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## 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?

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WILL THE FEDERAL COURTS OF APPEALS  
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DECISIONS POSE A GREATER THREAT?

MARTHA J. DRAGICH\*

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## INTRODUCTION

The published judicial opinion<sup>1</sup> is the "heart of the common law system."<sup>2</sup> Judicial opinions are a critical component of what we understand to be the "law."<sup>3</sup> In fact, a legal system's existence cannot be recognized "until the decisions of [its] courts are regularly published and are available to the bench and bar."<sup>4</sup> To the extent our "law" is embodied in precedents, published opinions are the authoritative sources of law. Indeed, stare decisis cannot operate in the absence of published opinions.<sup>5</sup> Opinions "are what courts do, not just what they say[;] [t]hey are the substance of judicial action."<sup>6</sup> Courts ensure the legitimacy of their decisions by preparing and

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1. An "opinion" is a "statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based." BLACK'S LAW DICTIONARY 1092 (6th ed. 1990). Some courts adopt a similar, albeit narrower, definition of opinion. The Ninth Circuit, for example, distinguishes opinions from memoranda and orders. 9TH CIR. R. 36-1 (stating that court may enter order with or without written opinion). This Article adopts *Black's* definition.

The term "opinion" implies nothing about the dissemination of the document. Opinions may be published or unpublished, and unpublished opinions may or may not be precedential. See *infra* Part I.A. Thus, at times this Article distinguishes between preparation of an opinion (as opposed to some other type of document) and publication or nonpublication of the opinion. Opinion preparation and publication each serve important but distinct purposes.

*Black's* defines "decision" to mean a "determination arrived at after consideration of facts, and in legal contexts, law." BLACK'S LAW DICTIONARY, *supra*, at 407. This Article uses "decision" to refer generically to court actions resolving the disputes before them, whether or not by opinion. It uses "disposition" to refer to decisions without opinions.

2. John Reid, *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 COLUM. L. REV. 59, 59 (1963) (calling opinions the working tool of lawyers, and building blocks of judges). This Article uses "common law" to describe adjudication that employs reference to prior decisions and reasoning by analogy as its primary tools. Similarly, Judge Richard Posner uses the phrase "common law" broadly "to mean any body of law created primarily by judges through their decisions . . . even if not by common law judges in the strict sense lawyers employ." RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 247 (1990); see also *infra* notes 37-42 and accompanying text (discussing federal courts as common-law-style tribunals that rely on precedent to guide decisionmaking).

3. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988) (discussing stare decisis and its role in providing stability and continuity in judicial decisions).

4. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 9 (1977).

5. See *infra* Part II.B (discussing importance of courts citing cases to show nature of law and precedent).

6. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961).

publishing opinions that explain and justify their reasoning. And judges and lawyers are utterly dependent upon published opinions to research, evaluate, argue, and decide cases—the most basic of legal tasks.

Yet over the past two decades, the federal courts of appeals have regularly employed practices that reduce the roles and uses of published judicial opinions.<sup>7</sup> This Article examines three of those practices: selective publication, summary disposition, and vacatur upon settlement. Part I describes each practice.

Part II establishes the critical importance of federal courts of appeals' opinions. After reviewing the manner in which the law develops through case-by-case adjudication, Part II examines the close connection between the history of opinion publication and the doctrine of *stare decisis*. Next, it defines five core values—stability, certainty, predictability, consistency, and fidelity to authority—that are prerequisites to a legitimate legal system, and suggests ways in which published opinions facilitate the operation of these core values in a system where law develops through adjudication. Finally, Part II examines the role of opinions as essential tools in the two main activities of lawyers and judges: researching and applying the law.

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7. These changes in appellate court practices are directly related to burgeoning caseloads. During the year ending September 30, 1993, there were 50,224 filings and 167 judgeships in the courts of appeals. ADMINISTRATIVE OFFICE OF U.S. COURTS, *Judicial Business of the United States Courts*, in ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 3 tbl. 1 (1993) [hereinafter 1993 ANNUAL REPORT] (advance copy on file with the Author). In 1970, there were 11,662 filings and 97 judgeships. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 99 (tbl. 2) (1971). Thus, from 1970 to 1993, filings increased by 330% while judgeships increased only 72%.

For analysis of the caseload crisis and suggestions for reform, see FEDERAL JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (1993) (reporting that caseload crisis has led to insufficient time to deliberate over cases, diminished quality of appellate process, and inconsistent interpretations of federal law); *id.* at 105-22 (suggesting full structural changes in appellate process); *id.* at 123-39 (proposing alternatives to full structural changes); FEDERAL CTS. STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 5, 109-31 (1990) (stating that caseload crisis is due mainly to increase in appeals from district courts, and recommending increase in judgeships and remodeling of appellate courts); Alan Betten, *Institutional Reform in the Federal Courts*, 52 IND. L.J. 63, 64 (1976) (attributing caseload crisis to sharp increase in criminal appeals); Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 7 (Arthur D. Hellman ed., 1990) (discussing steps taken by Ninth Circuit to handle burdensome caseload, including increase in judges, performance of en banc functions with less than full court, and formation of elaborate case inventory system); *id.* at 68-122 (recommending ways to make appellate process more efficient); see also THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 230 (1994) (suggesting adoption of certiorari-like system; replacement of current circuit system with alternative structure; or keeping present system but employing modifications adopted by Ninth Circuit).

Part III uses recent cases to illustrate how selective publication, summary disposition, and vacatur upon settlement impede the development of a coherent body of decisional law, frustrate lawyers and judges in performing their daily tasks, and threaten the legitimacy of the federal courts. This Article concludes that while efficiency is a proper concern, the courts of appeals currently overvalue it at the expense of the broader purposes they must serve in our legal system. Accordingly, this Article proposes that federal courts of appeals should (1) operate under presumptions favoring publication, (2) develop broader awareness of the many uses of precedent, and (3) publish full opinions in cases where they reverse the lower court decision or fail to reach a unanimous decision.

### I. PRACTICES REDUCING THE ROLE OF THE OPINION

Selective publication, summary disposition, and vacatur upon settlement undermine the notion that the "law," as enunciated by courts, can be found by researching published opinions. These practices challenge fundamental assumptions of lawyers and judges: that the law is findable, that the precedential value of a decision is readily ascertainable, and that past decisions provide sufficient information to guide citizens, attorneys, and judges in the future. Indeed, the United States' appellate tradition "contemplates such a central role for the published opinion that to have a two-tracked system is to have a different system" than the one we claim to have.<sup>8</sup>

#### A. *Selective Publication*

Selective publication describes the federal courts of appeals' concerted effort in recent years to reduce their opinion publication rates.<sup>9</sup> Unpublished opinions are common: the courts of appeals issued more than 10,000 unpublished opinions in 1993 alone.<sup>10</sup>

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8. BAKER, *supra* note 7, at 130.

9. See William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 577-79 (1981) (discussing movement initiated by Judicial Conference of United States in 1964 to reduce number of published circuit court opinions); 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, 940 (1989) (stating that by 1976, all circuit courts limited publication of opinions by rule).

10. The courts of appeals terminated 47,790 appeals during statistical year 1993. 1993 ANNUAL REPORT, *supra* note 7, tbls. B-1, B-2; see also *infra* note 48. Of these, 25,761 (54%) were terminations on the merits. 1993 ANNUAL REPORT, *supra* note 7, tbl. B-1.

I ran a search to determine how many unpublished federal appeals court dispositions appeared on Westlaw for the year 1993. This search yielded 17,100 documents. I also searched for summary dispositions, and found 6248 such actions in 1993. See *infra* note 19. Subtracting 6248 summary dispositions from the 17,100 unpublished documents results in 10,852 documents.

Serious interest in selective publication dates back at least thirty years. In 1964, the Judicial Conference of the United States issued a general recommendation that judges publish only those opinions "which are of general precedential value."<sup>11</sup> Within several years,<sup>12</sup> each circuit had adopted a rule regarding publication of opinions and citation of unpublished opinions.<sup>13</sup> In the twenty years since those rules were adopted, the percentage of opinions published has declined.<sup>14</sup>

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I assume that, in these cases, opinions were written but not published. Additional unpublished opinions may exist because some circuits do not provide unpublished opinions to LEXIS and Westlaw. See Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 158 n.15 (1992) (stating that as of 1990, half of all federal circuit courts had not made their unpublished opinions available to LEXIS or Westlaw); see also Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1498 n.97 (1994) (describing how LEXIS and Westlaw handle opinions designated "not for publication").

11. U.S. ADMIN. OFFICE OF THE COURTS, JUDICIAL CONFERENCE REPORTS 1962-64, at 11 (1964).

12. During this time, the Federal Judicial Center completed a study of the circuit courts' publication practices. Board of the Fed. Judicial Ctr., Recommendation and Report to the April 1972 Meeting of the Judicial Conference of the United States 4-7 (1972) (unpublished manuscript, on file with the Office of the Judicial Conference Secretariat, Administrative Office of the U.S. Courts) (reporting on publication of court of appeals opinions and recommending reduction in number of opinions published); see also Donald R. Songer et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 965 (1989) (finding that circuit courts' publication practices varied).

13. See, e.g., D.C. CIR. R. 11(c) (stating that its unpublished decisions can be cited only for preclusive effect, and other courts' unpublished dispositions are allowed only if originating jurisdiction gives them precedential status), 14 (listing criteria for publication); 1ST CIR. R. 36.2 (giving guidelines for publication and allowing citation of unpublished opinions only in related cases); 2D CIR. R. 0.23 (stating that unanimous decisions will not be published if all judges on panel agree that no jurisprudential purpose would be served by written opinion); 3D CIR. I.O.P. 5.5 to .6 (stating that precedential or institutional value is prerequisite to publication, and disallowing citation of unpublished opinions as precedent); 4TH CIR. I.O.P. 36.4 to .6 (listing standards for publication and allowing citation of unpublished opinions only in rare cases and for res judicata, estoppel, or law of case); 5TH CIR. R. 47.5.1 to .3 (listing publication guidelines and normally allowing citation of unpublished opinions only in cases with related facts, for res judicata, collateral estoppel, and law of case); 6TH CIR. R. 10(F) (allowing citation of unpublished decisions only where no published opinion would serve as well, and for res judicata, collateral estoppel, and law of case), 24 (listing publication criteria); 7TH CIR. R. 53(b)(2)(iv), 53(c)(1) (listing publication guidelines and allowing citation of unpublished orders only for res judicata, collateral estoppel, and law of case); 8TH CIR. R. 28A(k) (allowing citation of unpublished opinions only where cases are related by identity of parties or cause of action), 47B (allowing affirmation or reversal without opinion when court determines that opinion would have no precedential value); 9TH CIR. R. 36-2 (listing publication guidelines); 9TH CIR. R. 36-3 (stating that unpublished dispositions have no precedential value except for res judicata, collateral estoppel, or law of the case); 10TH CIR. R. 36 (listing publication criteria and denying precedential status to unpublished opinions); 11TH CIR. R. 36-2 (denying binding precedential value to unpublished opinions); FED. CIR. R. 26 (listing publication criteria).

14. The Fifth Circuit's publication history provides a good example. In 1969, the Fifth Circuit published opinions in more than 80% of its decisions. See *NLRB v. Amalgamated Clothing Workers Local 990*, 430 F.2d 966, 969, 971 (5th Cir. 1970) (stating that Fifth Circuit issued "printed" opinions in 1128 of 1372 appeals filed in 1969). In the 1978-79 statistical year, the Fifth Circuit published opinions in only 58.6% of its decisions. See Reynolds & Richman, *supra* note 9, at 587. In 1987, that percentage dropped to 46.7%. Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 7 n.19 (1989). Thus, the Fifth

Although the Federal Judicial Center offered a model rule for opinion publication,<sup>15</sup> the courts of appeals have been free to adopt whatever criteria they think appropriate. Not surprisingly, their rules differ considerably,<sup>16</sup> not only in terms of criteria, but also in their treatment of the precedential value of unpublished opinions.<sup>17</sup>

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Circuit's publication rate declined by approximately 41% from 1969 to 1987.

15. COMM. ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 22-23 (1973) (reproducing Model Rule on publication of judicial opinions).

16. All of the rules establish (at least implicitly) a presumption regarding the publication of opinions. The rules of the District of Columbia, First, and Fifth Circuits favor publication, while the others establish a presumption against publication. Compare D.C. CIR. R. 14(A); 1ST CIR. R. 36.1; 5TH CIR. R. 47.5.1 with 2D CIR. R. 0.23; 3D CIR. I.O.P. 5.5.1; 4TH CIR. I.O.P. 36.4; 6TH CIR. R. 26; 7TH CIR. R. 53(A); 8TH CIR. APP. I; 9TH CIR. R. 36-2; 10TH CIR. R. 36.1; 11TH CIR. I.O.P. OPINIONS FRAP 36; FED. CIR. R. 47.8. Furthermore, some circuits have detailed criteria by which publication decisions will be made, while others provide only the most general guidance. Compare D.C. CIR. R. 14(B); 4TH CIR. I.O.P. 36.4; 5TH CIR. R. 47.5.1; 6TH CIR. R. 26; 7TH CIR. R. 53(C); 8TH CIR. R. 47B APP. I; 9TH CIR. R. 36-2; 11TH CIR. R. 36-1 (listing criteria) with 1ST CIR. R. 36.2; 2D CIR. R. 0.23; 3D CIR. I.O.P. 5.5.1; 10TH CIR. R. 36.1 TO .2; FED. CIR. R. 47.8 (providing general guidance).

17. Several circuits have declared that unpublished opinions are not precedential. See D.C. CIR. R. 11(C) (stating that unpublished decisions are not precedential unless from jurisdiction that gives precedential weight to its unpublished dispositions); 2D CIR. R. 0.23 (stating that unpublished opinions cannot be cited in unrelated cases); 3D CIR. I.O.P. 5.6 (stating that unpublished opinions have no precedential value). Four circuits allow citation of unpublished opinions to establish *res judicata*, collateral estoppel, or law of the case. See 4TH CIR. I.O.P. 36.6; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3; FED. CIR. R. 47.6(b). The Fifth Circuit considers its unpublished dispositions precedential only in related cases or when they establish the law of the case, *res judicata*, or collateral estoppel. 5TH CIR. R. 47.5.3.

The precedential value of the Sixth Circuit's unpublished dispositions is undefined. Their citation is "disfavored" except to establish *res judicata*, estoppel, or the law of the case, or when "there is no published opinion that would serve as well." 6TH CIR. R. 10(f). The Tenth Circuit recently adopted a similar provision, suspending its Rule 36.3 until December 31, 1995 or further order. See General Order of Nov. 29, 1993 (10th Cir.), cited in *Griggs v. State*, No. 93-3098, 1993 WL 520976 (10th Cir. Dec. 14, 1993) (carrying notice explaining that citation is disfavored but permitted if opinion is persuasive on material issue and copy is attached, but only where no published opinion would serve as well).

This is the second time the Tenth Circuit has changed its citation rule. Until 1986, the Tenth Circuit allowed citation of unpublished opinions. See William L. Reynolds & William L. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1181 (1978) (reprinting former 10TH CIR. CT. APP. R. 17(c)). The Tenth Circuit changed its rule in 1986, over the dissent of then-Chief Judge Holloway and two other judges. See *In re Rules of the U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 36 (10th Cir. 1992) (giving historical background supporting court's decision to adopt rule that denies precedential weight to unpublished opinions except under doctrines of law of the case, collateral estoppel, and *res judicata*).

Under the Eleventh Circuit's rule, unpublished opinions are not binding precedent, but may be cited as persuasive authority. 11TH CIR. R. 36-2. The Eleventh Circuit's handling of the precedential status of unpublished opinions, however, is quite confusing. The court has stated that unpublished opinions "are binding precedent." *Harris v. United States*, 769 F.2d 718, 721 n.1 (11th Cir. 1985) (emphasis added); see also *United States v. Rosenthal*, 763 F.2d 1291, 1294 (11th Cir. 1985); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 918 (1986). This view apparently follows the rule of the Fifth Circuit. See *Howell v. Schweiker*, 699 F.2d 524, 526-27 (11th Cir. 1983) (stating that Eleventh Circuit was bound by unpublished Fifth Circuit opinions rendered before Oct. 1, 1981 because "decision[s] without published opinion[s] [are] binding precedent" (citing *United States v. Ellis*, 527 F.2d 863, 868 (5th Cir. 1977))). In another case, however, the Eleventh Circuit stated that "unpublished

### B. Summary Disposition

Summary disposition occurs when the court announces its judgment of affirmance or reversal either orally in open court or in a terse (often one-word) written disposition. Summary dispositions give no written explanation of the court's reasoning—not even to the parties or to researchers with access to unpublished opinions.<sup>18</sup> The courts of appeals issued more than 6200 summary dispositions in 1993; nearly 300 were reversals in whole or in part.<sup>19</sup> Summary disposition rules and practices, much like rules regarding unpublished opinions, vary among the circuits.<sup>20</sup> The precedential value of summary

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opinions are *not* considered binding precedent.” *United States v. Giltner*, 972 F.2d 1563, 1564 n.2 (11th Cir. 1992) (emphasis added) (citing 11TH CIR. R. 36-2).

18. *Reynolds & Richman*, *supra* note 17, at 1174 n.38 (restating D.C. CIR. R. 14(d), which allows court to dispense with unneeded opinions).

19. I ran a Westlaw search to locate 1993 appeals court cases disposed of without opinions. The search yielded 6248 documents, although, in all likelihood, additional dispositions of this type exist but do not appear online. Of the 6248 documents retrieved, 285 contained the term “reversed.” Each document included information about the style of the case, citation to its publication in a table in the printed reports, a one line disposition statement (“affirmed,” “reversed and remanded,” etc.), and a court statement regarding the publication and precedential status of the disposition. *See, e.g., United States v. Brown*, 12 F.3d 217 (Table) (11th Cir. 1993) (summarily affirming district court judgment).

20. *See, e.g., D.C. CIR. R. 14(c)* (stating that court may dispense with published opinions as it deems appropriate); 1ST CIR. R. 27.1 (stating that court can dismiss for lack of jurisdiction, affirm if no substantial question is presented, or reverse for obvious error); 2D CIR. R. 0.23 (allowing summary disposition where decision is unanimous and panel finds that written opinion serves no jurisprudential purpose); 3D CIR. I.O.P. 10.6 (requiring unanimous decision to employ summary action); 4TH CIR. R. 34(a) (requiring unanimous decision for summary disposition), I.O.P. 27.6 (allowing summary dispositions only in extraordinary cases); 5TH CIR. R. 47.6 (listing mandatory criteria for enforcement of lower court decision without opinion); 6TH CIR. R. 19 (permitting summary disposition when decision is unanimous and panel agrees that written opinion serves no jurisprudential purpose); 7TH CIR. R. 53(b)(2)(iii), 53(d)(1) (stating that majority of judges is necessary to publish disposition); 8TH CIR. R. 47A (stating that court may summarily affirm or reverse when question presented requires no further consideration), 47B (listing criteria for affirmance or enforcement without opinion); 9TH CIR. R. 36-2 (listing criteria for publication); 10TH CIR. R. 36.1 (stating that court may use its discretion to affirm or dismiss appeal without written opinion); 11TH CIR. R. 36-1 (listing criteria for court affirmance without opinion); FED. CIR. R. 36 (same). All of the circuits allow summary affirmances, which are issued either by order or orally in open court.

Although the Fifth, Eleventh, and Federal Circuit rules do not mention summary reversals, they, like the other circuits, employ those as well. *See, e.g., Buckhalter v. Burlington N. R.R.*, 1 F.3d 1237, 1237 (Table) (5th Cir. 1993); *United States v. Smith*, 11 F.3d 167, 167 (Table) (11th Cir. 1993); *Speed Shore Corp. v. Allied Steel & Tractor Prods.*, 16 F.3d 421, 421 (Table), *text available on Westlaw*, 1993 WL 514359 (Fed. Cir. 1993).

The Fourth Circuit's summary disposition procedure is explicitly linked to the decision to dispense with oral argument. *See* 4TH CIR. R. 34(a) (allowing any appropriate disposition “including, but not limited to, affirmance or reversal” when all judges agree to dispense with oral argument). In all circuits the court may decide to make a summary disposition. The District of Columbia, First, Third, Fourth, and Tenth Circuits allow the parties to move for such disposition as well. D.C. CIR. R. 14(c); 1ST CIR. R. 27.1; 3D CIR. R. 27.4; 4TH CIR. I.O.P. 27.6; 10TH CIR. R. 27.2.1. In the Fourth Circuit, such a motion may be made by the parties in “extraordinary cases” only; “motions for summary affirmance or reversal are seldom granted.” 4TH CIR. I.O.P. 27.6.



dispositions is sometimes difficult to determine.<sup>21</sup>

### C. *Vacatur upon Settlement*

Vacatur upon settlement is a "peculiar practice" in which courts destroy decisions in accordance with settlement agreements by the parties.<sup>22</sup> Vacatur upon settlement can occur at several stages. The court of appeals may vacate the district court's judgment upon a joint motion by litigants who settle their dispute while appeal is pending.<sup>23</sup> Occasionally, the court of appeals vacates its own judgment during the pendency of a motion for rehearing or an appeal to the Supreme Court or following the issuance of a remand.<sup>24</sup> The Supreme Court may be asked to vacate the court of appeals judgment when litigants settle a case in which certiorari or appeal is pending before the Court.<sup>25</sup> Vacatur may or may not be a condition of the settlement agreement.<sup>26</sup>

The use of vacatur upon settlement varies considerably among the circuits.<sup>27</sup> Proponents argue that a policy allowing routine vacatur

21. The Federal Circuit has stressed that a summary disposition should not be viewed as a blanket adoption of the district court's reasoning because it may be based upon "any ground appropriate to the case." *Quad Envtl. Tech. Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 874 (Fed. Cir. 1991). In the District of Columbia, Second, Third, Seventh, Eighth, and Ninth Circuits, summary dispositions are not precedential. D.C. CIR. R. 11(c); 2D CIR. R. 0.23; 3D CIR. I.O.P. 5.6; 7TH CIR. R. 53(b)(2)(iii); 8TH CIR. R. 47B, APP. I; 9TH CIR. R. 36-3. Tenth Circuit Rule 36.3, denying precedential status to summary dispositions, has been suspended. See *supra* note 17. The Federal Circuit allows citation to every disposition of the court except those unanimously designated as nonprecedential. FED. CIR. R. 47.8. Rules permitting summary dispositions in the remaining circuits are silent about the precedential value (other than preclusive effect) of such dispositions. 1ST CIR. R. 27.1; 4TH CIR. R. 34(a); 5TH CIR. R. 47.6; 6TH CIR. R. 19.

22. Jill E. Fisch, *Captive Courts: The Destruction of Judicial Decisions by Agreement of the Parties*, 2 N.Y.U. ENVTL. L.J. 191, 192 (1993).

23. Michael W. Loudenslager, Note, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments*, 50 WASH. & LEE L. REV. 1229, 1233-35 (1993) (discussing how various circuits respond to motions for vacatur).

24. *Id.*

25. The Court recently rejected the practice of routine vacatur upon settlement of the litigation. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389-90 (1994) (stating that Article III gives appellate courts right to dispose of entire case as justice requires, but prohibits courts from considering merits of case when issue is moot); *infra* notes 243-52 and accompanying text.

26. See, e.g., *Bonner Mall*, 115 S. Ct. at 386 (addressing unilateral motion of Bancorp for vacatur of Ninth Circuit's decision after parties settled); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (noting that after reaching settlement, parties jointly moved for vacatur); *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993) (explaining agreement whereby parties conditionally reached agreement to settle if Second Circuit would vacate its decision).

27. The Second Circuit routinely grants joint motions for vacatur of the judgment below, see, e.g., *Nestle Co. v. Chester's Mkt.*, 756 F.2d 280, 283 (2d Cir. 1985) (allowing vacatur because parties' interest in settling their dispute outweighs public interest in judgment), and the Federal Circuit has followed this practice, see, e.g., *Federal Data Corp. v. SMS Data Prods. Group*, 819 F.2d 277, 280 (Fed. Cir. 1987) (stating vacatur is appropriate response for appellate court when

of judgments will encourage settlement.<sup>28</sup> But vacatur has the effect of "eradicating,"<sup>29</sup> "erasing,"<sup>30</sup> or nullifying decisional law without any explanation or statement of reasons.<sup>31</sup> Vacatur is "an intrinsically ambiguous act."<sup>32</sup> When courts of appeals vacate a judgment upon settlement, they do not explain or justify the action on the basis of law, but by reference to consent of the parties.<sup>33</sup> Vacatur leaves a gap in the law because there is no indication whether the vacated judgment was correct.<sup>34</sup> Vacatur gives litigants "the authority to revise judicial opinions."<sup>35</sup> Thus, vacatur upon settlement, along with selective publication and summary disposition, tends to obscure the law.

## II. THE IMPORTANCE OF JUDICIAL OPINIONS

Judicial opinions serve many purposes for both the judges who write

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parties settle differences). *But see Manufacturers Hanover*, 11 F.3d at 381 (refusing to vacate court of appeals' own judgment upon settlement). *See generally* Loudenslager, *supra* note 23, at 1233 (contrasting Second and Seventh Circuits' use of vacatur).

The Seventh Circuit, on the other hand, has stated that it will always deny such motions. *In re Memorial Hosp.*, 862 F.2d 1299, 1300 (7th Cir. 1988) (finding that parties cannot erase court opinions with private agreements). The District of Columbia and Third Circuits have adopted the Seventh Circuit's reasoning. *Clarendon Ltd. v. Nu-West Indus.*, 936 F.2d 127, 129 (3d Cir. 1991); Loudenslager, *supra* note 23, at 1233 n.34 (citing *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991)).

The Ninth Circuit takes the intermediate position that the court should grant vacatur upon settlement when the circumstances of the case warrant. *See National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 765 (9th Cir. 1989) (balancing parties' interests in avoiding continuing litigation costs, and preserving their rights to relitigate same issues against other parties, against public interest in finality of judgments, and potential interest of third parties who may face litigation on same issues (citing *Ringsby Truck Lines v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982))); *see also* Resnik, *supra* note 10, at 1484-85 n.55 (referring to practice as "vacatur on consent").

28. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425, 431 (1993) (Stevens, J., dissenting from dismissal). Justice Stevens opposes routine vacatur. *See infra* notes 232-33 and accompanying text (discussing Stevens' views). For a summary of divergent judicial views on vacatur, see Resnik, *supra* note 10, at 1522-26.

29. Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 589 (1991) (discussing courts' willingness to vacate judgments following settlement).

30. *See* Loudenslager, *supra* note 23, at 1229, 1233 (stating that circuit courts granting vacatur are, in effect, vacating district court opinions on request of parties); *see also* Fisch, *supra* note 22, at 192-93 (stating that courts are destroying decisions in accordance with settlement agreements).

31. Of course, traditional legal research practices, such as shepardizing the case, will inform the researcher that the judgment has been vacated.

32. Resnik, *supra* note 10, at 1512.

33. Resnik, *supra* note 10, at 1533.

34. Fisch, *supra* note 22, at 193 (asserting that vacatur does not explain outcome). For a discussion of the subsequent use of vacated opinions, see Resnik, *supra* note 10, at 1509 (discussing use of vacated opinions as precedent and persuasive authority).

35. Resnik, *supra* note 10, at 1473.

them and their eventual readers.<sup>36</sup> To appreciate fully the value of appellate opinions, one must bear in mind the role of the federal courts of appeals and the manner in which law develops through adjudication. Full, published opinions are essential to the operation of the doctrine of stare decisis. They help ensure the legitimacy of the judicial system and serve as the basic tools of lawyers and judges in their daily work. This section reviews, as a preliminary matter, the law-making responsibilities of federal courts of appeals. It then examines the relationship of published opinions to the development of law, the application of stare decisis, the legitimacy of the courts, and the process of legal research and analysis.

The federal courts of appeals have a special obligation to articulate a coherent body of decisional law<sup>37</sup> because they are the de facto courts of last resort in the federal system.<sup>38</sup> Significant controversy surrounds the proper scope of federal decisional law<sup>39</sup> and the role of precedent in constitutional adjudication.<sup>40</sup> For purposes of this

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36. See BAKER, *supra* note 7, at 119-20 (articulating three primary purposes of written opinion: assuring litigants and public that decision was based on reasoned judgment; reinforcing decisionmaking and ensuring correctness; and creating precedent).

37. One of the most important tasks of a court is "keeping the underlying body of unwritten law alive and growing, and not only rationally consistent within itself but rationally related to the purposes which the social order exists to serve." Henry M. Hart, Jr., *Comment on Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 40, 42-43 (1959). According to the Federal Courts Study Committee, "modern society requires no less" than the "carefully crafted case law" that results, at least in part, from the notion that judges "decide cases with sufficient thought and produce opinions in cases of precedential importance with the care they deserve." FED. COURTS STUDY COMM., *supra* note 7, at 109. I argue that virtually all cases are, at least potentially, of "precedential importance."

38. Betten, *supra* note 7, at 67 (stating that circuit courts are last resort for 98.6% of district court decisions).

39. This debate centers on the existence of federal common law. The Supreme Court held in *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), that there is no federal common law, overruling the contrary holding of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Professor Gilmore argues, however, that "[e]ven at the time the *Erie* case was decided," a "federalizing principle" emerged such that

the presence of any kind of federal interest in a case is enough to support the conclusion that decision should be governed by federal law rather than by the law of any state. . . . It was once assumed as a matter of course that gaps in an incomplete federal statute were to be filled in in the light of principles borrowed from the common law—that is, the law of some state. That approach has been superseded by the idea that federal statutes generate a common law penumbra of their own: gaps are to be filled in by a process of extrapolation from whatever the court conceives the basic policy of the statute to be.

GILMORE, *supra* note 4, at 93-94.

40. See generally Monaghan, *supra* note 3, at 739-48 (discussing role and validity of stare decisis in American legal system). The "conventional wisdom is that stare decisis should and does have only limited application" in such cases. *Id.* at 741. Discussing the relative roles of text and gloss in constitutional interpretation, however, Monaghan argues that:

[I]n [the] actual process of constitutional adjudication the constitutional text plays only a role, and an increasingly subordinate one at that. . . . [F]requently the text operates as little more than a boundary marker restraining judicial law-making. In

Article, it is sufficient to include federal decisions construing and interpreting federal statutes and regulations and resolving issues in "federal specialty areas."<sup>41</sup> What is significant is the extent to which courts of appeals rely on prior cases to guide their decisions—a manner of adjudication very much like that of a common law court.<sup>42</sup>

In our three-tiered federal court system, the traditional role of the courts of appeals was to review decisions for correctness.<sup>43</sup> Law-making was reserved for the Supreme Court.<sup>44</sup> Federal appeals courts lack discretion to reject appeals,<sup>45</sup> even in cases where the law is already well-settled. Hence, they undoubtedly hear some cases that present little opportunity to make law or to extend or alter existing law. But more often, federal appeals courts are called upon to "announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve."<sup>46</sup> This role is extremely important because the Supreme Court today reviews a minute percentage of the decisions of the courts of appeals.<sup>47</sup> In 1993, for example, the Supreme Court reviewed a mere 0.25% of federal appeals court dispositions, and only 2.36% of cases in which petitions

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each instance, the case law overwhelms the text and historical understanding. The latter play no directive role in determining most issues. Thus, in the arena of constitutional adjudication it is quite possible to see the case law and not the text as of central importance.

*Id.* at 771-72. Monaghan concludes that "[a]t this point in our history, when adherence to stare decisis promotes the underlying values of stability and continuity better than does adherence to the original understanding, the latter cannot prevail." *Id.* at 772. In any event, the debate about the role of precedent in constitutional adjudication focuses primarily on the jurisprudence of the Supreme Court in view of its role as the ultimate arbiter of constitutional disputes. The resolution of that controversy is not critical to this Article's analysis.

41. GILMORE, *supra* note 4, at 94. Gilmore notes:

Since World War II the Supreme Court has given a wide currency to the ideas that, in federal specialty areas [such as admiralty, bankruptcy, and patents], a federal rule must be "fashioned" if one does not already exist and that a proper regard for federal supremacy requires the application of the federal rule even if the forum of litigation is a state court.

*Id.* at 94-95.

42. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 202 (1985) (recognizing that federal courts often must apply judge-made law in deciding issues before them).

43. PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 2 (1976).

44. *Id.* at 2-4.

45. 28 U.S.C. § 1291 (1988) provides for appeal from "all final decisions" of the district courts. See MICHAEL E. TIGAR, *FEDERAL APPEALS* § 2.02 (2d ed. 1993) (describing finality doctrine and noting exceptions).

46. CARRINGTON ET AL., *supra* note 43, at 3.

47. In the statistical year ending September 30, 1993, appeals courts disposed of 47,790 appeals. In the same year, parties filed 5110 petitions for certiorari. The Supreme Court granted only 138, 17 of which were dismissed. *Petitions for Review on Writ of Certiorari to the Supreme Court Commenced, Terminated, and Pending During the Twelve Month Period Ending September 30, 1993*, in 1993 ANNUAL REPORT, *supra* note 7, tbl. B-2.

for certiorari were filed.<sup>48</sup>

As a result, the courts of appeals have become the effective courts of last resort in the federal system. In more than 99% of the cases the courts of appeals hear, they bear ultimate law-making responsibility.<sup>49</sup> The percentage of district court dispositions appealed has increased dramatically, indicating a growing demand for both error correction and law-making from appeals courts.<sup>50</sup> This responsibility requires the courts of appeals to evaluate their procedures not only in light of caseload pressures but also in light of the impact of their procedures on the development of the law and the integrity of the judicial process.

### A. *The Development of Law Through Adjudication*

In a common law system, the law develops, as every law student learns, through case-by-case adjudication.<sup>51</sup> It develops not in a linear fashion, but by accretion, like the reef formed by the gradual deposit of shells. Case law develops in fits and starts, as specific disputes present themselves for resolution.<sup>52</sup> The resolution of each new case results in the announcement of a legal rule—represented by a shell—that is laid down next to or atop the rules—or shells—deposited in earlier, related cases. Gradually a discernable structure develops. That structure is irregularly shaped. It consists of lumps, holes, and tentacles that stretch outward in various directions.<sup>53</sup>

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48. This low review rate has persisted for many years. The following statistics are illustrative:

	1970	1980	1990	1993
Appeals Terminated	10,669	20,877	38,520	47,790
Certiorari Filed	1,977	2,433	3,406	5,110
Certiorari Granted	107	139	146	138
Certiorari Dismissed	42	11	11	17
Actually Reviewed	65(.60%)	128(.61%)	135(.35%)	121(.25%)

1993 ANNUAL REPORT, *supra* note 7, tbls. B-1, B-2. According to the Federal Courts Study Committee, in 1945, the Supreme Court reviewed 7.9% of appeals court terminations, and 21% of cases in which petitions for certiorari were filed. FED. COURTS STUDY COMM., *supra* note 7, at 111.

49. See FED. COURTS STUDY COMM., *supra* note 7, at 110 (stating that increase in appellate cases and decrease in Supreme Court review have transformed courts of appeals into enunciators of national law).

50. See FED. COURTS STUDY COMM., *supra* note 7, at 110. Litigants in 1945 appealed about 1 in 40 district court dispositions; in 1988 they appealed 1 in 8. *Id.*

51. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 3, 3 (1989) (analyzing role of precedent in common law legal system); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (describing common law system as system in which law grows through fact-specific pronouncements).

52. See Scalia, *supra* note 51, at 1177 ("The law grows and develops . . . case-by-case, deliberately, incrementally, one-step-at-a-time.").

53. For another model explaining how leading cases in a particular area of the law form a coherent whole, even though they contain no common legal feature, see Bruce Chapman, *The*

The judge charged with deciding a case (or the attorney preparing to argue it) can only examine this structure, such as it is, and attempt to determine where the case fits.<sup>54</sup> Few cases are exactly alike, and new ones often fall into gaps in the structure. Existing rules must be expanded or modified, or new rules created to fill the gaps.<sup>55</sup> In deciding a case, judges search precedent (along with public policies, notions of fairness, and a variety of other inputs)<sup>56</sup> for the firmest possible foundation upon which to attach expanded, modified, or new rules. And so the structure grows. Both judge and lawyer, of course, must also take note of currents that alter the structure of the law in a process similar to erosion.

The increasing importance of statutes and regulations<sup>57</sup> does not dramatically alter this conception of the law's evolutionary progress.<sup>58</sup> Statutes and regulations provide an underlying structure that

*Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41, 65-67, 76-77, 104 (1994) (analyzing development of tort law notions of privity, foreseeability, and liability to illustrate how bodies of law develop over time).

54. See POSNER, *supra* note 2, at 130-31 (recognizing that statutes, precedent, and other legal values constrain judicial decisionmaking).

55. See POSNER, *supra* note 2, at 131 (stating that when traditional constraints on judicial decisionmaking leave judges with few options, many will turn to policy).

56. See POSNER, *supra* note 2, at 131 (explaining traditional process of adjudication).

57. See POSNER, *supra* note 2, at 128 (identifying growth of statutes as one cause of decline in legal consensus).

58. See Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401, 401-02 (1968). Judge Traynor remarks:

A judge's responsibility is the greater now that legislatures fabricate laws in such volume. The endless cases that proceed before him increasingly involve the meaning or applicability of a statute, or on occasion its constitutionality. . . . The hydraheaded problem is how to synchronize the unguided missiles launched by legislatures with a going system of common law.

*Id.*

The judge's responsibility is "not simply a job of confining the reach of a statute when that is appropriate[, but also entails] the perceptive use of policies embodied in statutes as bases for development of the general law." Hart, *supra* note 37, at 43.

On this topic, see generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982), particularly chapter XII, entitled *The Role of Courts in an Age of Statutes*. Calabresi argues:

Whatever common law role can remain for the courts in our age of statutes must, like the traditional common law role, leave to the legislatures the last say, unless constitutional guarantees are involved. . . . [The courts' common-law function today] is the judgmental function (which cannot successfully be accomplished by sunset laws or automatic updates) of deciding when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it. It is to be the allocator of that burden of inertia which our system of separation of powers and checks and balances mandates. It is to assign the task of overcoming inertia to that interest, whose desires do not conform with the fabric of the law, and hence whose wishes can only be recognized if current and clear majoritarian support exists for them. It is this task (so like that exercised by courts in updating the common law) which desperately needs doing in a checked and balanced statutory world like ours, and it can be done by courts using traditional judicial methods and modes of reasoning.

*Id.* at 164.

may be more regular than the one described above.<sup>59</sup> Legislative bodies and agencies are not restricted to addressing only specific cases or controversies that are ripe for adjudication, but may attempt to regulate prospectively an entire set of problems or circumstances.<sup>60</sup> Nevertheless, statutes and regulations provide only a skeleton,<sup>61</sup> and the task of judges or attorneys in cases governed by statute or regulation is largely the same as in cases arising under the common law. Thus, only careful examination of judicial opinions reveals the structure of the law, whether common law or the "common law penumbra"<sup>62</sup> that surrounds statutes and regulations.

### B. *The Relationship of Opinion Publication to Stare Decisis*

Published opinions that state the facts and the reasoning upon which decisions rest are essential to the operation of stare decisis, a fundamental doctrine of our legal system.<sup>63</sup> Stare decisis requires that a prior decision be followed in subsequent cases unless it is distinguished or overruled. The application of the doctrine usually turns on a determination of the identity between the two cases—a determination that cannot be made unless the facts and reasoning of the prior case are known.<sup>64</sup> Indeed:

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59. See Hart, *supra* note 37, at 42-43 (remarking that unwritten common law is less firm than legislative law).

60. See Lillian R. BeVier, *Judicial Restraint: An Argument from Institutional Design*, 17 HARV. J.L. & PUB. POL'Y 7, 9-11 (1994) (comparing judiciary's task of resolving specific dispute to legislature's task of broad policymaking).

61. See ANTHONY D'AMATO, *HOW TO UNDERSTAND THE LAW* 54-61 (1989) (discussing interaction between legislatures, which make laws, and courts, which must often interpret and give flesh to those laws in deciding specific cases). Similarly, Judge Posner states that courts must make law when legislative bodies have not acted; when legislatures, possessing only general knowledge, create problems by passing laws that cannot possibly cover all cases that may arise; and when the political process of passing legislation forces compromises that result in incoherent law. POSNER, *supra* note 42, at 4-5. The Sherman Act, the Clean Air and Clean Water Acts, and Title VII of the Civil Rights Act of 1964 are but a few examples of laws that have necessitated judicial lawmaking. The broad language of these statutes has required many years and thousands of cases to give them meaningful definition, and the definitions continue to evolve.

62. See POSNER, *supra* note 42, at 285 (referring to judicial interpretations of statutes).

63. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 518 (1989) (opinion of Rehnquist, C.J.) (describing stare decisis as "a cornerstone of our legal system"); Alexander, *supra* note 51, at 3 (calling stare decisis core feature of adjudication in United States' legal system); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367 (1988) (insisting that central tenet of United States' legal system is that judges are constrained by precedent). Elsewhere, Chief Justice Rehnquist has stated that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

64. See Maltz, *supra* note 63, at 372 (explaining that precedent controls future cases with similar facts).

[i]n a legal system built on stare decisis, the law-announcing function of opinions as precedents . . . is the function most emphasized among law students, law teachers and members of the bar, particularly as they study opinions in an attempt to ascertain "what the law is" . . . [J]udicial opinions originate the legal rules, principles, standards, and policies that comprise the main body of society's law . . .<sup>65</sup>

The close relationship between the doctrine of stare decisis and opinion publication practices is best illustrated by reviewing the parallel histories of their development.

The concept that a written record of decisions is needed for a system of law based on precedents to function is not new.<sup>66</sup> But for centuries, the most important sources of the law were treatises that restated the law,<sup>67</sup> such as the commentaries of Coke<sup>68</sup> and Blackstone.<sup>69</sup> Decisions were relatively few, and many of the fields of law we know today did not exist. The law could be reduced to a treatise that synthesized, but did not reproduce, the precedents.<sup>70</sup> Moreover, law was practiced in a more homogeneous society and was primarily confined to the local jurisdiction. Lawyers and judges could remember the salient precedents as easily as law students today

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65. Leflar, *supra* note 6, at 810-11.

66. See HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 23 (1992) (stating that written records are necessary for legal systems based upon precedent). The Anglo-American practice dates back at least to the early British *Yearbooks* of the 14th century. These reports, however, like private reports that followed them, were unofficial and incomplete, and their accuracy is questionable. *Id.* at 23-24.

67. See CRAIG E. KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 12-14 nn.31-32 (1993). Early treatises served as the basic text for legal education. Henry St. George Tucker wrote of *Blackstone's Commentaries*:

The transcendental merit of the Commentaries on the Laws of England precludes every idea of improvement, on the method observed in them; and where the law remains unaltered, it would be presumption to deviate from the authority, or even the language of their Author, the precision of the one being equal to the weight of the other.

St. George Tucker's Lecture Notebooks, Tucker-Coleman Collection, Earl Gregg Swem Library, College of William and Mary, Williamsburg, Virginia, *cited in id.* at 14 n.66. Although some of the described laws were inapplicable in the United States, early American lawyers used the *Commentaries* as a prototype for American law. *Id.* at 31. St. George Tucker later revamped *Blackstone's Commentaries* to make it wholly relevant to the United States. HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA (Winchester, Va. 1831); see also DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (1941) (stating that in first century of American jurisprudence, "the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law").

68. SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (Philadelphia, R.H. Small 1853).

69. SIR WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (Philadelphia, Birch & Small 1803).

70. See, e.g., *id. passim*.



remember black letter rules.<sup>71</sup> Legal "research," therefore, was a very different process. Lawyers usually consulted only a small number of highly familiar sources, including their own notes of important cases.<sup>72</sup>

In America, the first fully developed publication of judicial decisions came in 1789,<sup>73</sup> nearly two centuries after the establishment of the first colony. The first American reports consisted of lawyers' notes published as a public service.<sup>74</sup> They bore small resemblance to modern reports.<sup>75</sup> Once publication of opinions caught on, however, the stock of American legal materials grew rapidly. As early as the 1820s the legal profession complained about the rapidly multiplying law reports and treatises.<sup>76</sup> The multiplication of published decisions mirrored the rapid increase in litigation and the growing complexity of the law.<sup>77</sup> By the 1880s, nearly 1000 decisions were issued annually,<sup>78</sup> far too many to summarize neatly in treatises or carry in one's memory.<sup>79</sup>

71. Chapman comments on the relationship of legal sources to the process of learning the law, and in so doing, illustrates the extent to which published opinions have eclipsed treatises as authority:

[T]he mastery of law is more than the mastery of a set of rules ordering the cases. On the latter view, it would be better to read legal textbooks, which provide tidy rationalizations of the cases, than to read the cases themselves, and better to substitute quiet and isolated reflection for the daily confusions of on-site muddling through. That we have chosen to learn law the other way is testimony to the truth of Holmes's well-known claim that the life of the law is not logic, but experience.

Chapman, *supra* note 53, at 77 (citations omitted).

72. See JOHN P. DAWSON, *THE ORACLES OF THE LAW* 75-76 (1968) (indicating that lawyers most often relied on their own case notes, which were passed around legal circles, copied, and sometimes published).

73. BOSMAJIAN, *supra* note 66, at 25; see also FREDERICK C. HICKS, *MATERIALS AND METHODS OF LEGAL RESEARCH* 130-31 (3d ed. 1942) (listing years covered by each state's and federal court's official reporter system). Although the *Century Digest* purports to cover the years 1658 onward, its pages contain very few cases prior to 1820. Cases included in the digest were drawn not only from reporters but also "a great mass of legal periodicals and miscellaneous legal publications." 1 *CENTURY DIGEST* iii (1897). Thus, the fact that its coverage dates back to 1658 does not negate the statement that legal reporting developed only after the Revolution.

74. See Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800-1850*, 3 *AM. J. LEG. HIST.* 28, 34 (1959) (recognizing that no official reports existed in American colonies, but some jurisdictions published lawyers' notes).

75. *Id.* According to Kempin, early reporters of decisions "were interested almost entirely in the arguments of counsel," not the opinion of the court. *Id.* at 35. Formal opinions did not emerge in the courts until the early 19th century. *Id.*

76. See Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 *WASH. L. REV.* 9, 26-27 (1994) (discussing how increase in judicial opinions overwhelmed primitive organizational system).

77. See *id.* at 20-21 (remarking that publication of all available cases and expansion of legal system dramatically increased raw data available to legal researchers).

78. *Id.* at 28.

79. See *id.* at 19-21 (observing that large volume of cases began to overwhelm lawyers' capacity to remember); see also KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 7 (1989) (describing how increases in cases led to "inferior work force" sorting through volumes of

Not coincidentally, the “now-orthodox theory of truly binding precedent,”<sup>80</sup> which places a premium on the ability to locate relevant precedent, came into its own only in the nineteenth century.<sup>81</sup> While the general doctrine of precedent was well established at a much earlier date,<sup>82</sup> the strict doctrine of stare decisis is relatively young.<sup>83</sup> The general theory of precedent encouraged citing precedents *en masse* to illustrate for the court the nature of the law on the question involved.<sup>84</sup> The doctrine of stare decisis, on the other hand, is a “peculiar and legal adaptation of the common practice of relying on past experience,” which “reaches its apogee when a single precedent is considered to be a ‘binding’ authority.”<sup>85</sup> The development of the strict doctrine of stare decisis is tied directly to the availability of reliable case reports,<sup>86</sup> upon which the doctrine is utterly dependent.

By the mid-nineteenth century, as the doctrine of stare decisis matured, the unsystematic, idiosyncratic private reporting of vastly increased numbers of cases became ill-suited to the conduct of

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individual cases).

80. LLEWELLYN, *supra* note 79, at 6.

81. LLEWELLYN, *supra* note 79, at 6.

82. See Kempin, *supra* note 74, at 30 (stating that stare decisis, which developed around 1800, grew out of earlier system of precedent); see also SIR CARLETON ALLEN, *LAW IN THE MAKING* 187-235 (1964) (finding roots of precedent in 13th century); DAWSON, *supra* note 72, at 78-90 (finding traces of precedent in 18th century); E.M. Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043, 1047 (1975) (fixing beginning of precedent in middle ages). These commentators variously fix the date at which a general doctrine of precedent took hold, but generally agree that its origins are, in the context of our legal system, ancient. Allen, for example, finds the first substantial evidence of the doctrine in the writings of Bracton in the late 13th century: “our own debt to Bracton is owed . . . in a large measure for the foundation of a system of precedents which, rightly or wrongly, has become an indispensable part of our system.” ALLEN, *supra*, at 117.

83. See ALLEN, *supra* note 82, at 233 (indicating that modern doctrine of stare decisis was still unsettled in late 1800s); Kempin, *supra* note 74, at 30-31 (distinguishing between precedent and doctrine of stare decisis and commenting on reasons for latter's late development).

84. Kempin, *supra* note 74, at 30. To some extent, the evolution from a general theory of precedent to a strict doctrine of stare decisis is also related to broader developments in legal philosophy, such as the shift from natural law to positivist views that occurred around the same time. Kempin describes the gradual evolution from the view that cases were the best evidence of what the law is, to the view that cases are law. *Id.* at 31-32, 37-38.

85. Kempin, *supra* note 74, at 29.

86. See Kempin, *supra* note 74, at 31, 32 (citing W.S. Holdsworth, *Case Law*, 50 L.Q. REV. 180 (1934) (articulating as one reason for stare decisis' late development that early reporters were few and often unreliable)); see also DAWSON, *supra* note 72, at 80. Dawson argues that a concept of precedent as *binding*—stare decisis—“could not emerge . . . until after 1800. The lack of reliable law reports was both symptom and cause; unreliable law reports were tolerated because theories of precedent were not strict, but theories of precedent could not be strict until reports became reliable.” *Id.* But see Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 475-76 (1994) (fixing establishment of doctrine of stare decisis somewhat earlier).

meaningful legal research.<sup>87</sup> These parallel developments led to the inception of modern, systematic, nationwide court reporting.<sup>88</sup> Modern case law research was made possible by the rigid categorization of decisions according to the issues they presented.<sup>89</sup> Reports and indexes were organized by jurisdiction (at least regionally), but the use of identical categories across jurisdictions facilitated broad-scale research.<sup>90</sup> No matter how numerous the precedents, relevant authority could be located.<sup>91</sup> This system, developed in the 1870s, not only allowed the doctrine of stare decisis to flourish, but also increased dependence on published opinions.<sup>92</sup>

Today, approximately 60,000 federal and state court decisions are published each year.<sup>93</sup> Commentators suggest that the increasing volume of cases has overwhelmed the reporting system, and in fact, it is this belief that led to the adoption of selective publication practices and noncitation rules.<sup>94</sup> Existing methods of case law research have collapsed under the weight of decisions, at least for research that is national in scope.<sup>95</sup> Moreover, application of the doctrine of stare decisis becomes more complex as the body of potentially relevant precedents grows.

Technological developments of the past two decades have partially remedied the situation.<sup>96</sup> Online databases provide access to a larger

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87. See Berring, *supra* note 76, at 21-22 (detailing rise of West Publishing classification system in response to increasing numbers of published cases and impossibility of traditional research methods).

88. See Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 20-22 (1987) (stating that need for better legal tools pushed publishers toward standard, comprehensive court reports).

89. See *id.* at 24-25 (explaining West Digest system's structure). In fact, consistency, the requirement that like cases be decided alike, is "the primary organizing principle for the cases themselves." Chapman, *supra* note 53, at 67.

90. See Berring, *supra* note 88, at 21 (praising West's development of uniform reporting system).

91. See Berring, *supra* note 88, at 28 (relating how West's classification system facilitated location of relevant authority).

92. See Kempin, *supra* note 74, at 34-36 (documenting growth of published opinions as necessary precondition to birth of stare decisis).

93. Berring, *supra* note 76, at 27. An estimated 40,000 additional cases are available in electronic format. *Id.*

94. See Hinderks & Leben, *supra* note 10, at 157-58, 161-65 (recognizing national trend to selectively publish court opinions and prohibit citation of unpublished opinions).

95. See generally Berring, *supra* note 76, at 28 (documenting inability of West Digest System to handle onslaught of legal opinions); Hinderks & Leben, *supra* note 10, at 156-58 (stating that unpublished decisions and noncitation rules evolved to cure problems relating to growing number of judicial opinions). While the *Century Digest* covered state and federal decisions from 1658-1896 in 50 volumes, the most recent editions of the decennial digests cover only five years each in about 50 volumes. MORRIS L. COHEN ET AL., *FINDING THE LAW* 99 (1989).

96. See Hinderks & Leben, *supra* note 10, at 176-82 (indicating that accessibility of computers and databases has made legal information more available).

collection of decisions than would otherwise be available,<sup>97</sup> alleviating concerns about the amount of space required to house print reporters. Online technology also permits researchers greater flexibility in searching than the rigid digest categories allowed.<sup>98</sup> Researchers can often complete large research projects more quickly online than they could using printed sources. Online research technology continually advances in ways that make research even easier, as evidenced by innovations such as natural language searching, online citation verification capabilities, and hypertext links between a retrieved document and the authorities it cites. Arguments about the need to constrain the number of precedents have lost force as a result.

### C. *Opinions as Prerequisites to the Legitimacy of the Judicial Process*<sup>99</sup>

Judicial opinions are one means by which a legal system secures its "own acceptance in the society it governs."<sup>100</sup> A legal system is a framework of enforceable rules intended to regulate the conduct of society's members and, thus, to secure the benefits of liberty and social cooperation.<sup>101</sup> It is a hallmark of a legal system's legitimacy that its rules ought to be unambiguous, free of gaps and conflicts, and knowable in advance.<sup>102</sup> Clearly articulated and publicly announced rules allow citizens to act lawfully, enable parties to determine when litigation is appropriate, permit trial courts to reach correct results in most cases, and ensure that appellate courts can decide future cases

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97. See *Hinderks & Leben*, *supra* note 10, at 178 (discussing access to judicial opinions through Westlaw and LEXIS).

98. See *Berring*, *supra* note 76, at 28-29 (noting that online systems allow information retrieval via many methods).

99. This section sketches major jurisprudential principles underlying the American legal system, and cites a few leading scholars in this vast and complex field of study. Philosophies of the cited scholars differ in many respects, and it may seem strange to see them cited together. My purpose, however, is to show that certain fundamental concepts underlie virtually all modern jurisprudential theories. These basic principles are essential to the legitimacy of the legal system, no matter what one's specific philosophy regarding that system.

100. *Leflar*, *supra* note 6, at 812.

101. See, e.g., D'AMATO, *supra* note 61, at 1 (defining function of law as "artificial mechanism designed to channel human behavior into directions society wants"); JOHN RAWLS, A THEORY OF JUSTICE 235 (1971) (describing legal system as system of rules intended to promote cooperation while regulating conduct); Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 4 (1993) (asserting that law defines rights and duties and governs expectations).

102. See Keating, *supra* note 101, at 8-9. It must be possible to classify every alternative course of action as "required, optional or forbidden." *Id.* The law must be "complete and coherent, that is, free of insoluble internal conflicts." *Id.* at 8. But see Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 560 (1993) (suggesting that some forms of indeterminacy are "both necessary and desirable").

fairly and efficiently.<sup>103</sup>

Judicial decisions are exercises in "sheer power."<sup>104</sup> Federal judges must reach correct, timely, and uniform decisions, and announce them in opinions that explain them in a reasoned manner.<sup>105</sup> According to Judge Patricia Wald of the D.C. Circuit Court of Appeals, reasoned opinions "lend [decisions] legitimacy, permit public evaluation, and impose a discipline on judges,"<sup>106</sup> thus promoting public confidence in the integrity of the courts.<sup>107</sup> Judge Holloway of the Tenth Circuit cautions that "the basic purpose for stating reasons within an opinion or order must never be forgotten—that the decision must be able to withstand the scrutiny of analysis . . . as to its soundness . . . and as to its consistency with our precedents."<sup>108</sup> The rule of law requires that "all grounds for a decision be displayed in the judicial opinion, so that the justificatory argument can be subject to public disagreement, dissent, and correction."<sup>109</sup> Moreover, an opinion helps show litigants that their case received the court's full and thoughtful consideration, and may help them to identify bases for further appeals.<sup>110</sup>

103. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599 (1987) (concluding that coherent body of law is vital to courts' ability to cope with burgeoning caseloads). Justice Cardozo, explaining that "adherence to precedent should be the rule and not the exception," wrote that "the labor of judges would be increased almost to the breaking point if . . . one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

Landes and Posner, in an economic analysis comparing litigation to settlement, assert that "the ratio of lawsuits to settlements is mainly a function of the amount of uncertainty, which leads to divergent estimates by the parties of the probable outcome of the litigation. The amount of legal uncertainty is, in turn, a function of the stock of legal rules, a stock in most areas of the law composed largely of precedents." William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271 (1976) (footnote omitted); see also POSNER, *supra* note 42, at 255 (remarking that uncertainty in case law invites litigation).

104. Resnik, *supra* note 10, at 1536.

105. Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 768 (1983).

106. *Id.*

107. See BOSMAJIAN, *supra* note 66, at 27-28 (stating that published opinions serve to satisfy public and litigants that justice has been done).

108. *In re Rules of the U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 38 (10th Cir. 1992); see also BAKER, *supra* note 7, at 119-20 (stating that written opinions serve three central purposes: first, they assure that judicial opinions are "the product of reasoned judgment and thoughtful evaluation" and do not result from mere "whim and caprice"; second, they ensure correctness and reinforce decisionmaking; and third, in regard to appellate decisions, "they create precedents").

109. Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1022 (1994); see also Chapman, *supra* note 53, at 43 (stating that judicial opinions should outline all reasons for decisions in order to maintain legitimacy).

110. See BOSMAJIAN, *supra* note 66, at 28 (stating that published opinions satisfy public's desire for justice, guide future judges, and provide bases for appeal); Songer et al., *supra* note 12, at 963 (stating that judicial opinions help litigants understand rules of law and outcome of

Although case law develops in a manner that is not entirely predictable, it effectively balances the need for general, public rules with the flexibility to adapt to changing circumstances. Courts achieve this balance by designing their practices to take account of several core values that lend legitimacy to the judicial process. Stability, certainty, and predictability are prerequisites to the consent of the public to be governed by law, including judge-made law.<sup>111</sup> So, too, are the requirements that cases be decided consistently and according to preexisting authority.<sup>112</sup> The core values of stability, certainty, predictability, consistency, and fidelity to authority overlap, as do the labels used to describe them.<sup>113</sup> Thus, it is important to examine each value in order to appreciate how appellate courts' practices might endanger it.

### 1. *Stability*

Stability in the law refers to the balance between continuity with the past and flexibility to address current problems.<sup>114</sup> In other words, stability expresses the tension between minimizing disruptive or chaotic change and maintaining the ability of the legal system to keep pace with developments in society.<sup>115</sup> The doctrine of *stare decisis*

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case).

111. Carrington, Meador, and Rosenberg, for example, consider it imperative that judges announce reasons for their decisions. A statement of reasons assures a considered decision and facilitates public understanding and acceptance of the decision. CARRINGTON ET AL., *supra* note 43, at 9-10. Llewellyn discusses at length the need for reckonability in the law. Llewellyn's work responded to the perceived danger that the bar was losing confidence in the steadiness of the courts and in the law, and that the courts might lose their feeling for and responsibility to continuity. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 14-15 (1960).

112. Gregory Keating stated it another way:

Taking seriously the idea of decision in accordance with pre-existing norms thus imposes three general conditions on the practice of legal decision. First, the practice must meet the formal conditions of generality, publicity, prospectivity, and impartiality. . . . Second, the practice of legal justification must express the contrast between the rule of general norms and the rule of persons (the rule of law and the rule of "men"). . . . Third, legal justification . . . must be able to perform the institutional task assigned to it—the task of ordering conflicting claims on the basis of *legal* reasons.

Keating, *supra* note 101, at 7-8.

113. There is also some disagreement about the "value" of these core values. See Schauer, *supra* note 103, at 600-02. Schauer, for example, is skeptical of arguments that "focus on stability for stability's sake." *Id.* at 601. He believes that values such as stability, predictability, and efficiency in decisionmaking promote "suboptimal" decisions because decisionmakers may ignore the "full richness of human experience." *Id.* at 600.

114. See GILMORE, *supra* note 4, at 14 (defining law as "[t]he process by which a society accommodates to change without abandoning its fundamental structure"); see also Russell K. Osgood, *The Enterprise of Judging*, 17 HARV. J.L. & PUB. POL'Y 13, 15 (1994) (arguing that judges need to understand and accept evolution in law).

115. See CALABRESI, *supra* note 58, at 3-5 (examining ramifications of fundamental change in America from legal system based on common law to one dominated by statutes). One implication of the change in America's legal system is the balance between continuity and change. *Id.* at 3. Calabresi explains that courts and legislatures effect change and maintain

advances stability in the law by presuming the rationality of existing law,<sup>116</sup> while realizing that change may be necessary to maintain the integrity of the law.<sup>117</sup> Stability in the law is a major component of stability in government and in society.<sup>118</sup> It fosters orderly transitions of power and steady economic development.<sup>119</sup> Most importantly, stability in the law helps to ensure the continued vitality of the legal system itself.<sup>120</sup>

## 2. *Certainty*

Certainty in the law requires that once an issue is decided the ruling is final and, under normal circumstances, will not be reexamined.<sup>121</sup> This notion, of course, is central to the doctrine of stare decisis.<sup>122</sup> While rules might not exist to cover every eventuality, once a rule is established it may be relied upon with confidence.<sup>123</sup> Inherent in certainty is the idea that it is sometimes more important to have a well-established rule than to search endlessly for the best rule.<sup>124</sup> The proliferation of laws and increased utilization of the judicial system make the difficulties associated with uncertainty in the law more acute.<sup>125</sup> Moreover, uncertainty in the law undermines

continuity in very different ways. Changes in the law occur incrementally when made by the courts, and suddenly when made by legislatures. *Id.* at 4-5. Continuity in the law is preserved by the courts' constant reexamination and reaffirmation of precedents. Statutes can remain in force long after they become obsolete, in the sense that a majority no longer supports them, because legislatures are generally not required to reassess existing legislation. *Id.*

116. *Monell v. Department of Social Servs.*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring).

117. See Kempin, *supra* note 74, at 49 (arguing that cases should be overruled when their reasoning is discovered to be incorrect); see also ALLEN, *supra* note 82, at 334-66 (discussing how British view, in which House of Lords would not overrule past decisions even when reason dictated that it should, resulted in law's inability to keep pace with changes in society).

118. See John T. Loughran, *Some Reflections on the Role of Judicial Precedent*, 22 FORDHAM L. REV. 1, 3-4 (1953) (explaining that stare decisis ensures social stability).

119. See RAWLS, *supra* note 101, at 237-38 (stating that stable legal system fosters organization of social behavior and provides basis for expectations).

120. See Loughran, *supra* note 118, at 1-3 (arguing that stability has enabled common law to remain preeminent because it creates uniformity and equality in law).

121. See D'AMATO, *supra* note 61, at 86 (stating that judges may feel compelled to follow precedent in order to promote feeling of certainty); RAWLS, *supra* note 101, at 237 (arguing that in order for people to regulate their behavior, cases that are alike must be treated similarly).

122. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (stating that stare decisis fosters consistent and reliable development of law).

123. See *id.* (stating that stare decisis promotes predictability in law and fosters reliance on decisions).

124. *Id.* ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right." (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))); see also Chapman, *supra* note 53, at 111 (stating that it might be just as important to find acceptable rule as it is to find best rule).

125. See Scalia, *supra* note 51, at 1179 (arguing that we can no longer afford uncertainty in law because of individuals' increased dependence on courts).

citizens' confidence in the legal system.<sup>126</sup>

### 3. Predictability

Predictability arises from our need to know what the law is on a specific issue.<sup>127</sup> This value incorporates the idea that the law should be relatively free of gaps and conflicts.<sup>128</sup> Unpredictability "vitiat[es] a cardinal purpose in the law"—influencing future conduct.<sup>129</sup> If the law is in a constant state of flux, it cannot induce people to behave in ways deemed beneficial to society.<sup>130</sup> It is unfair to expect citizens to conform their conduct to the requirements of the law if they cannot determine what the law is and predict the legal consequences of proposed actions.<sup>131</sup> If the rules are unpredictable, the risks inherent in a proposed course of conduct cannot be calculated, and potentially beneficial transactions will be deferred or avoided altogether.<sup>132</sup> Similarly, criminal law cannot deter undesirable conduct if criminals cannot predict the likelihood

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126. See Coleman & Leiter, *supra* note 102, at 559-94 (arguing that while absolute determinacy in law is neither possible nor desirable, basic notion that citizens must be able to know rules in order to follow and accept them is legitimate); Kutz, *supra* note 109, at 1000 (stating that unpredictability of legal consequences frustrates faith in legal and political systems).

127. Justice Holmes wrote:

[T]he reason why . . . people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Oliver Wendell Holmes, *The Path of the Law*, in THE HOLMES READER 59 (Julius J. Marke ed., 1955).

128. See Keating, *supra* note 101, at 16-19 (arguing that gaps and conflicts in law frustrate predictability but are unavoidable).

129. Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 774 (1965).

130. See POSNER, *supra* note 42, at 248 (stating that regulatory purpose served by continuity in law is frustrated by constant changes in law).

131. See RAWLS, *supra* note 101, at 238 (stating that what laws regulate must be clear so that citizens know how to behave); Kutz, *supra* note 109, at 1000 (stating that citizens cannot predict legal consequences when law is indeterminate); Schauer, *supra* note 103, at 597 (stating that ability to predict outcome of cases allows people to anticipate future).

Numerous opinions of the courts of appeals discuss the importance of predictability of results. See, e.g., *Aguirre v. United States*, 956 F.2d 1166 (Table), text available on Westlaw, 1992 WL 38624, at \*5 (9th Cir. 1992) (stating that although judges are not constitutionally bound to follow precedent, chaos would result if they continually made conflicting decisions), cert. denied, 113 S. Ct. 968 (1993); *United States v. Diaz-Bastardo*, 929 F.2d 798, 799 (1st Cir. 1991) (stating that in criminal cases, fairness requires adherence to principles of stare decisis).

132. See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 911 (1980) (White, J., dissenting from denial of certiorari) (stating that unpredictability in law may disrupt commercial relations due to need for certainty of result).



and severity of punishment for their actions.<sup>133</sup>

#### 4. Consistency

The fundamental requirement that like cases be decided alike produces consistency in the law.<sup>134</sup> This value is essential to fair and impartial decisionmaking.<sup>135</sup> Consistency is a prerequisite to the operation of stare decisis, which applies when cases are indistinguishable.<sup>136</sup> The legal system must provide for "uniform and coherent enunciation and application of the law," because "a legal system which tolerates needless disuniformity and incoherence . . . has forsaken its commitment to even-handed decision-making."<sup>137</sup> Consistency among panels of an appellate court is particularly important because the law-making responsibilities of these courts require them to develop a coherent body of law.<sup>138</sup> Recognizing this fact, the courts of appeals have adopted prior-panel rules<sup>139</sup> and procedures such as en banc review to ensure uniformity within the circuit.<sup>140</sup>

#### 5. Fidelity to authority

Fidelity to authority is central to the notion of a rule of law, not of persons.<sup>141</sup> It is, in a sense, the very core of judging:

[T]o judge . . . means to decide by reference to preexisting

133. See Stephen G. Bené, Note, *Why Not Fine Attorneys? An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 921-22 (1991) (discussing calculation of benefits and costs of criminal activities under general theory of deterrence); Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2036 (1992) (stating that predictability in sentencing scheme fosters deterrence).

134. See, e.g., Chapman, *supra* note 53, at 44 (explaining that doctrine of stare decisis requires "treating like cases alike"); Schauer, *supra* note 103, at 595-96 (stating that treating similar cases differently is arbitrary and unfair).

135. See Schauer, *supra* note 103, at 596 (arguing that fairness is achieved by consistency in law).

136. See Chapman, *supra* note 53, at 44 (explaining that doctrine of stare decisis applies if cases are similar).

137. CARRINGTON ET AL., *supra* note 43, at 11-12.

138. See *Aguirre v. United States*, 956 F.2d 1166 (Table), text available on Westlaw, 1992 WL 38624, at \*5 (9th Cir. 1992) ("[T]he seeds of chaos are sown if a single court prances off in sharply conflicting directions. . . . Thus, absent unusual or exceptional circumstances, judges of coordinate jurisdiction within a jurisdiction should follow brethren judge's rulings."), cert. denied, 113 S. Ct. 968 (1993); Wald, *supra* note 105, at 768-69 (stating that courts should strive toward uniformity in decisions); see also *supra* notes 37-50 and accompanying text (citing sources that explain need for development of coherent body of law).

139. Gerald B. Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, A.B.A. J., July 1993, at 72, 72 (stating that courts of appeals employ "self-imposed, 'prior-panel rules' that bind three judge panels to follow earlier panels' holdings," and explaining how monitoring of prior panels' holdings burdens courts).

140. See *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974) (stating that purpose of en banc court is maintenance of intracircuit uniformity).

141. See PHILIP SOPER, A THEORY OF LAW 111 (1984) (stating that judges decide cases according to preexisting legal standards, not personal desire or whim).

standards rather than personal whim. . . . [J]udges . . . decid[e] cases by reference to external legal standards. . . . Thus, the court is doubly constrained: it must reach decisions that accord with preexisting standards (it must judge), and it has no choice about the standards to be used in performing that task (it must judge according to law).<sup>142</sup>

Indeed, the idea that courts "should decide cases in accordance with general, public, pre-existing laws" is an absolute prerequisite to legitimacy of a legal system, and is essential to securing the benefits of personal liberty.<sup>143</sup>

In sum, preparation and publication of opinions promotes certainty, predictability, and stability in the law because those values depend on the complexities and subtleties of the court's reasoning, not merely on the result. Opinions also advance consistency and fidelity to law, for new decisions can only be consistent with, and faithful to, existing law if that law can be found. Making the law widely available permits citizens to conform their conduct to the law, allows attorneys to assess accurately the viability of potential claims, and guides future appellate and lower court judges in deciding similar disputes.<sup>144</sup>

#### *D. Opinions as Essential Tools in Research and Analysis*

A published opinion is the "working tool of lawyers and the building block of judges."<sup>145</sup> Opinion writing facilitates the decisionmaking process by sharpening analysis,<sup>146</sup> and by imposing a sense of responsibility and discipline on judges.<sup>147</sup> When writing opinions, judges must determine whether their decisions are

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142. *Id.*; see also Keating, *supra* note 101, at 3-10 (explaining that three basic premises of political thought support view that courts make decisions based on preexisting law); Shelton M. Vaughn, Preface, *Judicial Decisionmaking: The Role of Text, Precedent, and the Rule of Law*, 17 HARV. J.L. & PUB. POL'Y xi, xiii (1994) (stating that judges must practice judicial self-restraint and "fidelity to the law").

143. Keating, *supra* note 101, at 4.

144. See POSNER, *supra* note 42, at 248 (arguing that law gives people notice as to what is acceptable behavior and projects future rulings); Loughran, *supra* note 118, at 3-4 (explaining that attorneys rely on past decisions to advise clients and that judges rely on them to simplify decisionmaking process).

145. Reid, *supra* note 2, at 59.

146. See FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 57-58 (1980) (explaining that preparation of written opinion is strong device for assuring accuracy of logic); see also BAKER, *supra* note 7, at 120 (arguing that one purpose of decision writing is to require writer to fully reason through to conclusion).

147. See LLEWELLYN, *supra* note 111, at 26 (noting that preparation of opinions "affords not only back-check and cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of effects ahead"); Wald, *supra* note 105, at 768 (stating that written opinions should lend courts legitimacy, permit public evaluation, and impose discipline on judges).

consistent with and faithful to prior decisions, and whether the opinions establish certain and predictable rules for future cases.<sup>148</sup> Published opinions are the tangible evidence of the law's evolution and foreshadow its future development.<sup>149</sup> Without published opinions, the basic tasks of legal research and analysis would be impossible for attorneys and judges.<sup>150</sup>

Attorneys and judges perform legal research not as an end in itself, but rather to locate rules that guide conduct, allocate benefits, or decide controversies.<sup>151</sup> Judges apply the law to the facts of the case at hand to resolve the dispute between the parties, and to establish or clarify the law for future disputes.<sup>152</sup> Attorneys apply existing law to predict and advocate the outcome of a client's dispute, and to advise the client on an appropriate course of action.<sup>153</sup> With opinions in hand, a judge or attorney can undertake the detailed factual analysis and comparison that is required to evaluate the merits of the facts presented.

The law upon which this sort of analysis is based emerges from the application of legal norms to the particular facts of the earlier cases now consulted as precedent.<sup>154</sup> The law is embodied in the reports of those cases.<sup>155</sup> Unless the instant case and the precedent case are identical, the rule formulated in the precedent case is transformed by application to a new and relevantly different situation.<sup>156</sup> Distinguishing cases based on subtle differences in the facts is a "hallmark of stare decisis";<sup>157</sup> "in [the] art [of distinguishing cases] is . . . to be found much of the true essence of case law."<sup>158</sup> Thus, the

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148. See COFFIN, *supra* note 146, at 57 (stating that written opinion is product of judge's attempt to explain facts, law, logic, and policy implications of particular case).

149. See LLEWELLYN, *supra* note 111, at 26 (stating that opinions show how similar cases should be decided in future).

150. See generally Kempin, *supra* note 74 (describing how modern methods of research and analysis differ from those of lawyers and judges prior to mid-19th century).

151. See Berring, *supra* note 76, at 12 (stating that legal profession depends on finding, reading, and analyzing cases).

152. See COFFIN, *supra* note 146, at 52 (explaining how judges apply legal principles to facts in deciding cases); POSNER, *supra* note 42, at 247 (stating that judges both make decisions based on precedent and create precedent).

153. Cf. Hinderks & Leben, *supra* note 10, at 212-14 (illustrating how unpublished opinions and noncitation rules create practical problems for attorneys' efforts to analyze law and advise clients).

154. See Berring, *supra* note 76, at 12 (explaining that legal theorists analyze case law by relating cases to one another).

155. See Berring, *supra* note 76, at 13 (noting that legal profession considers judicial decisions primary sources).

156. See Chapman, *supra* note 53, at 67 (describing how prior rule is transformed when judge applies it to instant case).

157. Reynolds & Richman, *supra* note 17, at 1186 (citation omitted).

158. LLEWELLYN, *supra* note 79, at 13.

availability of the facts and analysis of prior cases is vital to the process of applying the law to current cases.<sup>159</sup> Knowledge of the result alone is not enough to support the process of legal reasoning.

It is important to take a broad view of the ways in which opinions are used in practice. A decision does far more than resolve the dispute between the parties or correct the errors of the court below. Appellate decisions are "typically stated in general terms," and their authority is intended to guide the resolution of like cases in the future.<sup>160</sup> Opinions provide a wealth of information, including the rule announced in the decision, the reasoning on which it rests, and the specific facts that establish the parameters of the rule's application.<sup>161</sup>

But opinions do much more. For example, readers can compare and evaluate the majority opinion alongside any concurring or dissenting opinions in order to determine precisely what the court decided and how far its decision may extend in future cases.<sup>162</sup> Opinions facilitate the discovery of conflicts in the law of the circuit.<sup>163</sup> The ability to study a court's opinions is accordingly critical to developing a sophisticated understanding of what the law is.

Opinions also permit readers to view the law in historical context. Insofar as opinions identify the precedents on which the court relied, they allow readers to form an understanding of the law's maturity.<sup>164</sup> In addition, the highly specialized citators on which legal research depends allow readers to gauge the continuing vitality of a decision

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159. See Robel, *supra* note 9, at 947 (describing lawyers' practice of examining opinions to determine how courts apply important precedents).

160. Chapman, *supra* note 53, at 43.

161. See LLEWELLYN, *supra* note 111, at 26 (stating that opinions serve many functions such as providing reader with reasoning of court and precedent court applied).

162. See LLEWELLYN, *supra* note 111, at 26 (arguing that dissent forces accountability of current law). For an example of the phenomenon where the dissenting view is eventually adopted by a majority, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 957-68 (4th ed. 1991) (citing cases and describing evolution of "clear and present danger" test in freedom of speech cases from early dissents of Justices Holmes and Brandeis to adoption of test (with modifications) by majority of Supreme Court).

163. CARRINGTON ET AL., *supra* note 43, at 38 (discussing conflicts in law of Ninth Circuit that are only detectable with aid of unpublished opinions, which forecloses presentment to, and resolution of conflict by, court); see also Reynolds & Richman, *supra* note 17, at 1203 (arguing that noncitation rules lower possibility for review intended to resolve conflicts among circuits); David L. Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 MARQ. L. REV. 581, 583 (1978) (stating that unpublished opinions in California include "not-inconsiderable body of law dealing with novel points and giving rise to conflicts among decisions." (quoting Gideon Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 386, 443 (1973))).

164. See Reynolds & Richman, *supra* note 17, at 1190 (stating that later opinions on similar case clarify earlier principles).

based on the frequency and approval with which it is cited.<sup>165</sup> Often, the determination whether or not a particular opinion is law-making cannot be made until years later, when further developments in the law demonstrate what the authoring judge could not forecast.<sup>166</sup> Moreover, the lasting authority of a decision depends largely on the quality of its reasoning, which can be evaluated only by reading the opinion. At a minimum, the tasks of researching and applying the law require that the law be findable and knowable, that the precedential value of prior decisions be ascertainable with some degree of reliability, and that prior decisions provide guidance for future cases. These conditions, in turn, can be satisfied only by the publication of judicial opinions stating the facts of the case, the issues considered, the court's reasoning, and the result.

Many lawyers assume that appellate courts publish all their opinions,<sup>167</sup> a once-valid assumption.<sup>168</sup> Until recently, lawyers who researched all the published opinions of the relevant jurisdiction (and validated their findings through citators) could be confident that they had conducted adequate case law research. The cases described in Part III demonstrate that selective publication, summary disposition, and vacatur upon settlement invalidate these basic assumptions about legal research. Researchers must now look beyond published opinions for authority,<sup>169</sup> and must independently evaluate the precedential status of their findings in light of the noncitation rules.<sup>170</sup>

165. See Reynolds & Richman, *supra* note 17, at 1190 (stating that growth in number of cases on certain issue increases assurance as to legal consequences); see also Nichols, *supra* note 17, at 916 (noting that it can be persuasive to make arguments based on long line of precedent, but arguments based on frequency of citation are not available when decision to be cited was not published).

166. See Nichols, *supra* note 17, at 921 (stating that judges cannot anticipate problems their opinions will be used to solve); *In re* Rules of the U.S. Court of Appeals for the Tenth Circuit, 955 F.2d 36, 38 (10th Cir. 1992) (arguing that future developments reveal opinion's significance); *In re* Amendment of Section (Rule) 809.23(3), stats., 456 N.W.2d 783, 788 (Wis. 1990) (Abrahamson, J., dissenting) (arguing that all rulings are precedent).

167. COHEN ET AL., *supra* note 95, at 42 (stating that many researchers wrongly assume that opinions in all cases considered are published).

168. See J. MYRON JACOBSTEIN & ROY M. MERSKY, FUNDAMENTALS OF LEGAL RESEARCH 36 (3d ed. 1985) (noting that nearly all opinions of courts of appeals were once published); see also *supra* note 14 (describing declining publication rates).

169. See *In re* Rules, 955 F.2d at 38 (noting that, if experience showed that unpublished rulings truly added nothing to law, lawyers would only research published opinions).

170. See *id.* at 37 (arguing that forbidding citation of prior decisions may "have overtones of a constitutional infringement"). Judge Holloway of the Tenth Circuit believes that:

[A]ll rulings of [the] court are precedents, like it or not, and [the court] cannot consign any of them to oblivion by merely banning their citation. . . . No matter how insignificant a prior ruling might appear to us, any litigant who can point to [it] and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness.

### III. THE IMPACT ON JUDICIAL PROCESS AND THE PRACTICE OF LAW

Selective publication, summary disposition, and vacatur affect the judicial process and the practice of law in numerous ways.<sup>171</sup> Commentators suggest that practices which reduce the availability of opinions confer an unfair advantage on certain classes of litigants over others,<sup>172</sup> and increase litigants' costs and the costs of operating the judicial system.<sup>173</sup> It also appears that cases without published opinions are less likely to be reviewed by the Supreme Court.<sup>174</sup> Without discounting the cogency of such observations, this Article focuses on a different issue: the manner in which all three practices affect the judicial process and the practice of law by altering the way we use legal authorities to resolve disputes.

#### A. *A Secret Body of Law*

As Part II.C argues, if the values underlying our legal system are to operate effectively, the law must be findable and knowable. Selective publication makes it difficult to find the law. According to Judge Wald, unpublished opinions "increase the risk of nonuniformity; allow difficult issues to be swept under the carpet; and result in a body of 'secret law' practically inaccessible to many lawyers."<sup>175</sup> For exam-

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*Id.*

171. See *id.* (arguing that all rulings, including unpublished ones, are precedent and need to be cited if necessary); see also *Commissioner v. McCoy*, 484 U.S. 3, 8 (1987) (Marshall, J., dissenting) (arguing that summary dispositions are disrespectful to parties and courts); John P. Stevens, *Address to the Illinois State Bar Association's Centennial Dinner*, 65 ILL. B.J. 508, 510-14 (1977) (describing ways in which summary disposition affects practice of law); Wald, *supra* note 105, at 781-83 (describing costs and benefits of summary dispositions); Jack B. Weinstein, *Factors Determining the Degree of Public Availability of Judicial Opinions*, 2 N.Y.U. ENVTL. L.J. 244, 245 (1993) (describing selective publication of federal court of appeals opinions as "deleterious").

172. See, e.g., Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405, 414 (1981) (arguing that unpublished opinions are more readily available to institutional litigants, large firms, and other powerful organizations); Nichols, *supra* note 17, at 918 (stating that Federal Circuit has special duty to minimize advantage of lawyers who have better knowledge of unpublished decisions); Robel, *supra* note 9, at 946 (articulating fear that some litigants who appear before courts often will have better access to opinions).

173. See Reynolds & Richman, *supra* note 17, at 1194 (stating that purported monetary savings from nonpublication will be lessened if citation of unpublished decisions is permitted).

174. See Reynolds & Richman, *supra* note 17, at 1203 (positing that Supreme Court is less likely to review cases with unpublished opinions because unpublished opinions are not as detailed as reported opinions).

175. *National Classification Comm'n v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985); see also *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting from summary reversal) (arguing that court of appeals' decision not to publish opinion was wrong because it resulted in insufficient unpublished opinion that did not deeply analyze court's decision); *United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974) (stating that summary affirmances have no stare decisis effect due to potential for development of "secret law" inherent in use of decisions alone without court's supporting reasoning); POSNER, *supra* note 42, at 120-26 (explaining difficulties that unpublished opinions bring to practice of law); Wald, *supra* note

ple, although subsequent panels are bound to follow the prior decisions of other panels of the same court,<sup>176</sup> it is not possible to do so (except by happenstance) if prior judicial decisions are unavailable to judges in later cases.<sup>177</sup> Two unacceptable results are imaginable: the subsequent panel, unaware of a prior unpublished decision, might reach a contrary result, creating a conflict in the law of the circuit; or the subsequent panel might decline to publish an opinion to avoid calling attention to the fact that its decision conflicts with the holding of a prior panel.<sup>178</sup>

Moreover, to the extent that unpublished decisions are binding authority or reliable evidence of the way the court will rule, selective publication frustrates attorneys' attempts to fulfill their Rule 11 obligation to perform a reasonable inquiry before filing a complaint

105, at 781-84 (arguing that judges should write opinions for cases that make law).

176. See *United States v. Killion*, 7 F.3d 927, 930 (10th Cir. 1993) (stating that panels are bound by decisions of prior panels "absent en banc reconsideration or superseding contrary decision of Supreme Court"), *cert. denied*, 114 S. Ct. 1106 (1994).

177. See *Nichols*, *supra* note 17, at 914 (stating that author, a federal judge, never used unpublished opinion to decide case).

178. Not all circuits apply the prior-panel rule in the same fashion. The Third and Sixth Circuits consider themselves bound only by the reported decisions of prior panels. *Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237, 240-41 (3d Cir. 1993); *United States v. Hardin*, 9 F.3d 1548 (Table), *text available on Westlaw*, 1993 WL 460766, at \*5 (6th Cir. 1993) (Nelson, J., concurring), *cert. denied*, 114 S. Ct. 1323 (1994). Circuits that apply the prior panel rule only to reported cases leave themselves vulnerable to the criticism that unreported decisions are used to suppress precedent or hide unpopular decisions, and that the court, in refusing to be bound by them, flouts the values of consistency and fidelity to authority.

The other circuits claim to apply the prior panel rule whether or not the earlier decision was reported. *Killion*, 7 F.3d at 930; *Horwitz v. Alloy Automotive Co.*, 992 F.2d 100, 103 (7th Cir. 1993); *Clow v. United States Dep't of Hous. & Urban Dev.*, 948 F.2d 614, 616 n.2 (9th Cir. 1991) (per curiam) (citing *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989)); *Busby v. Crown Supply*, 896 F.2d 833, 840-41 (4th Cir. 1990); *Jusino v. Zayas*, 875 F.2d 936, 993 (1st Cir. 1989); *Evans v. Clarke*, 868 F.2d 267, 268-69 (8th Cir. 1989); *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988), *cert. denied*, 493 U.S. 814 (1989); *Farrish v. Mississippi State Parole Bd.*, 836 F.2d 969, 975 (5th Cir. 1988); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981); *United States v. Caldwell*, 543 F.2d 1333, 1369 n.19 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976); *Joly*, 493 F.2d at 675-76; see also *In re Rules of the U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1992) (noting that court's duty is to apply prior rulings).

Circuits that attempt to apply the prior panel rule to all earlier decisions run into the difficulty, described by Judge Tjoflat, of monitoring the law of the circuit. Tjoflat, *supra* note 139, at 72. The difficulty of keeping abreast of a court's decisions increases dramatically as the court grows in membership. On a court of 28 active members, there are 3276 possible panel combinations, while on a court with 11 active judges there are only 165 possible panel combinations. *Id.* On large circuits, each member sits with each other member only infrequently, and participates in relatively few of the court's decisions. The courts of appeals in 1993 each reached between 1365 (First Circuit) and 8966 (Ninth Circuit) decisions, 1993 ANNUAL REPORT, *supra* note 7, tbl. B, far more than the human mind can assimilate. See *Robel*, *supra* note 9, at 944 (stating that task of monitoring decisions is particularly difficult in light of fact that some circuits do not routinely circulate unreported decisions to judges not on panel).

in federal court.<sup>179</sup> Attorneys are expected to locate not only authority supporting their claims, but also adverse authority and recent changes in the law.<sup>180</sup> The reasonableness of the inquiry depends on circumstances such as the clarity of the law, the complexity of the legal issue, and the resources available to the attorney.<sup>181</sup> Selective publication makes it difficult to assess the clarity or ambiguity of the law or the complexity of the legal issue by creating "secret" law. This practice also contributes to the imbalance in resources available to attorneys by effectively making certain opinions available only through high-cost commercial databases.<sup>182</sup> Even if the argument that there is "too much law" is credible, selective publication does not solve the problem. It does not reduce the amount of law, but actually creates an additional, less accessible body of law that must be consulted, making research more difficult and raising the cost of litigation.

Summary dispositions also contribute to the difficulty of finding the law by providing insufficient information about what the court actually decided. These dispositions state only the result in the case, and provide no information about the facts or the reasoning on which the decision is grounded. The Supreme Court, discussing its own summary dispositions, has noted that "ascertaining the reach and content of summary actions may itself present issues of real substance."<sup>183</sup> In Supreme Court practice, summary affirmances uphold the judgment but not necessarily the reasoning by which it was reached.<sup>184</sup> The courts of appeals have characterized the import of their summary dispositions in similar terms.<sup>185</sup> When courts affirm or reverse without opinions, they create law that researchers cannot find.<sup>186</sup>

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179. See FED. R. CIV. P. 11(b) and STANDARD D(12); see also *Hinderks & Leben*, *supra* note 10, at 213-14 (arguing that there are situations where attorney must review unpublished decisions in order to fulfill duties of reasonable care and diligence).

180. See GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* 130-34 (1994) (explaining that attorney's investigation into law must be timely, thorough, and reasonable under circumstances).

181. *Id.* at 132-34.

182. See *Robel*, *supra* note 9, at 955 (discussing advantages gained by frequent litigants who know holdings of court and have access to unpublished opinions).

183. *Hicks v. Miranda*, 422 U.S. 332, 345 n.14 (1975).

184. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

185. See *Quad Envtl. Tech. Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 874 (Fed. Cir. 1991) (stating that summary affirmances are not to be taken as appellate court's adoption of district court's reasoning, as affirmance could have been on any appropriate ground); *Burgin v. Henderson*, 536 F.2d 501, 503 (2d Cir. 1976) (stating that summary affirmance has no precedential value and should not suggest to district judge that his earlier opinion was correct).

186. The Fifth Circuit's opinion in *Morgan Guarantee Trust Co. v. Blum* exemplifies how a summary affirmance creates "secret" law. *Morgan Guar. Trust Co. v. Blum*, 649 F.2d 342 (5th



The following examples illustrate the seriousness of the courts of appeals' creation of a body of "secret law" by failing to publish opinions in important cases that make new law or modify established law. In *National Classification Commission v. United States (National I)*,<sup>187</sup> the District of Columbia Circuit affirmed, without opinion, the National Classification Commission's construction of a statute.<sup>188</sup> In a subsequent case involving the same parties (*National II*), the court held that its disposition in *National I* precluded petitioners from relitigating the issues.<sup>189</sup>

Along with her opinion for the panel in *National II*, Judge Wald filed a separate statement voicing concerns about the propriety of the court's decision not to publish an opinion in *National I*.<sup>190</sup> Judge Wald argued that *National I* was a "case of first impression involving a substantial question of statutory interpretation," which required an "examination of Congress' purpose and intent," and which would be of widespread public interest.<sup>191</sup> Cases of first impression and cases involving legal issues of widespread public interest explicitly merit publication under the District of Columbia Circuit's "Plan for Publication of Opinions."<sup>192</sup> Despite the obvious applicability of these criteria, the panel failed to publish its opinion in *National I*.

Cir. 1981). *Blum* concludes with the statement that "[a]s to the remainder of the issues on appeal, we affirm on the basis of the reasoning of the court below." *Id.* at 346. This statement signals that the reasoning of the court below was sound and implies that the appellate court would adopt the same reasoning in future cases. The Fifth Circuit's opinion, however, provides no clue as to what that reasoning was, and states in a footnote that "[w]e need not quote portions of the unpublished opinion below relevant to these issues since they have no precedential value." *Id.* at 346 n.5. Thus, the Fifth Circuit endorsed reasoning that is unavailable in its opinion or in a published opinion below. Readers of *Blum* are deprived of the opportunity to know what reasoning the court found persuasive or what, precisely, the court held.

187. 737 F.2d 1206 (Table) (D.C. Cir. 1984).

188. *National Classification Comm'n v. United States*, 737 F.2d 1206, 1206 (Table) (D.C. Cir. 1984) (*National I*).

189. *National Classification Comm'n v. United States*, 765 F.2d 164, 165 (D.C. Cir. 1985) (*National II*).

190. *Id.* at 172. Judge Wald further noted that "the present case testifies to the unfortunate by-products of the overuse of this rapidly growing mode of disposition." *Id.*

191. *Id.* at 174.

192. The District of Columbia Circuit's Plan for Publication of Opinions (adopted Apr. 17, 1973), provides that an opinion will be published if:

- a. It establishes a rule of law on a point of first impression for the court, or alters or modifies a rule of law previously announced.
- b. It involves a legal issue of unusual or continuing public interest.
- c. It criticizes existing law.
- d. It is considered a significant contribution to legal literature, e.g. through historical resolution of an apparent conflict in opinions, by furnishing an analysis of the rationale and policy or content of a rule of law.
- e. It applies an established rule of law to a factual situation significantly different from that in published cases.

*Id.*

Similarly, the Supreme Court recently decided *United States v. Edge Broadcasting Co.*,<sup>193</sup> which involved the broadcasting of commercials for lotteries.<sup>194</sup> Neither the district nor appellate court opinion was published. Writing for the majority, Justice White "deem[ed] it remarkable and unusual that although the Fourth Circuit Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion."<sup>195</sup>

One would assume that a decision holding a federal statute unconstitutional merits publication, but the Fourth Circuit's rule does not explicitly cover this situation.<sup>196</sup> A decision holding a federal statute unconstitutional, however, arguably warrants publication under the Fourth Circuit's rules because it "alters," "modifies," or "criticizes" existing law, albeit not case law.<sup>197</sup> The Fourth Circuit's *Edge Broadcasting* holding creates a conflict between two branches of government, if not two circuits.<sup>198</sup> Moreover, the case turns on First Amendment speech issues and involves accommodation of neighboring States' inconsistent regulation of broadcasters, which are matters of "continuing public interest."<sup>199</sup> Under any reasonable reading of the Fourth Circuit's publication rule, the opinion ought to have been published.<sup>200</sup>

Responding to critics of selective publication and summary disposition, judges assert that the development of the law is not impeded when redundant, straightforward, or unimportant cases are

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193. 113 S. Ct. 2696 (1993), *aff'g* 956 F.2d 263 (Table) (per curiam), *text available on Westlaw*, 1992 WL 35795 (4th Cir. 1992).

194. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), *aff'g* 956 F.2d 263 (Table) (per curiam), *text available on Westlaw*, 1992 WL 35795 (4th Cir. 1992).

195. *Id.* at 2702 n.3.

196. See 4TH CIR. I.O.P. 36.4. The rule provides for publication only if the opinion satisfies one or more of the following standards for publication:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
- ii. It involves a legal issue of continuing public interest; or
- iii. It criticizes existing law; or
- iv. It contains an historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

*Id.*

197. *Id.*

198. *Id.*

199. 4TH CIR. R. 36.4(ii).

200. Two additional facts suggest that the case was not easy or routine. The panel's decision was not unanimous; one judge disagreed with the majority's application of a leading Supreme Court case, *see Edge Broadcasting*, 1992 WL 35795, at \*4 (Widener, J., dissenting) (criticizing majority's application of test for determining constitutionally permitted restrictions on commercial speech), and it took the court 16 months to decide the case, *see id.* at \*1 (stating that case was argued before Fourth Circuit on Oct. 31, 1990, and decided on Feb. 27, 1992).

unaccompanied by full, published opinions.<sup>201</sup> The intent of the publication rules is, accordingly, to ensure that "law-making" opinions are published, leaving unpublished only those opinions that add nothing to the development of the law.<sup>202</sup> These rules, however, have failed to secure that result, either because they are unclear or because the courts fail to follow them.<sup>203</sup> Judges exercise considerable discretion, even under the courts' publication guidelines, in deciding when opinions should be prepared or published, and thus, which decisions become law. Judges cannot accurately determine at the time of disposition which cases require published opinions. Indeed, Justice Stevens states that this practice "rests on a false premise" in that it "assumes that an author is a reliable judge of the quality and importance of his own work product."<sup>204</sup> Likewise, Judge Holloway notes that "when we make our *ad hoc* determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed."<sup>205</sup>

Opinions that acknowledge conflicts or uncertainty in the law of the circuit are not always published,<sup>206</sup> although the existence of a conflict should be grounds for publication under any reasonable interpretation of the rules.<sup>207</sup> Furthermore, cases in which the

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201. See *NLRB v. Amalgamated Clothing Workers Local 990*, 430 F.2d 966, 971-72 (5th Cir. 1970) (explaining Fifth Circuit's adoption of rule permitting dispositions without opinion); Nichols, *supra* note 17, at 916 (explaining that motivation behind selective publication is desire to avoid publishing decisions that lack precedential or other significant utility).

202. See Nichols, *supra* note 17, at 916 (stating that selective publication is intended to curb publication of opinions considered redundant or irrelevant to law).

203. See REPORT AND RECOMMENDATIONS OF THE ADVISORY COMMITTEE ON PROCEDURES CONCERNING UNPUBLISHED DISPOSITIONS BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (June 8, 1984) (reporting that one-third to one-half of D.C. Circuit's cases each year are disposed of without published opinions, and concluding that 40% of unpublished decisions arguably should have been published under court's criteria); see also Hinderks & Leben, *supra* note 10, at 188-211 (discussing inconsistent and incorrect application of nonpublication rules); Hoffman, *supra* note 172, at 418 (concluding that at least some potentially valuable decisions go unpublished); Reynolds & Richman, *supra* note 17, at 1192-93 nn.132-34 (giving examples of unpublished but law-making opinions).

204. Stevens, *supra* note 171, at 508; see also *In re Rules of the U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 38 (acknowledging that court often changes its mind about publication).

205. *Rules*, 955 F.2d at 38.

206. See *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 95 n.3 (5th Cir. 1992) (noting conflict among Fifth Circuit cases regarding whether abstention factors should apply to declaratory judgment actions). The Fifth Circuit's affirmation in *Granite State* was originally published only in a table opinion. *Granite State Ins. Co. v. Tandy Corp.*, 959 F.2d 968 (Table) (5th Cir. 1992); see also Hoffman, *supra* note 172, at 413 n.9 (citing studies that discuss "apparently significant unpublished memoranda").

207. See Hoffman, *supra* note 172, at 415-16 (discussing practice of circulating unpublished opinions among judges in order to prevent intracircuit conflict, and suggesting that this practice undermines rationale for nonpublication).

appellate court reverses the court below, or in which the appellate panel's decision is not unanimous, would seem to require publication as "law-making" decisions even though the rules do not explicitly address these situations. If the district court erred in its application of the law, the law is probably unclear. Similarly, the presence of concurring or dissenting opinions usually indicates disagreement or uncertainty about the applicable law.<sup>208</sup> These factors strongly suggest that the courts of appeals should publish opinions in such cases.

### B. Uncertainty About Precedential Status

Even if the law embodied in unpublished opinions can be found through online databases or other means, its value to the researcher may be unclear. Selective publication practices, and the accompanying noncitation rules, make for very uncertain precedent and complicate legal research. In at least two circuits, citation of unpublished dispositions is "disfavored" but allowed,<sup>209</sup> an unacceptably ambiguous statement of precedential effect. Furthermore, different panels of the same circuit, deciding similar cases and applying the same publication criteria, sometimes reach opposite conclusions regarding the precedential status of their opinions.<sup>210</sup> As a result, researchers must independently undertake the difficult task of assessing the precedential value of unpublished opinions.

While publication formerly signified precedential status, court rules establishing the circumstances under which unpublished opinions may be cited have muddled the waters. Publication is no longer synonymous with precedential status. Moreover, "publication" as used by the

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208. The circuits have adopted varying rules about who makes the publication decision: the author of the panel's decision, the entire panel, the authors of separate opinions, or the entire court. See D.C. CIR. R. 36(a)(1); D.C. CIR. I.O.P. XII.B (court); 1ST CIR. R. 36.2(b) (at least one judge on panel); 2D CIR. R. 0.23 (at least one judge on panel); 3D CIR. I.O.P. 5.1.2 (unanimous panel); 4TH CIR. I.O.P. 36.4 (author or majority of joining judges); 5TH CIR. R. 47.5.2 (at least one judge on panel); 6TH CIR. R. 24(b) (majority of panel); 7TH CIR. R. 53(d) (majority of panel); 8TH CIR. R. 47B (publication decision made by entire court); 9TH CIR. I.O.P. E(8) (entire court); 10TH CIR. R. 36.1 (court); 11TH CIR. R. 36 (court, but majority of panel can subsequently publish previously unpublished opinion); FED. CIR. R. 47.6(b) (at least one judge on panel). But see Nichols, *supra* note 17, at 925 (noting that, as dissenting judge, Nichols would not avail himself of Federal Circuit's rule allowing dissenting judges to force publication of panel decision, because by doing so he would be giving precedential effect to decision with which he disagreed).

209. 6TH CIR. R. 10(f); General Order of Nov. 29, 1993, *supra* note 17 (suspending Tenth Circuit Rule 36.3, thereby allowing, but disfavoring, citation to unpublished decisions).

210. Compare Morton Thiokol, Inc. v. Argus Chem. Corp., 873 F.2d 1451 (Table) (Fed. Cir. 1989) (failing to publish opinion vacating findings on validity of patent after finding of noninfringement) with Morton Int'l v. Cardinal Chem. Co., 959 F.2d 948 (Fed. Cir. 1992) (publishing opinion after finding of noninfringement).

courts of appeals still refers to print sources, not to the overall dissemination of the document in a variety of formats.<sup>211</sup> In the earliest days of selective publication this dilemma was not acute, for researchers seldom found unpublished opinions.<sup>212</sup> Unpublished opinions, however, are now widely available, particularly through online legal research services.<sup>213</sup> Subscribers to these services can find unpublished opinions just as easily as published ones.<sup>214</sup> By virtue of their widespread availability, regardless of their citability, unpublished opinions have become important sources of legal information that researchers cannot ignore if they hope to remain competitive in the marketplace for clients and, indeed, to meet standards of effective advocacy. Attorneys cannot run the risk that their opponents will gain an advantage by researching an additional body of law.

As for the precedential value of summary dispositions, the courts themselves are in disagreement. The Supreme Court clearly accords precedential value to its summary dispositions, but has recognized the

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211. "Publication" seems to refer only to print sources because unpublished opinions are regularly available through commercial online services such as Westlaw and LEXIS. In addition to making unpublished opinions available on commercial online services, the courts of appeals have begun to disseminate their opinions electronically over public-access bulletin board systems in an effort to make opinions available to the public more easily and more quickly than they could be obtained as slip opinions through the clerk's office, and at less cost than through the commercial online services. See Roy G. Nelson, *Revolution in Court Technology*, N.Y. L.J., Mar. 9, 1993, at 4 (discussing federal appellate courts' use of electronic bulletin board systems for dissemination of slip opinions); Alan J. Rothman, *Judicial Computing's Winning Appeal*, N.Y. L.J., May 12, 1992, at 4 (discussing access of New York state judges to electronic bulletin boards for New York State Court of Appeals).

212. See *United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974) (discussing problems of unequal access to unpublished opinions); CARRINGTON ET AL., *supra* note 43, at 36 (discussing unfair advantage held by attorneys located near courts and other institutions retaining unpublished opinions on file); Nichols, *supra* note 17, at 913 (noting popular perception of unfair impediments facing attorneys who lack access to unpublished opinions).

The major exception would have been major or institutional litigants, such as insurance companies or the Government, who appeared frequently before certain courts and could maintain private files of relevant opinions to which they had access by virtue of their status as parties to the litigation. Until recently, it is unlikely that anyone thought it necessary to research unpublished opinions, and it would have been nearly impossible to do so because these opinions were not included in the West Digest system—the sole extant nationwide index of judicial opinions.

Slip opinions are generally available upon request from the clerk of court, but one must know that a relevant decision exists in order to request it. Slip opinions are usually available on a subscription basis only to a few major law libraries within the circuit. The subscription service may or may not include unpublished decisions.

213. See *supra* note 10 (discussing availability of unpublished opinions on Westlaw and LEXIS).

214. In fact, at least on LEXIS, unpublished federal court opinions are retrieved along with published decisions as a matter of course. On Westlaw, the same is true for courts of appeals opinions. For federal district court opinions, however, the researcher must select a database that includes unpublished opinions if they are to be included in the search result.

difficulty of ascertaining the reach or content of those decisions.<sup>215</sup> The courts of appeals have adopted divergent rules about summary dispositions.<sup>216</sup> Rules granting precedential value to summary dispositions are based on a flawed premise—that the precedential value of a decision can be determined when only the result and not the reasoning is known. In other words, the question is not simply whether the decision is precedential, but whether it establishes a precedent for a particular proposition. The naked statement that a decision was affirmed or reversed cannot answer this question, regardless of whether the court considers the decision “precedential.”

Vacatur also creates confusion regarding precedential value. When a court, in a published opinion, affirms or reverses the court below, or overrules its own prior decision, the import of its action is clear. Even when a court recedes from a previous holding without overruling it, the published opinion, including any concurring or dissenting opinions, sheds light on the scope of the rule thereafter. When a court simply orders a prior judgment vacated upon settlement between the parties, however, the validity of the vacated judgment is shrouded in mystery. Vacatur creates “quasi-law.”<sup>217</sup> When courts vacate prior judgments, they leave subsequent researchers to wonder whether the reasoning of the vacated decisions is sound.<sup>218</sup> A judgment is an event that, once it occurs, cannot be redacted<sup>219</sup> regardless of vacatur, but vacatur may deprive it of its status as law.

As is the case with unpublished opinions and summary dispositions, courts disagree about the propriety of relying on a vacated opinion, even for persuasive effect.<sup>220</sup> In a 1961 case, the Supreme Court stated that a vacated lower court judgment establishes no binding precedent, and implied that the lower court’s vacated opinion would be deprived of any precedential value.<sup>221</sup> Justice Powell, however, has taken the view that the statements of the lower court continue to have precedential value until the court decides to the contrary, even though the vacated judgment can no longer be said to be the law of

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215. See *supra* notes 183-84 and accompanying text (discussing Supreme Court’s difficulty in determining scope of precedential value of summary dispositions and their underlying reasoning).

216. See *supra* note 20 (citing and discussing various circuits’ rules about summary disposition).

217. Resnik, *supra* note 10, at 1511.

218. Fisch, *supra* note 22, at 193.

219. See Resnik, *supra* note 10, at 1511.

220. See Resnik, *supra* note 10, at 1507-09 (discussing approaches of courts of appeals as to whether and to what extent they should rely on vacated opinions).

221. A.L. Mechling Barge Lines v. United States, 368 U.S. 324, 329 n.11 (1961).

the case.<sup>222</sup> Although the Supreme Court recently raised this issue in oral arguments,<sup>223</sup> it did not decide the issue.<sup>224</sup>

Two recent cases offered the Supreme Court the opportunity to rule on the use of vacatur upon settlement. In the 1992-93 Term, the Court granted certiorari in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*<sup>225</sup> Philips sued Izumi and Windmere for patent infringement, and also sued Windmere for unfair competition.<sup>226</sup> Windmere countersued on an antitrust claim and was awarded \$89 million.<sup>227</sup> While appeal was pending on the antitrust claim, Philips and Windmere agreed to settle.<sup>228</sup> Philips agreed to pay Windmere \$57 million, and the parties jointly moved to vacate the judgments below.<sup>229</sup> Izumi intervened to block the vacatur and preserve the ruling in favor of Windmere, whose defense costs Izumi had paid.<sup>230</sup> In a per curiam opinion the Court dismissed the writ of certiorari as improvidently granted.<sup>231</sup> Thus, the propriety of allowing unsuccessful litigants to petition the court to vacate an unfavorable precedent as part of a settlement agreement remained uncertain.

Justice Stevens, joined by Justice Blackmun, dissented from the dismissal in *Izumi*.<sup>232</sup> Justice Stevens roundly condemned the vacatur practice:

While it is appropriate to vacate a judgment when mootness deprives the appellant of an opportunity for review, . . . that justification does not apply to mootness achieved by purchase. Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of

222. *County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting).

223. This question was on the minds of several members of the Court during oral argument. *See Arguments Before the Court; Courts and Procedure; Automatic Vacatur Rule*, 63 U.S.L.W. 3279-80 (Oct. 11, 1994) (reporting "extended questioning" about whether Ninth Circuit's opinion would remain persuasive precedent or become interesting law review article, and whether it could still be given collateral estoppel or res judicata effect).

224. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994).

225. 114 S. Ct. 425 (1993).

226. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425, 425 (1993).

227. *Id.*

228. *Id.* at 426.

229. *Id.*

230. *Id.*

231. *Id.* Although the Court noted significant disagreement among the circuits with respect to the vacatur practice, the Court did not reach the merits of the case because it would have had to address the question of Izumi's right to intervene, which was "neither presented in the petition for certiorari nor fairly included within the one question that was presented." *Id.* at 425.

232. *See id.* at 428-32 (Stevens, J., dissenting) (arguing that intervention issue was fairly included within question about propriety of Federal Circuit's vacatur practice, and stating concern about impact of vacatur on both third-party interests in litigation and public interest in finality of judgments).

private litigants and should stand unless a court concludes that the public interest would be served by a vacatur. . . . The public interest in preserving the work product of the judicial system should always at least be weighed in the balance before such a motion is granted.<sup>233</sup>

This Term, the Court went out of its way to decide a vacatur case, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*.<sup>234</sup> *Bonner Mall* involved default on real-estate taxes.<sup>235</sup> The day before the scheduled foreclosure sale of the affected property, Bonner filed a Chapter 11 bankruptcy petition, along with a reorganization plan that depended on the availability of the "new value exception" to the absolute priority rule.<sup>236</sup> The Bankruptcy Court ruled that the new value exception was unavailable.<sup>237</sup> The District Court reversed, and the Ninth Circuit affirmed the District Court decision.<sup>238</sup> Bancorp then filed a petition for certiorari, which was granted,<sup>239</sup> but while the appeal was pending the parties adopted a consensual plan of reorganization, settling the case.<sup>240</sup> Bancorp then requested that the Supreme Court vacate the Ninth Circuit's judgment.<sup>241</sup> The Court set the vacatur question for briefing and oral argument.<sup>242</sup>

In a unanimous decision, the Court held that "mootness by reason of settlement does not justify vacatur of a judgment under review."<sup>243</sup> The Court described vacatur as an "extraordinary remedy," to which petitioner must demonstrate equitable entitlement.<sup>244</sup> Justice Scalia offered several rationales for this result. First, the use of vacatur as a "refined form of collateral attack on the judgment would . . . disturb the orderly operation of the federal judicial system."<sup>245</sup> Second, the Court should not vacate cases on the basis of an "assumption" that cases accepted for review are likely to be reversed.<sup>246</sup> Third, litigants and the public are best served by preserv-

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233. *Id.* at 431-32 (citations omitted).

234. 63 U.S.L.W. 3279 (U.S. Oct. 11, 1994) (explaining that after case was settled and U.S. Bancorp had requested that Supreme Court vacate Ninth Circuit's decision, Court directed parties to brief issue of mootness where parties voluntarily settle).

235. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994).

236. *Id.*

237. *Id.*

238. *In re Bonner Mall Partnership*, 142 B.R. 911 (D. Idaho 1992); *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993).

239. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 114 S. Ct. 681 (1994).

240. *Bonner Mall*, 115 S. Ct. at 389.

241. *Bonner Mall*, 114 S. Ct. at 1367.

242. *Id.* at 1368.

243. *Bonner Mall*, 115 S. Ct. at 393.

244. *Id.* at 392.

245. *Id.*

246. *Id.* at 393.



ing the appellate court's decision.<sup>247</sup> Finally, the Court found it impossible to predict whether routine vacatur would produce significant judicial economies.<sup>248</sup>

Justice Scalia's opinion, however, left an opening for the continued use of vacatur upon settlement, by stating that its holding does "not . . . say that vacatur can never be granted when mootness is produced [by settlement]."<sup>249</sup> He stressed that the "determination is an equitable one," and noted that vacatur might be appropriate in exceptional circumstances.<sup>250</sup> Discussing in dictum appellate court vacatur of district court judgments, the Court intimated that the same equitable considerations would apply.<sup>251</sup> *Bonner Mall* makes clear that the "mere fact that the settlement agreement provides for vacatur" is insufficient.<sup>252</sup>

What remains in doubt is the nature of the "exceptional circumstances" that petitioner must show to justify vacatur.<sup>253</sup> Routine vacatur by the courts of appeals upon settlement presumably cannot stand after *Bonner Mall*. Whether the Ninth Circuit's balancing test<sup>254</sup> is sufficient to account for the equitable considerations laid out in *Bonner Mall* is open to debate.<sup>255</sup>

*Bonner Mall* is silent on the question of the remaining value (if any) of a vacated opinion.<sup>256</sup> The matter at issue in *Bonner Mall*—whether the new value exemption to the absolute priority rule

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247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. Vacatur cases not involving settlement further illuminate the Supreme Court's concerns. In *Cardinal Chemical Co. v. Morton International*, for example, the Court rejected the Federal Circuit's routine practice of vacating a judgment of patent invalidity when it upheld a finding that the patent was not infringed. *Cardinal Chem. Co. v. Morton Int'l*, 113 S. Ct. 1967 (1993). The alleged infringer, Morton, prevailed below both on the infringement claim and on its counterclaim that the patents at issue were invalid. On appeal, the Federal Circuit affirmed the finding of noninfringement but vacated the judgment that the patent was invalid, believing that it was unnecessary to decide the validity of the patent if it had not been infringed. The Supreme Court found little merit in the Federal Circuit's approach, noting that it leads to the "wasteful consequences of relitigating the validity of a patent after it has once been held invalid in a fair trial." *Id.* at 1977. Vacatur "denies the patentee . . . appellate review, prolongs the life of invalid patents, [and] encourages endless litigation (or at least uncertainty) over the validity of outstanding patents." *Id.* at 1978. It also prevents the successful litigant from "preserving the value of a declaratory judgment that . . . 'it obtained on a valid counterclaim at great effort and expense.'" *Id.* at 1976 (quoting *Morton Int'l v. Cardinal Chem. Co.*, 967 F.2d 1571, 1577 (Fed. Cir. 1992) (Nies, C.J., dissenting from denial of reh'g en banc)).

256. *Bonner Mall*, 115 S. Ct. at 386.

survived the enactment of the Bankruptcy Code—is far from settled.<sup>257</sup> The Ninth Circuit's ruling in *Bonner Mall* made new law for that jurisdiction on this issue, and provided guidance to parties and lower courts within its boundaries. The effect of vacatur in this case would have been to return the law of the Ninth Circuit to a more uncertain status, particularly if the Ninth Circuit's opinion is deemed, after vacatur, to have no remaining precedential or persuasive value.

Vacatur diminishes the predictive value of past decisions and leaves the law in a state of profound uncertainty. Moreover, vacatur upon settlement may allow certain categories of litigants to "rig" the common law,<sup>258</sup> and may reduce the role of the courts to merely "validat[ing] the wishes of the parties before them."<sup>259</sup> Viewed in this manner, court approval of vacatur upon settlement compromises the notion that decisions should be based on law, not on the status or resources of the parties. The lack of clarity surrounding the precedential value of unpublished opinions, summary dispositions, and opinions vacated upon settlement undermines the values of certainty, stability, and fidelity to law.

### C. Lack of Guidance for Future Decisions

Perhaps the most troublesome manner in which selective publication, summary dispositions, and vacatur weaken the development of the law is their failure to provide guidance for future conduct and for resolving future disputes. That is, even if a relevant decision can be located, and its precedential value ascertained, it may provide insufficient information about the facts of the case, the relevant rules, and the reasoning behind the rules' application.<sup>260</sup> Judges, no less than attorneys, must be able to evaluate prior decisions based upon a sophisticated understanding of what the court actually decided. Failing to provide sufficient guidance for future decisions jeopardizes the courts' ability to decide cases consistently and according to the law.<sup>261</sup>

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257. See, e.g., 4 NORTON BANKRUPTCY LAW AND PRACTICE 2D § 93.13 (William L. Norton, Jr. ed., 1993) (articulating "several reasons to question" availability of exception, and collecting cases).

258. See Roger Parloff, *Rigging the Common Law*, AM. LAW., Mar. 1992, at 74, 74 (discussing effects of vacatur on insurance litigation); see also Fisch, *supra* note 22, at 204-08; Sandra Torrey, *When Decisions are Written in Disappearing Ink*, WASH. POST, July 25, 1994, at F7 (discussing ability of wealthy corporations and institutions to offer generous settlements to plaintiffs in exchange for joining in motion to vacate).

259. Resnik, *supra* note 10, at 1528.

260. Fisch, *supra* note 22, at 204.

261. See *Commissioner v. McCoy*, 484 U.S. 3, 8 (1987) (Marshall, J., dissenting) (arguing that need for fairness and accuracy in courts' decisionmaking outweighs advantages of summarily

Two examples illustrate the practical difficulties judges face in applying summary dispositions and unpublished opinions. In *Burgin v. Henderson*,<sup>262</sup> a district judge dismissed the complaint, relying on a previous, unreported decision that had been orally affirmed by the Second Circuit.<sup>263</sup> On appeal, the Second Circuit remanded *Burgin* for a factual hearing.<sup>264</sup> The appellate court stated that the question was still open because its affirmance of the district judge's earlier opinion was of no precedential value.<sup>265</sup> Thus, even though affirmance indicates that the lower court reached the correct result in the earlier case, it is impossible to know whether the lower court's analysis was sound. In future cases the trial judge cannot rely with confidence on the rationale previously employed.

While summary affirmances open the way for future relitigation of the same question, summary reversals are even more troubling. In such cases, the lower court receives no information about the nature of its error. Each year, the courts of appeals summarily reverse a substantial number of district court rulings in whole or in part.<sup>266</sup> It is reasonable to assume that federal district judges generally know the law of the circuit and attempt to apply it faithfully. It strains the imagination to think that district judges reached the wrong result in hundreds of cases where the law was entirely clear and settled.<sup>267</sup> In many of these reversals, the authorities must have been unclear, conflicting, or unavailable to the district judge. In any event, it would seem sensible, when district judges do err, for the courts of appeals to provide an explanation to prevent future errors of the same type.<sup>268</sup> The courts of appeals should publish full opinions whenever

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disposing of cases without first reviewing full record below and entertaining supplemental briefs on merits of case).

262. 536 F.2d 501 (2d Cir. 1976) (describing facts and disposition of unreported case at district court level).

263. *Sekou v. Henderson*, 495 F.2d 1367 (Table) (2d Cir. 1974), *aff'g* No. 73-CV-543 (N.D.N.Y. 1973). The judge was aware of the earlier unreported decision because he was its author. See *Burgin v. Henderson*, 536 F.2d 501, 503 (2d Cir. 1976).

264. *Burgin*, 536 F.2d at 504.

265. *Id.* at 503.

266. See Nichols, *supra* note 17, at 925-26 (discussing rule in some circuits that panel must publish reversals (including vacatur or modification of order below)); Songer et al., *supra* note 12, at 975-76 (finding 12% rate of reversal in Eleventh Circuit's unpublished decisions in 1986, and noting that more than one-third of reversals by Eleventh Circuit that year were unpublished). With respect to the guidance appellate decisions provide lower court judges, data on unpublished opinions applies with equal force to summary dispositions, in which opinions are neither prepared nor published.

267. See LLEWELLYN, *supra* note 79, at 8 ("If the proper outcome of the case were not really a matter of doubt, how is it that an honest, competent judge in the court of first instance could decide it 'incorrectly'?").

268. See Reynolds & Richman, *supra* note 9, at 610-11 (asserting that judicial accountability demands publication of circuit court opinions reversing or admonishing district court judges).

er they reverse the court below.

The case of *Guam v. Yang*<sup>269</sup> illustrates similar problems resulting from selective publication. Yang was convicted of kidnapping and first-degree criminal sexual conduct, and his conviction was affirmed by the District Court of Guam, Appellate Division.<sup>270</sup> Yang appealed to the Ninth Circuit, which affirmed, relying on two unpublished decisions of the Appellate Division of the District Court of Guam.<sup>271</sup> Both of those decisions had been affirmed by the Ninth Circuit in unpublished memorandum decisions.<sup>272</sup> Two members of the Ninth Circuit panel considered it appropriate to rely on the Appellate Division's prior decisions because the Guam courts had no rule prohibiting the citation of their own unpublished decisions.<sup>273</sup> In their view, the court of appeals was bound to respect the Guam court's determination of what constituted Guam's decisional law.<sup>274</sup>

The dissenting judge, conversely, believed that the Guam court had relied not on its own prior unpublished decisions, but rather on the Ninth Circuit's unpublished affirmances of those decisions.<sup>275</sup> In his view, reliance on the unpublished affirmances was improper under Ninth Circuit Rule 21(c), which prohibits citing or using unpublished memorandum dispositions of that court.<sup>276</sup> After a rehearing en banc, the Ninth Circuit reversed the panel decision, holding that the Guam courts were not entitled to rely on unpublished Ninth Circuit decisions, which have no precedential authority.<sup>277</sup>

District court judges, attempting to reach results warranted by the law of the circuit, understandably search for and rely on any available evidence of what the law is.<sup>278</sup> If the court of appeals is willing to

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269. 800 F.2d 945 (1986), *withdrawn*, 833 F.2d 1379 (1987), and *rev'd after reh'g*, 850 F.2d 507 (9th Cir. 1988) (en banc).

270. See *Guam v. Yang*, 800 F.2d 945, 946 (1986), *withdrawn*, 833 F.2d 1379 (1987), and *rev'd after reh'g*, 850 F.2d 507 (9th Cir. 1988) (en banc).

271. *Id.* at 947-48 (citing *Guam v. Hilton*, Cr. App. No. 82-00055A (D. Guam App. Div. 1984), *aff'd*, 760 F.2d 276 (9th Cir. 1985); *Guam v. Ignacio*, Cr. App. No. 79-00036A (D. Guam App. Div. 1980), *aff'd*, 673 F.2d 1339 (9th Cir. 1982)).

272. *Guam v. Hilton*, 760 F.2d 276 (Table) (9th Cir. 1985); *Guam v. Ignacio*, 673 F.2d 1339 (Table) (9th Cir. 1982).

273. *Yang*, 800 F.2d at 947 n.2 (noting lack of express prohibition in Guam's Appellate Division Rules against citation to unpublished decisions).

274. *Id.*

275. *Id.* at 948 (Ferguson, J., dissenting).

276. *Id.* (citing 9TH CIR. R. 21(c)).

277. *Guam v. Yang*, 850 F.2d 507, 511 (9th Cir. 1988) (en banc).

278: The frustration of district court judges with this dilemma is also evident in the Fourth Circuit. There, several district courts openly continue to rely on unpublished decisions of the court of appeals, despite that circuit's noncitation rule. See, e.g., *Martin Oil Co. v. Philadelphia Life Ins. Co.*, 827 F. Supp. 1236, 1237 n.2 (N.D. W. Va. 1993) (determining that lack of Fourth Circuit published opinion on point, material relevance of unpublished case, and provision of copies of case to parties in action obviate need to follow circuit's noncitation rule); see also

reach a decision, it should permit district courts to rely on that decision in the future. District court judges cannot follow the law if the appellate court refuses to explain what the law is or where the lower court erred. By failing to provide sufficient guidance to lower court judges, summary dispositions, selective publication practices, and noncitation rules undermine certainty, predictability, and fidelity to authority. These practices breed confusion about the relevance of various statements from a court. Summary reversals and reversals unaccompanied by published opinions compromise fidelity to law in that they give no reason to support what seems a drastic action. Moreover, they give the impression of arbitrary, cavalier action by the appellate court and threaten confidence in the judicial process.<sup>279</sup>

### CONCLUSION

The common law's evolutionary development through case-by-case adjudication yields an irregular and complex structure. The law is difficult to know, and in many ways the most important aspects of the "law" are its subtle contours and shadings of meaning. These features are revealed not by the mere result of a case, but rather by the analysis and explication of facts and reasons set forth in a published opinion.

Only through thoughtful preparation of opinions can judges demonstrate due consideration of each case. Only through publication of opinions in all potentially law-making decisions can the courts secure the values of stability, certainty, predictability, consistency, and fidelity to authority, which are essential to the vitality and legitimacy of the judicial system. Because the courts of appeals are, in over ninety-nine percent of the cases that reach them, courts of last resort,<sup>280</sup> they in particular have a special obligation to oversee the development of a coherent body of law and to safeguard the legitimacy of the judiciary. These obligations far outweigh the caseload pressures that cause the courts of appeals to employ selective publication, summary disposition, and vacatur upon settlement with increasing frequency. When the courts of appeals change their opinion writing and publishing practices, they imperil the development of a coherent body of law, threaten the legitimacy of the federal

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CARRINGTON ET AL., *supra* note 43, at 37-38 n.16 (citing cases in which district courts have relied on unpublished circuit court opinions).

279. See *Commissioner v. McCoy*, 484 U.S. 3, 8 (1987) (Marshall, J., dissenting) (discussing detrimental effects of summary dispositions on confidence in judicial system).

280. See *supra* notes 47-48 and accompanying text (discussing grants of certiorari by U.S. Supreme Court relative to number of appeals terminated by courts of appeals).

courts and their acceptance in society, and frustrate the daily work of judges and lawyers.

The courts of appeals should reevaluate the use of these practices. Because it is so difficult to determine, at the time of the decision, which opinions make law, the courts should operate under a strong presumption favoring the preparation and publication of opinions.<sup>281</sup> This presumption would require publication except in truly insignificant cases. Published opinions should accompany all cases reversing the district court and all cases in which the panel's decision is not unanimous.

Summary reversals should never be issued. The parties, the lower court, and future litigants are entitled to an explanation of the error below. The courts of appeals should limit summary affirmances to cases in which a published opinion below adequately states the grounds of the decision, and then the appellate court should state explicitly that it affirms both the result and the reasoning of the court below. When a court of appeals endorses the reasoning of an unpublished district court opinion, it should order publication of the district court opinion as an appendix to its summary affirmance order. If it does not endorse the reasoning of the district court, the appellate court should prepare and publish a full opinion.

Vacatur at the request of the parties should be granted only upon an express written determination by the court that the value of vacatur in promoting settlement outweighs the public interest in maintaining certainty and finality in the law. The courts of appeals should assiduously guard against the impression that parties may procure the erasure of unfavorable precedents. Even assuming that the availability of vacatur encourages settlement prior to appeal, this benefit does not justify a practice that retards the development of a coherent body of law and gives the appearance of unfairness.

These recommendations reflect the principle that all "law-making" opinions should be published. They recognize the courts of appeals' obligations to oversee the coherent development of the law and to preserve the integrity of the judicial process. While these recommen-

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281. Courts may be able to achieve some measure of efficiency by altering the format of their opinions. The format of opinions is a separate question from the determination whether or not to publish. Numerous commentators, including judges, have suggested that an abbreviated opinion format, which recited briefly the facts and issues involved, as well as the court's reasoning, would promote certainty, consistency, predictability, and fidelity to authority. See, e.g., CARRINGTON ET AL., *supra* note 43, at 33-35 (discussing proposal for abbreviated memorandum opinion); POSNER, *supra* note 42, at 230-32 (describing excessive length of federal appellate opinions and overuse of footnotes); Wald, *supra* note 105, at 782 (discussing abridged memorandum decisions). At the same time, these abbreviated opinions should conserve judge's time and lessen the "swelling" of the law.

dations would increase the rate of opinion publication, they admit that opinions need not be published in frivolous appeals or cases where the law is truly well-settled.

The courts of appeals' admittedly legitimate concerns with increasing caseloads do not warrant practices that threaten the development of a coherent body of law and fundamentally alter our appellate traditions. Rather than adopting practices that strike at the very core of their function in our legal system, the courts of appeals should pursue structural or other reforms to address the caseload crisis. Appellate court practices that create a "secret" body of law of questionable precedential value, and that provide wholly inadequate guidance to district court judges, lawyers, and citizens, are misguided and destructive. Selective publication, summary dispositions, and vacatur upon settlement worsen, rather than improve, the situation.