Bar Association's Standing Committee on Ethics and Professional Responsibility found itself confronted

2. For some excellent sources on these issues, see THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL (1994); PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL (1976); DANIEL J. MEADOR ET AL., APPELLATE COURTS (1994); Thomas E. Baker, *2020 Year-End Report on the Judiciary by the Chief Justice of the United States*, 24 PEPP. L. REV. 859 (1997); William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290 (1996); 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 (1978) [hereinafter Reynolds & Richman, *The Non-Precedential Precedent*]; Memorandum from Paul D. Carrington to the Commission on Courts of Appeals, (Mar. 6, 1998) (on file with author); Statement of Professor Robert J. Van Der Velde to the Commission on Structural Alternatives for the Federal Courts of Appeals (visited Nov. 17, 1998) <http://app.comm.uscourts.gov/hearings/submitted/VANDERVE.htm>.

with a question: How does a lawyer who has a favorable unpublished opinion fulfill the ethical obligation of representing a client vigorously in the face of a rule that prohibits citing the opinion?[3] Recognizing that other important principles of law are involved, the ABA's Standing Committee on Ethics and Professional Responsibility consulted the Judicial Administration Division of the ABA. As a result the committee created a Task Force on Unpublished Opinions to consider the issue and make a recommendation.[4] The Task Force consisted of three judges and three attorneys[5], and its discussions did not focus on the ethical dilemmas facing lawyers. Instead, it focused on determining what rules courts should adopt concerning citation of unpublished opinions. Although the Task Force could not reach a consensus on a rule, it did recommend that the standard was one of appellate practice and was not intended to impose any ethical obligation on the lawyer.[6] However, the ABA realized that further exploration would be helpful.

The Judicial Division of the Appellate Judge's Conference responded by developing a program at a 1998 ABA meeting entitled "Citation of Unreported Appellate Opinions: Pragmatism v. Purism."[7] As an ethics issue, the question had been resolved; but as a procedural and substantive issue, the question remains unresolved. Often the analysis underlying court opinions break along a line with judges predominately on one side and law professors and experienced appellate lawyers on the other. The reason perhaps lies in the different roles these equally well-intended and knowledgeable representatives serve. Judges are rightly concerned with managing the massive increase in volume that has inundated the appellate courts in the last thirty years; lawyers are concerned with representing their clients' interests. Lawyers want a high quality appellate court review of what they and their clients believe to be an erroneous decision in their case by a trial judge. In contrast, an overburdened court looks for ways to truncate the process and dispose of cases. An aggrieved citizen hires a lawyer to invoke the unabridged process to obtain a thorough review by experienced appellate judges.

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3. *See* JUDICIAL DIVISION, AMERICAN BAR ASS'N, CITATION OF UNREPORTED APPELLATE OPINIONS: PRAGMATISM V. PURISM 1 (discussion paper for Aug. 3, 1998 program) (on file with author).

4. *See id.* at 2.

5. The judicial members of the panel were: The Honorable Mary B. Briscoe, United States Court of Appeals for the Tenth Circuit; The Honorable Ming W. Chin, First District Court of Appeals, Division Three; The Honorable Alan M Wilner, Maryland Court of Appeals. The practicing attorneys on the panel were: Charles E. Carpenter, Jr., Richardson, Plowden, Carpenter & Robinson, P.A., Columbia, S.C.; Deborah Coleman, Hahn, Loeser & Parks, Cleveland, Ohio; Renee G. Goldfarb, State Attorney's Office, Chicago, Ill.

6. *See id.* at 3.

7. *See* JUDICIAL DIVISION, *supra* note 3.

III. THE NO-CITATION RULE AS A CITATION ISSUE

The no-citation debate is really another debate in disguise. If citation principles are examined, the question whether unpublished opinions should be citable is easily resolved. However, commentators that have addressed the question almost never visit principles of citation as a part of their discussion. Principles of citation make it clear that lawyers should be permitted to cite unpublished opinions as authority for their positions.

Lawyers who draft briefs cite to a wide variety of authorities and follow the generally accepted hierarchy of binding and persuasive authority that exists in the legal community. Debate over the details may take place, but every law student's earliest instruction includes the main points.

The first rank of authorities consists of sources that are binding on the appellate court. These sources include constitutions, statutes, regulations, and decisions of the highest court of the controlling jurisdiction.[8] A new, second rank of sources, if it can be cited, is unpublished decisions of the highest court of the controlling jurisdiction. A third rank of sources is primary persuasive materials, which would be binding authority but for their extra-jurisdictional or lower court origin. These include out-of-state or out-of-circuit cases and cases from inferior courts of the same jurisdiction. This rank can be further divided into categories that depend on factors such as (1) how closely the facts of the case match the case under consideration, (2) the regional or jurisprudential kinship of the deciding court, (3) the age of the case, (4) the reputation of the court or judge, and (5) the rationale of the opinion.[9] A fourth rank of sources includes secondary persuasive authorities,[10] which can also be further divided. Although subject to differing views, one sub-ranking might be: (1) the restatements of law, (2) treatises from nationally known scholars, (3) law review articles, (4) lesser known treatises, (5) other legal periodicals, and (6) legal encyclopedias.

A question not often addressed is where unpublished opinions should fit into the citation system. If unpublished opinions are to be treated in the traditional common law fashion, then they constitute a source of the first rank; that is, binding authority within the jurisdiction of the deciding court. These unpublished opinions should be citable if they are binding authority, and they sometimes are.

If unpublished opinions are viewed merely as persuasive authority, then they would occupy a new, second rank and should be citable. In the past, the

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8. *See generally* RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 129-32 (1990) (providing a general discussion of hierarchy of authority).

9. *See generally* CHRISTINA L. KUNZ ET AL., THE PROCESS OF LEGAL RESEARCH 5-6 (2d ed. 1989) (differentiating between primary and secondary persuasive materials).

10. *See generally id.* (commenting on secondary authority); CHRISTOPHER G. WREN & JILL ROBINSON WREN, THE LEGAL RESEARCH MANUAL 65-74 (2d ed. 1986) (discussing general information concerning persuasive authority).

judiciary has always had an appropriate preference for common law cases over other authorities. Cases from common law courts present real decisions reached by real judges arising out of real conflicts. Indeed, they are the source of the common law.

Several factors affect the strength of a cited case. For example, a case whose facts match the parties' facts carries great weight with most courts, and a regional origin can give a case particular strength in a neighboring court. Also, a recent decision may provide stronger support than one from decades past. Finally, the reputation of the deciding judge or court may give a case particularly persuasive strength.

If these criteria are useful, then how should they be applied to unpublished opinions? If factual similarity governs, does an unpublished opinion with a matching fact pattern bear more weight than a factually remote, published opinion? Does an unpublished opinion from either a neighboring jurisdiction or a lower court in the same jurisdiction carry more weight than a published decision from a distant jurisdiction? Does an unpublished decision within the forum from the previous year have more strength than a published decision issued five decades ago from another jurisdiction? Should a recent, unpublished decision of a respected court weigh more heavily than a published decision from an obscure court? Should a recent, well-reasoned unpublished opinion from within the jurisdiction be more persuasive than an old, poorly reasoned published opinion from a remote court? Most lawyers would say yes to all of these questions. But the no-citation rule says no.

If the discussion moves to secondary persuasive authorities, should unpublished opinions outrank treatises, articles, and encyclopedias? Nothing in the rationale underlying the hierarchy of citation of authorities supports a no-citation rule for unpublished opinions. In fact, unpublished opinions would rank above all primary and secondary persuasive sources. The only real question is whether unpublished opinions would obtain a rank equal to binding, published decisions or whether they should occupy a new and unique position beneath binding authority but above primary and secondary persuasive sources.

IV. THE ORIGIN OF THE NO-CITATION RULE

The 1973 Report of the Advisory Council for Appellate Justice recommended that appellate courts reduce the number of published opinions.[11] Subsequent experience and advances in technology continue to challenge this position. A variety of criteria for choosing which cases are worthy of publication have been established by various bodies in an attempt to define

11. Statement of Professor Robert J. Van Der Velde to the Commission on Structural Alternatives for the Federal Courts of Appeals (visited Nov. 17, 1998) <http://app.comm.uscourts.gov/hearings/submitted/VANDERVE.htm>.

those that are "important" enough to publish.[12]

Soon after the adoption of unpublished opinions, courts began to recognize the increasing availability of unpublished opinions and lawyers' reliance on them as authority. In order to give efficacy to the no-publication tactic, courts began to adopt rules limiting or prohibiting citation of these unpublished opinions.[13]

V. THE ASSERTED REASONS FOR THE NO-CITATION RULE: EFFICIENCY AND FAIRNESS

The historical justifications for prohibiting citation to unpublished opinions are to reduce costs and to avoid unfairness. First, without the no-citation rule, a market for unpublished opinions will develop, thereby hindering judicial efficiency. The reasons for selectively publishing opinions will be lost because judges will spend more time writing opinions that can be cited. Accordingly, judicial costs will increase. Second, allowing citation to unpublished opinions will promote unfairness. Prohibiting citation benefits the parties and attorneys by saving time and resources because repeat litigants may develop a library.

These justifications assume both that the selected publication rules are good and that court opinions serving only a dispute-settling function have value only to the parties in the case. Some contend that these opinions have no value to the legal community at large.

Many contrary arguments regarding a limited publication rule and a no-

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12. An example is D.C. Cir. R. 36(a)(2), which provides that the court publishes opinions in cases meeting one or more of the following criteria:

> (A) with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this court;
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> (B) it alters, modifies, or significantly clarifies a rule of law previously announced by the court;
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> (C) it calls attention to an existing rule of law that appears to have been generally overlooked;
>
> (D) it criticizes or questions existing law;
>
> (E) it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit;
>
> (F) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion;
>
> (G) it warrants publication in light of other factors that give it general public interest.

13. *See, e.g.*, 4th CIR. R. 36(c) ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."); 5th CIR. R. 47.5.4 (limiting the use of unpublished dispositions as precedent by way of date restriction); 11th CIR. R. 36-2 (permitting use of unpublished opinions as persuasive authority).

citation rule exist. For example, some may argue that the rules are premised on two questionable assumptions: first, that the law-making function of the court has priority over the dispute-settling function of the court; and second, that opinions which perform only the dispute-settling function do not have value to the public. A strong contrary argument is that dispute-settling decisions have the most value. Courts were created to settle disputes. Dispute-settling cases represent the main body of law from which lawmaking is a by-product. The more novel cases are the aberrations in the system rather than the norm.

VI. THE REAL REASON FOR THE NO-CITATION RULE

The real reason for the no-citation rule is overload on the appellate courts. The rule is a response of the current cadre of appellate judges who are valiantly trying to handle the volume of their dockets. These judges have responded to the volume crises in two ways. One response is an enormous expansion of judicial resources by adding legions of staff attorneys, law clerks, visiting judges, and other parajudicial persons to augment the capacity of the court. The second response is to truncate the procedures to speed cases through the judicial process.

More appellate justice may not be a bad thing. The structural, procedural, and personnel responses since the 1960s have already gone too far in holding back the supply of justice needed to meet the increase in demand. Though the purpose of appellate courts has not changed, the burden on these courts has changed dramatically. The ability of courts to serve their purpose and to serve the citizens who employ them has not kept pace with the increases in demand. Stressed trial courts, stressed lawyers, rocket dockets, new legislation, new causes of action, enhanced rights of criminal defendants, more educated citizens, and increased prosperity all properly generate more appeals. Other factors have also increased the need for access to courts. Courts, like schools, have more burdens shifted upon them from eroding families, eroding churches, transitory communities, a heterogeneous society, technology, and urbanization. Citizens are more confrontational, as seen in sports, the streets, the classroom, and ultimately in the appellate courts.

Judicial responses since the 1960s have been numerous, predominantly in administrative and procedural changes. Administrative changes include adding more law clerks and radically changing their functions, increasing law clerks' tenure, adding central staff attorneys, and adding conference attorneys to mediate appeals. Procedural changes include rationing and truncating the work of judges. As a result, oral arguments are endangered, written opinions are greatly reduced, and judges' conferences have diminished.

The point is not to speak ill of the current judges; that would be similar to denigrating a small, poorly equipped army sent forth against a much larger force. Understandably, the current bench is improvising and scrounging for resources and reinforcements. Each judge on the front line now has many more staff judges in support than ever before. However, to meet the overwhelming

increase in numbers, a need for more front-line judges exists. Truncating procedures and delegating judicial functions to staff are the only choices that judges have. These are natural choices because the alternatives are to either reduce the flow of cases, which judges have no power to do, or to let the docket back up, which they feel responsible to prevent. This rationing of the judicial review process has gone too far.

Traditionally, lawyers and citizens expected each judge to read briefs with care and discrimination in an appeal. Judges were expected to read the record to the extent necessary to understand the case and to validate the significant facts. Judges would hear oral arguments and listen attentively to what clients paid dearly to have their lawyers say.[14] Judges would give independent consideration to each case and would conduct serious, meaningful collaboration with their colleagues. Judges or their law clerks would do independent research when necessary. A judge would then either write an opinion or study and contribute to an opinion written by a colleague. In short, a judge would take full advantage of the adversarial process, decide the case, and then publicly explain the reasons for the decision.

The judges performing these tasks would be interested but impartial legal scholars who could think for themselves, act within a collegial court, and work well in the relative loneliness of appellate chambers. These judges would be well known to the bar; they would not be anonymous, and they would not be auxiliary civil servants. Instead, they would possess much of the experience which Holmes described as "[t]he life of the law."[15] In essence, they would bring wisdom and common sense to the task of deciding appeals.

If this is a reasonable model, how do the facts of today's judicial process conform to the model? To begin with, even within the model, appellate courts are institutions which are relatively invisible to lawyers or citizens. They are housed in impressive buildings designed to legitimize the judicial process, but the majority of judges, lawyers, and litigants are not in the courtroom very frequently. Litigants have very little direct contact with judges. The courtroom remains empty and silent like a nave most of the time and, like a nave, is the setting for dignified and meaningful proceedings—but proceedings that are only brief, fleeting respites from the otherwise frenetic pace of the life of the law.

The primary contact that citizens have with appellate courts is through their representatives, their lawyers. Citizens believe that their lawyers prepare a brief for members of the court to read and deliver an argument on their behalf setting forth what counsel selects as the most persuasive points. Citizens further

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14. Some think these lawyers might be useful providers of what Holmes called "'the implements of decision.'" *See* John W. Davis, *The Argument of an Appeal*, *in* ADVOCACY AND THE KING'S ENGLISH, 212, 216 (George Rossman ed., 1960) (quoting Holmes).

15. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) ("The life of the law has not been logic: it has been experience.").

believe that wise and experienced judges then ponder, confer, decide, and explain the decision.

That does not happen. Internal operating procedures now carve deep chasms in oral argument, written opinions, and conferences of judges. Briefs are delivered to law clerks and staff attorneys who are often too young to have full life experiences, do not know trial practice, appellate practice, or the jurisdiction's body of law and, while extremely bright, have not developed the wisdom and practical experience that citizens expect in a high judicial office. The law clerks and staff attorneys filter the case, recommend the answer, and draft the opinion.

A spirited but unpersuasive argument is that law clerks or staff attorneys do not become assistant judges or controlling bureaucracies. However, consumers of justice do not believe the argument, and candid judges, off the record, often acknowledge its falsity. The only certainty that a client and lawyer have that a real judge has heard their side is through oral argument—the shortest, yet the most endangered, of the available judicial procedures. Even when judges grant oral argument, they have often made tentative decisions, a practice which the judiciary rightfully forbids anyone else to do. In oral argument, the time is usually abbreviated and the method is often inquisitorial. The carefully planned and developed presentation is frequently abandoned. The idea that decision making can benefit from reflective listening to an advocate's independent thoughts, developed after long hours of contemplating the client's case, seems discarded. Without oral argument the consumers of justice are led to believe that their carefully prepared, dearly paid for briefs which set forth their causes are mailed to a great black box staffed by bright, young interns who submit a solution to senior management for approval.

Clients invest much expense, time, and effort in their cases. When told that the court is so busy and the judge's time is so valuable that the court cannot afford to hear a client's side argued, that client's response is plausibly, "I am sorry to hear that the court is in such desperate financial straits that it cannot afford an hour of time so that my attorney can come present my case in person. My lawyer says that an hour in the office arguing a case with co-workers saves time and brings clarity to the case more quickly. But you seem to disagree. If you will please tell me what your billable rates are, I will gladly reimburse the appellate court for an hour of each judge's time in exchange for their courtesy in hearing my cause. I have expended far more than that on more mundane aspects of the case and will gladly bear that expense. Knowing that I have at least had this hour of your personal attention is important to me. That this contact be face to face is also important, but I know there may be some exceptions. I certainly don't mind waiving the privilege occasionally, but I would really like to preserve the opportunity. If you deny me that hour, then I wonder what you did with my brief and the record. To whom is my lawyer writing the brief? It matters. I prefer that you personally handle my case and not delegate it to one of your bright, young associates. I will be glad for them to hear one of my cases in a few years. They seem to have great promise, and

I like them, but I would like *you* to hear my case."

The classic symptoms that demonstrate the need for more judges are the denial or abbreviation of oral argument, the reduction of conferencing and deliberation time, the addition of law clerks and central staff attorneys, and the decrease in the amount of explanation of the rationale behind the court's decisions.[16] However, adding more judges certainly raises legitimate concerns. The primary concerns are cost, cheapening, collegiality, and coherence.[17] Added costs are inevitable, but the cost of adding judges can be offset by reducing administration. If the costs of housing, feeding, managing, and supervising the staff are traded for a proportionate, additional number of judges supported by one law clerk each, the costs could remain constant while improving the quality and quantity of justice. Cheapening, collegiality, and coherence are more at risk by further delegating and truncating than by adding judges.

If the legislature and the people intend to increase the business of the courts, they should appropriate money for more judges. These added judges, unlike staff attorneys and law clerks, would be identifiable, responsible, experienced judges. They might have to sacrifice bench or staff memoranda, but perhaps the trade-off is beneficial. A staff memorandum has been described as a method for giving a judge an accurate background "'uncolored by advocacy.'"[18] Unfortunately, such memoranda may trade the benefits of an adversarial system deployed by experienced lawyers for an inquisitorial system deployed by inexperienced lawyers. Bench memoranda often contain: "(1) a description of the procedural history and posture of the case; (2) a statement of the issues; (3) a summary of the facts necessary for decision of the issues; [and] (4) a summary of the opposing arguments . . . ."[19] Each of these elements is redundant because they can all be found in the front of the parties' briefs. Bench memoranda also include: "(5) [the staff attorney or law clerk's] own analysis of the law and the facts; (6) [the staff attorney or law clerk's] own recommendation of a disposition; (7) a draft of a memorandum decision; [and] (8) a recommendation [on oral argument] . . . ."[20] These last four elements are undesirable and inappropriate because they preempt the roles of the lawyers and the judge. They are carried out by those who have not been chosen for the office and who do not have the qualifications for the office. Having a pre-hearing law clerk or staff attorney recast the facts, recast the questions presented, recast the arguments of counsel, recommend a disposition, and draft an opinion is an inappropriate filtering of advocacy and an inappropriate delegation of judicial responsibility. A ninth element of a typical bench

16. *See* CARRINGTON ET AL., *supra* note 2, at 142-45.

17. *See* MEADOR ET AL., *supra* note 2, at 414.

18. *Id.* at 455 (quoting Donald P. Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 COOLEY L. REV. 157, 165 (1984)).

19. CARRINGTON ET AL., *supra* note 2, at 51-52.

20. *Id.* at 52.

memoranda is "a suggestion of issues to be discussed at oral argument."[21] This is a perfectly appropriate and useful function for a law clerk or staff attorney to provide to the judge. More of these functions may be appropriate in cases filed by pro se litigants whose briefs likely do not provide the court with cogent arguments.

Delegating the review of a trial court's decision to staff is inconsistent with the constitutional concept of the judicial branch of government. This practice also fails to produce proper error correction and law enunciation. Could that be why courts adopt procedures to produce unpublished opinions and hide them behind the curtain of a no-citation rule? Does the no-citation rule legitimately rank sources of authority? Hardly. Does the no-citation rule have anything to do with privacy or privilege? Not in America. Does the rule actually save time and expense? Partly. If the process and product are excellent, then why should they be kept secret under the guise of a no-citation rule?

Overall, screening pro se cases and having conference attorneys to mediate appeals are both helpful. For each judge to have one or two law clerks is also helpful. But the responsible limits of delegating and eliminating the court's functions have been reached and often exceeded. If having an appeal is valuable, and it is, then having appellate judges handle the appeal is also valuable. Only so much can be substituted for having wise, experienced, interested, scholarly judges carefully read the briefs, familiarize themselves with the facts, listen to arguments from those who have lived with the case more than anyone else, ponder alone, deliberate together, decide the case, and explain their reasons. The appellate courts need more judges to decide the cases and to write the opinions. These courts need fewer parajudicial staff handling cases and writing opinions that cannot be cited.

VII. THE NO-CITATION RULE SACRIFICES THE QUALITY OF APPELLATE DECISIONS

The no-citation rule treats courts' opinions as if they were not there. But they are. The opinions do not go away; instead, they take on many other forms and functions. In particular, unpublished and uncitable opinions (1) are creating an invisible shadow body of law; (2) are allowing courts to be less accountable for their decisions; (3) are insulating decisions from the rarefying effect of stare decisis; (4) are eliminating the salutary effect of having judges draft the court's opinions; (5) are depriving the public of the legitimizing effect of visible, publicly available decisions; (6) are known to the court, but are not answerable for by the court; (7) are not signed by anyone; (8) are often written by someone that is only one year out of law school; (9) are often binding on the court even when they are unknown to the parties; (10) are not subject to circulation and the crucible of analysis by the public, the bar, or legal commentators; (11) are

21. *Id.*

contrary to a policy of open government and the spirit and purpose of the Freedom of Information Act and the Sunshine Laws; (12) are partially reported by both specialty publications and institutional litigants; (13) are selected to remain unpublished by the authors rather than by the consumers or those affected by the judicial system; (14) are reducing the likelihood that the opinion will be reviewed further; (15) arguably violate the First Amendment of the Constitution; (16) are contrary to a citizen's right to redress grievances before the government; (17) are shielding the courts' main output from public view while highlighting the distinctive product of the judicial system; (18) are hiding the accumulating weight of authority on a point of law; (19) are hiding the erosion of authority on a point of law; (20) are allowing censorship of the judicial system's work-product; (21) are allowing courts to avoid difficult decisions; (22) are allowing courts to conceal divisive issues; and (23) are allowing the court's perspective to determine whether an opinion is worthy of publication.

VIII. JURISPRUDENTIAL REASONS AGAINST A NO-CITATION RULE

A. The Purposes of Written Appellate Court Decisions

Appellate court decisions serve at least two clear functions: dispute resolution and law making. The law-making function has obvious effects on the public. Appellate court opinions establish precedents to guide obedient lower courts or to correct wayward ones. Therefore, when an appellate court changes, modifies, or affirms a principle or rule of law, the clear impact on our common law system justifies a written opinion in which the court explains its reasons for changing, or refusing to change, the law.

Yet, even when a decision lacks this wide-ranging impact, such as when the court mechanically applies the law to the case at bar, other considerations call for a written opinion. Written opinions encourage judges to produce well-reasoned, well-written decisions because they subject judges' conclusions to public scrutiny. This leads to better, more consistent opinions because it holds judges accountable to the public which they serve. This accountability, in turn, dispels the perception of the judiciary as a self-regulating, secret society, and it legitimizes the judicial branch of the government in the eyes of its citizens.

Decisions serving only the dispute-resolution function are no less worthy of written opinions than law-making decisions; the justifications for the written opinions are simply different.[22] Even when acknowledging this argument, the question remains: Should all of these opinions be published? Assuming a

22. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960) ("(If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability.").

negative answer to this question,[23] another dilemma arises: Should citation to opinions deemed "unworthy" of publication be prohibited? And if so, why?

B. Selective Publication and the No-Citation Rule

The selective publication camp believes, in essence, that only opinions which overtly make law are worthy of publication.[24] They believe that opinions which serve only the dispute-resolution function should still be written, just not published.[25] That way, the parties to the dispute get an explanation for the court's decision, but the "unimportant" case does not clog up the reporters which contain the "real" common law. By doing this, selective publication decreases research costs and promotes judicial efficiency.[26] Fewer published decisions mean fewer volumes for libraries to purchase. Moreover, if judges do not have to spend time crafting publishable opinions for every case, then dockets will move along faster. On its face, this does not seem to be an inefficient system. The system trims the fat away for a leaner common law. However, several problems remain.[27] First, occasionally the fat is needed.[28] A second problem is who decides and does the trimming.[29] A third problem is the reasoning behind the trimming. Finally, what is the cost?[30]

These no-citation rules create a shadow body of law—cases that exist and can be found, but about which no one may talk. In other words, the courts issue opinions which then become a partially kept secret. The courts know about these decisions, as do many attorneys, but the rules instruct everyone to pretend like they are not there. These rules would not be strangers in totalitarian jurisprudence or in a Franz Kafka novel. Proponents of no-citation rules defend this strange fiction with two major justifications.[31] First, they argue that allowing citation to unpublished opinions would frustrate the very goals of cost and judicial efficiency that selective publication seeks to achieve.[32] Publishers

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23. Although both sides of the "selective publication" debate have valid points, they are beyond the scope of this Essay. In order to focus more clearly on the no-citation rule, this Essay assumes, purely for this limited purpose, that leaving some opinions unpublished is justifiable.

24. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 121-22 (1985).

25. Judge Posner has summed up this line of reasoning: "[M]any appeals that formerly would have been decided with a full opinion . . . are now decided with an unpublished opinion. These are not frivolous appeals; one-line treatment ['affirmed,' for example] would be inappropriate. They call for an opinion and they get it, but it is not published." *Id.* at viii, 122.

26. *See* Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 547-49 (1997).

27. *See id.* at 549-51.

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.* at 549.

would feel pressure to provide libraries with unpublished opinions, and judges, knowing their work would be open to public inspection, would feel pressure to produce more thorough opinions.[33] The second justification is that citation to unpublished opinions would promote unfairness, because some parties would have more access to the opinions than others.[34] Those offering this justification maintain that citation to unpublished opinions would destroy the advantages of selective publication and would give repeat litigants an unfair advantage over less sophisticated parties.

These proponents' ideas are a flawed version of "don't ask, don't tell." In a true "don't ask, don't tell" scenario, nobody with power knows; therefore the information is not used. However, the case of an unpublished opinion under a no-citation rule is quite different. The decision is made, and the word is out; somebody now knows. The no-citation rule then tries to unring the bell and impose a code of silence. But the rule can only muffle the sound. It cannot make the known unknown. Those who have access know, and those who are diligent can talk to those who know. Most importantly, though, the court and its staff know—and they decide the case.

The arguments in favor of no-citation rules raise valid concerns, but they do not take into account the negative side effects caused by such rules. Strict no-citation rules create at least as many problems as they solve, and these created problems are important. Also, some of the problems created are not as obvious as the problems that are solved.

C. Side Effects of No-Citation Rules

1. A Shadow Body of Law

One major problem with strict no-citation rules is the creation of a "shadow body of law" that affects the judicial system in many different ways. Courts create unpublished opinions, but courts do not have to answer for them because the opinions are not widely disseminated and cannot be cited. Thus, the cases disappear from the radar of the legal community, and the courts require the parties to treat these opinions as if they no longer exist. But they do. They are locked away in the institutional memories of the courts that produce them, where they often wield a silent but powerful influence over future decisions.

Unpublished opinions, then, do not actually vanish without a trace. They exist in a quiet anonymity that allows the possibility of institutional abuses. The

33. Some judges believe that the opinions will never face public scrutiny. *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, 953-54 (1989).

34. *See* Shuldberg, *supra* note 26, at 550 ("Because unpublished opinions are distributed to the parties to the case, the concern is that repeat litigants, such as government attorneys, may maintain a file of these opinions that would be unavailable to future opponents who may litigate similar issues."); *see also* Robel, *supra* note 33, at 955-59 (arguing that institutional litigants, like the federal government, have greater access to unpublished opinions).

courts often know the prior decisions even if lawyers cannot cite them. This unspeakable institutional history certainly plays a role in decision making, but the role is covert. Also, if judges know that their opinions are not citable and that they will not have to sign the opinions, the same "quality control" pressures will not be in place.[35]

This is not to say that judges would be cavalier about these decisions or make them capriciously, but judges would certainly feel more comfortable writing opinions in which they put forth less than their full efforts. Knowing that the opinions are not citable, judges might even pass the task of writing to their staff, which includes law clerks.[36] This can mean that a person just out of law school would be supervising trial judges and resolving disputes for an appellate court. Although appellate judges no doubt review the resulting opinion, it is not their work.[37] The anonymous nature of the opinion would provide protection for all reputations involved, and the court could strike another case from its over-crowded docket.

Yet, the "shadow body of law" presents problems other than just the production of lower quality opinions. These opinions can influence, and even determine, future decisions. This creates another danger because, under no-citation rules, the parties before the court might be unaware of the decision that will ultimately guide the court. Granted, unpublished opinions are not supposed to have such precedential weight, but such cases *have* bound courts in the past.[38] Faced with the potential for cases being decided on the basis of

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35. *See* Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998). In his dissent, Judge Murnaghan noted:

> It seems logical that repeated decisions refusing to recognize a right would be evidence that the right was not clearly established even if the opinions were unpublished. However, it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law. For this reason we are loathe to cite to unpublished opinions, nor will we consider them to be evidence that a right is or is not clearly established.

Id. at 124 n.6 (Murnaghan, J., dissenting) (citation omitted).

36. *See* Robel, *supra* note 33, at 953-54.

37. Justice Brandeis has been attributed with saying, "'The reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work.'" CHARLES E. WYZANSKI, JR., WHEREAS—A JUDGE'S PREMISES 61 (1965).

38. *See, e.g.*, Peters v. United States, 9 F.3d 344, 346 (5th Cir. 1993) (per curiam) (citing to an unpublished opinion as support for the law of the circuit); United States v. Ellis, 547 F.2d 863, 868 (5th Cir. 1977) (viewing an unpublished decision as binding precedent); Durkin v. Davis, 390 F. Supp. 249, 253-54 (E.D. Va. 1975) (finding that unpublished dispositions represent the law of the circuit), *rev'd on other grounds*, 538 F.2d 1037 (4th Cir. 1976).

unpublished opinions, strict no-citation rules have Catch-22 attributes.[39] This is especially true when an unpublished opinion is not well reasoned because the opinion may bind the court even though the litigants currently before the court have had no opportunity to attack its reasoning.

In addition, unpublished opinions may help demonstrate that a certain rule is getting stronger or weaker in the jurisdiction, depending upon the cases cited to support it. For instance, a statement of a rule followed by a string citation of recent cases indicates that the rule continues to have a strong position in the jurisdiction. On the other hand, a rule supported only by a single case or by a cite consisting entirely of district court cases might indicate that the rule is on shaky ground. Unpublished opinions affect this process in two ways. First, if practitioners cannot find all of the cases applying a certain rule (e.g., because some are unpublished and uncitable), then it will be difficult to determine whether the jurisdiction's support of that rule has strengthened or weakened. Second, although unpublished decisions may reveal that a jurisdiction has been routinely applying a certain rule, if attorneys cannot cite the cases, then they cannot aptly demonstrate this trend to the court. Just as these decisions can operate as invisible precedent, they can also work behind the scenes to solidify or deteriorate a rule.[40]

2. *Unfair Use and Access*

As one goal, strict no-citation rules seek to promote judicial fairness by keeping repeat litigants that have substantial resources from compiling an exclusive secret weapon. The no-citation rule tries to solve this potential problem by making unpublished opinions a secret to everyone. Theoretically, this creates a level playing field because no one is allowed to use the difficult-to-find cases.[41] In fact, no-citation rules actually create unfairness because one side may locate an unpublished opinion and utilize the court's reasoning to its benefit while the other side may never even realize that the case exists. For example, assume that a federal agency has a case against a private party with facts similar to those dealt with in an unpublished opinion. The agency may have many unpublished opinions collected and categorized for easy access, whereas the private party might not have an easy way to locate the case. Even if no-citation rules prevent the agency from directly using the case, the agency

39. For a particularly paradoxical statement, albeit in a circuit with a less restrictive no-citation rule, see *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 355 (5th Cir. 1993), *reh'g granted en banc*, 12 F.3d 426 (5th Cir.), *rev'd*, 44 F.3d 334 (5th Cir. 1994), where the court explained, "This circuit has considered its unpublished opinions to be binding precedent, although we discourage their citation."

40. *See* Reynolds & Richman, *The Non-Precedential Precedent*, *supra* note 2, at 1189-90.

41. The argument that unpublished opinions are difficult to find has lost some force with the recent proliferation of on-line research services and circuit-specific CD-ROMs. *See* Shuldberg, *supra* note 26, at 556.

could skillfully articulate the successful arguments from that case to the court. Because the court would likely recognize the arguments and supporting authorities, the agency and the court would speak in a language that is like a secret code to which the private party is not privy. The private litigant, therefore, has no meaningful chance to argue against this "shadow body of law" and is unfairly disadvantaged.[42]

On the other hand, the institutional litigant might discover an unpublished case directly on point that would help the other side and simply bury it. Rather than equalizing the institutional litigant and the one-time, private litigant, the no-citation rule may give an unfair advantage to institutional litigants. Because no-citation rules bar the direct use of unpublished cases, the institutional party could conceal such a case without running afoul of any ethical rule regarding duties to disclose controlling authorities to the court.[43] Therefore, strict no-citation rules favor institutional and other repeat litigants, thereby fostering the unfair practices that they were designed to prevent.[44]

3. *The "Shadow Body of Law" Beyond the Appellate Court*

The "shadow body of law" plays a larger role than many lawyers suspect. Only a fraction of future disputes will be resolved by appellate courts, before whom unpublished opinions cannot be cited. Trial courts resolve more disputes than appellate courts, have no prohibitory citation rule, and should follow the jurisdiction's precedent. Also, arbitration and mediation are resolving an

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42. *See* George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 491 (1988). Unfair use of unpublished opinions is not merely hypothetical. The following is an example of litigants using an unpublished opinion to dictate settlement strategy:

> [I]n *Prudential-LMI Commercial Insurance Co. v. Colleton Enterprises Inc.*, a 1992 unpublished decision, the Fourth Circuit court held that a hotel damaged by Hurricane Hugo could not recover "windfall" losses from its insurer for being unable to accommodate the influx of repair persons and construction workers who would have booked rooms after the disaster if the hotel had not been damaged. According to plaintiffs' attorneys, insurance adjusters later used an insurance trade journal article about the decision to deny similar claims after Hurricane Andrew. Thus, although the Fourth Circuit had banned this opinion's citation, it did not thereby render the decision "unusable."

Suldberg, *supra* note 26, at 563-64 (footnotes omitted).

43. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1998) (stating that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel").

44. *See* Shuldberg, *supra* note 26, at 565-66.

increasing number of disputes,[45] and unpublished opinions can be cited in these forums. Furthermore, discussion of unpublished opinions can certainly occur during negotiations and settlement, which resolve the greatest number of disputes. Of course, the weight given to such opinions varies. Finally, many potential disputes are prevented due to advice that a lawyer gives a client. How does the lawyer advise the client about the "shadow body of law"? And how do all lawyers and all clients have equal access to these cases?

4. Lack of Trust and Faith in the Judiciary

The public tends to view the workings of government with skepticism and mistrust. Although the judicial branch might like to be immune from this public perception, it is no different in the eyes of the public.[46] Many "average Americans" may be more wary of the judiciary than of other branches of government, because they see judges as powerful people who answer to no one but themselves.

No-citation rules did not create this hostile perception, and free-citation standards would not eradicate it. However, no-citation rules add to this perception by increasing the aura of secrecy over the functioning of the judicial branch and by strengthening the perception that the judiciary is not accountable.[47] The creation of hidden, anonymous judicial opinions does not further the recent efforts to remove the veil of secrecy from our government's activities. The Freedom of Information Act[48] ("FOIA") and the Government in the Sunshine Act[49] ("Sunshine Act") are designed to put the decisions and operations of government in the public forum.[50] Further, the United States Supreme Court, while acknowledging the need for secrecy in some instances, has gone so far as to set limits on presidential claims of privilege, ruling that some information is too important to keep from the public.[51] But it was more

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45. ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS 3 (1996).

46. *See* RICHARD A. POSNER, LAW AND LITERATURE 32 (rev. ed. 1998) ("The public is more cynical about law than the profession is, and it is useful for legal professionals to be reminded of this from time to time.").

47. This discussion is not meant to imply that the credibility of the judiciary hinges on the status of citation rules. However, the practice of creating a "shadow body of law"—a compilation of inaccessible, anonymous cases—adds to the existing public mistrust of government. Moreover, lawyers are citizens too, with their own questions about the status of the judicial bureaucracy, and this "shadow body of law" is certainly not lost on them.

48. 5 U.S.C. § 552 (1994 & Supp. II 1996).

49. *Id.* § 552b.

50. *See* Jennifer A. Bensch, *Seventeen Years Later: Has Government Let the Sun Shine In?*, 61 GEO. WASH. L. REV. 1475, 1483-84 (1993); Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the* National Parks *Test*, 61 GEO. WASH. L. REV. 1430, 1433-36 (1993).

51. *See* United States v. Nixon, 418 U.S. 683 (1974); *see also In re* Sealed Case, 116 F.3d 550, 555 (D.C. Cir. 1997) (addressing a claim of executive privilege in a grand jury investigation of former Secretary of Agriculture Mike Espy).

than the public's right to know that spawned the FOIA and the Sunshine Act; it was a recognition that decision makers behave differently if their identities and actions are publicly revealed.[52] When personal rights are at stake regarding decisions to be made, those decisions and the processes which lead to them should be announced publicly. In addition, the decision makers' identities should be known so that they can be held accountable for their reasoning that led to the decision. Uncitable judicial decisions are inconsistent with these concepts.

Of course, secrecy and anonymity in decision making are sometimes desirable. There can be drawbacks to scrutinizing the work of government officials too closely. For instance, few people would argue that sensitive topics, such as personnel decisions or national security issues, should be unqualifiedly open to the public, and some believe that the application of the Sunshine Act has negatively affected government decision making.[53]

Still, when a court issues an unpublished opinion under a no-citation rule, suspicion automatically surrounds the opinion. The losing party asks a host of questions concerning the opinion: Did a judge write it? If so, which one? If not, what is the background of the law clerk who wrote it? What other "shadow cases" might have swayed the court's reasoning? If these questions remain unanswered, the losing party might suspect that the decision was arbitrary or unfair.[54] With an unpublished, uncitable opinion, convincing that party otherwise is difficult.[55]

Both selective publication and no-citation rules allow for judicial censorship. To reform this system, judges closely involved with the case should not be the ones to decide whether the opinion should be published or citable. Notably, judges might take different approaches as to what kinds of cases are publishable. This ability to control which parts of its work will be seen certainly does nothing to improve the public's perception of the judiciary. In addition, judges may not be able to aptly predestine which opinions will be the most useful precedent.[56]

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52. This is why the votes of elected representatives and the decisions of other legislative and administrative bodies ranging from city councils to school boards are open for public scrutiny. People believe that their elected and appointed officials behave better under the microscope of public attention than behind closed doors.

53. *See* Bensch, *supra* note 50, at 1476.

54. *See* Shuldberg, *supra* note 26, at 567.

55. This is especially true in the increasingly frequent cases where the court hears no oral argument and issues an unpublished opinion based solely on the briefs. In these cases, a party cannot even be certain that a judge ever read their brief, and the attorneys must target their arguments to an unknown audience.

56. Statement of Professor Robert J. Van Der Velde to the Commission on Structural Alternatives for the Federal Courts of Appeals (visited Nov. 3, 1998) <http://app.comm.uscourts.gov/hearings/submitted/VANDERVE.htm>. Positive as well as negative reasons underly taking the selection authority out of the hands of the author. For example, Lincoln himself did not think much of his hurriedly written Gettysburg Address; a retrospective public recognized its importance. If the main purpose of selective publication is to reduce the

Using an uncitable, unpublished opinion to dodge sensitive issues or to delay confronting a conflict within the court is possible.[57] Moreover, uncitable, unpublished opinions may keep questionable decisions out of the glare of academic and professional review. This avoidance, in turn, removes one of the major checks on the exercise of judicial power; namely, critical review by commentators, practitioners, the public, and higher courts.[58] Unpublished opinions coupled with no-citation rules also effectively remove the check on appellate court power, which is inherent in review by the Supreme Court. The Court rarely expends its limited resources correcting cases which, in theory, will affect only the parties at bar.[59] Selective publication and no-citation rules create a potentially dangerous situation because "they tend to leave some of the most powerful persons in the country accountable (with regard to at least part of their work) to no one—not even to themselves or to each other."[60]

The "shadow body of law" concept does not affect only the judiciary's perceived legitimacy. Allowing judges to issue "anonymous" opinions can also affect the actual, substantive decision-making process. "Anonymity and irresponsibility go hand in hand, in all branches of government."[61] Attention makes people cautious; they think more about their decisions. When people are before the public, they are influenced by that accountability; they try to be careful and consistent.[62] On the other hand, when people feel that they are not being watched, they are much more likely to do what they want, regardless of what other people might think about their actions.[63]

How this basic tenet of human nature fits with the notion of unpublished decisions and no-citation rules is clear. Judges who feel as if they are deciding certain cases in a vacuum might reach different decisions than if they were treating these cases as opinions to be published. This is not meant to say or to imply that judges would consciously alter their decision-making processes. However, even with their extensive legal training, judges retain the human nature that affects all decision makers. If the decisions will really be the same, then what is the harm in full disclosure?

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amount of law being put onto the shelves of libraries, then non-judicial panels might work better than the current system. For instance, a panel consisting of contract law practitioners and professors could screen all court decisions regarding contract issues and could decide which ones are important enough to be published.

57. *See* Shuldberg, *supra* note 26, at 552-53.

58. *See id.*

59. *See* Reynolds & Richman, *The Non-Precedential Precedent*, *supra* note 2, at 1202-03.

60. *Id.* at 1204.

61. George Rose Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 ARK. L. REV. 26, 32 (1978).

62. *See generally* ROBERT WRIGHT, THE MORAL ANIMAL 210-26 (1994) (discussing society's imposition of morality and its effect on human behavior).

63. *See generally* EDWARD L. DECI & RICHARD FLASTE, WHY WE DO WHAT WE DO 17-29 (1995) (demonstrating that people's intrinsic motivation decreases when they are extrinsically rewarded).

IX. A PARTIAL JURISPRUDENTIAL REFORM TO REDUCE PARAJUDICIAL STAFF AND INCREASE JUDICIAL CAPACITY

The literature has been ringing with the debate over structural reform in the appellate courts. Congress has recently created the United States Commission on Structural Alternatives to the Federal Courts of Appeal. Its purpose is to study and report on structural reforms in the Federal Courts of Appeal.[64] Much of the debate derives from concerns of judicial politics, but the larger debate is over marshaling judicial resources to meet increases in volume. Many judges think their courts are doing just fine, thank you; they simply need to get rid of the trash cases and need to continue increasing their staff in order to do so. They do not need more judges.

Many commentators disagree and think that other structural and personnel reforms are needed. Suggestions include dividing the courts, adding another layer of courts, reducing the courts' jurisdiction, and adding more judges.[65] One structural reform which receives too little consideration is a structural change reducing the number of structures. This, in turn, would limit the truncating of judicial processes and the delegation of decision making to parajudicial staff. If a no-citation rule reflects some sheepishness over staff work being used as the future standard of the common law, then the answer is to cut the huge staff and add more judges who are in direct contact with the cases. Without an administrative bureaucracy, both the risk of too much delegation and the truncating of traditional appellate decision making is greatly reduced.

An example of the current administrative machinery is found in the testimony of Chief Judge Hatchett of the Eleventh Circuit.[66] Judge Hatchett described the Eleventh Circuit as consisting of twelve active judges, four law clerks per judge, forty-three staff attorneys, and twenty-one visiting judges.[67] In reality, over one hundred individuals with legal training make decisions about cases before the Eleventh Circuit. Many of these individuals are young, inexperienced, unseen, and unknown. They are supplemented by another echelon of secretaries, librarians, paralegals, human resources staff, pay masters, and others.

An experienced federal judge can certainly dispose of routine cases in a far more efficient manner than these staff persons. Furthermore, an experienced judge should be the one deciding cases. By limiting the maximum number of law clerks to two per judge and the maximum number of staff attorneys to the number of judges on the court, as has been suggested by Professors Meador,

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64. 28 U.S.C.A. § 41(1)(B) (West Supp. 1998).

65. *See* MEADOR ET AL., *supra* note 2, at 365-430, 1063-1158 (providing an overview and discussion of reforms).

66. *See* Joseph W. Hatchett, *Prepared Statement Before the Commission on Structural Alternatives for the Federal Courts of Appeals* (visited Nov. 3, 1998) <http://app.comm.uscourts.gov/hearings/atlanta/hatchett.htm>.

67. *See id.*

Rosenberg, and Carrington,[68] and by considering visiting judges and the cost of their law clerks and staff attorneys, this problem could be solved without a large increase in costs. Eliminating the bulk of these positions and using the resources to expand the number of appellate judges would do much to answer the current volume crisis in the appellate courts.

X. CITATION REASONS AGAINST A NO-CITATION RULE

If a lawyer must submit an appellate brief to a court, what kinds of authority would the lawyer like to cite to that court? What kinds of authority should the lawyer be able to cite to that court? The court will allow citations to legal encyclopedias and other legal periodicals along with law review articles, treatises, and the Restatements. In addition, the court will accept citations to cases from other jurisdictions, cases from lower courts, concurring opinions, and dissenting opinions. The court will also allow citations to Attorney General opinions, and even unpublished opinions.[69]

What if the lawyer wishes to cite a case previously decided by the very court to which the lawyer must submit the brief? Would the lawyer's former law professors encourage the lawyer to cite such a case? Not only should lawyers cite such a case, but they should cite it in preference to these other sources. It is a real case arising out of a real dispute between real parties—the stuff of which the common law is made. It should be citable.

XI. A COMPROMISE CITATION SOLUTION TO ALLOW CITATION OF UNPUBLISHED OPINIONS FOR THEIR PERSUASIVE VALUE

Although the ideal solution is a legislature's commitment of sufficient resources to match the demand for appellate judges with sufficient appellate judicial supply, its arrival is not visible on the political horizon. If there were enough appellate judges, the need and justification for the expediency of uncitable unpublished opinions would disappear. But what should courts do in the meantime? What is the best way to approach unpublished opinions given the present circumstances?

Three primary positions regarding citation of unpublished opinions have been advanced. The classic model is to cite all cases, whether published or unpublished, as precedent because they are decisions of a common law court and thus part of the common law. Diametrically opposed is the view that courts should adopt the most restrictive rule of the deciding court or the forum court:

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68. CARRINGTON ET AL., *supra* note 2, at 48.

69. *See generally* discussion *supra* Part III (describing ranks of authority and suggesting where unpublished opinions should fit within the hierarchy).

if either has a no-citation rule, then the court should not allow citation.[70] A compromise view is to allow the citation of unpublished opinions as persuasive authority but not as binding precedent. The Eighth Circuit has adopted such a rule:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. . . . When citing an unpublished opinion, a party must indicate the opinion's unpublished status.[71]

This approach avoids some of the negative side effects of the no-citation rule and captures some of the efficiencies of its purpose. It allows lawyers to see what the appellate courts are doing and to follow them or challenge them. It allows trial courts to see what the appellate courts are doing and forces courts to be accountable. It allows administrative agencies to see what the appellate courts are doing and prevents them from acting with impunity. It also enables appellate courts to be seen by the public. Moreover, it enhances cohesion and consistency of the law of the jurisdiction. It reduces secrecy and censorship and takes some pressure off of the judicial writing burden. At the same time, it requires self-conscious decision making by judges. Although this rule does not eliminate a market for unpublished opinions, it does reduce the market value.

A published opinion meets the traditional common law normative model. An unpublished opinion provides a unique diminished status for a court decision. An uncitable unpublished opinion remains a secret.

XII. A WORD OF CAUTION TO LAWYERS

Without question, unpublished opinions should be citable. However, that does not mean they should be cited. The substantive benefits of citing these cases are not great, and their use will be met with psychological resistance. The courts have already said they are not proud of them. Accordingly, they should only be used in the absence of better alternatives.

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70. When a state court is applying foreign law or a federal court is applying state law this approach may constitute either a denial of full faith and credit or a violation of the *Erie* doctrine. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1937).

71. 8th CIR. R. 28A(k).

XIII. CONCLUSION

Lawyers would like to present cases to experienced judges who carefully read the briefs, attentively listen to oral arguments, confer with their colleagues, and write carefully crafted opinions. They do not want to travel on a voyage over the deep like ancient fishermen who may either die an unknown death or return with a catch of good fortune, never knowing why, and only able to curse or give thankful praise to the all powerful but unrevealing gods. If, instead of judges, lawyers are to submit their cases to a large administrative staff for filtering, recommendation, and explanation, it is better if the results are known and some degree of accountability can be maintained. The opinions which emerge from this process should be citable.