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A New Proposal to Permit Lawyers To Cite "Unpublished" Opinions:

Does It Go Far Enough?

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Tuesday, Sep. 02, 2003

The Administrative Office of the U.S. Courts recently proposed a significant amendment to the Federal Rules of Appellate Procedure. The amendment—which, if adopted, would go into effect in December 2005 or later—would permit lawyers, in their briefs to the federal appeals courts, to cite even those opinions that are formally designated as "unpublished" or "non-precedential."

Currently, several circuit courts forbid the citation of such opinions. The result is Orwellian: Attorneys must treat a body of case law that is easily accessible in publicly available electronic databases as though it does not exist. Moreover, this body of law is substantial: roughly eighty percent of cases adjudicated by our federal appeals courts set no binding precedent.

The rule allowing citation of these opinions is an excellent idea that has been too long in coming. Yet it is also, at best, a half measure. It leaves in place the practice of designating certain opinions as non-precedential in the first place. That practice is difficult to square with fundamental principles of justice.

The Historical Emergence of Binding Precedent in England

To see the significance of unpublished opinions in the American legal system, it may be helpful to trace the origins of our notion of legal precedent.

In thirteenth century England, students attending court sessions first began publishing "year books" summarizing the proceedings. Because no official records of the grounds for judicial decisions were kept, the year books were considered quasi-authoritative: The decisions reported in the year books were not considered binding in subsequent cases, but medieval English judges often turned to the year book summaries for evidence of past practice.

By the middle of the sixteenth century, student-compiled year books had been replaced by private reports of decisions, and the system was evolving into the modern notion of precedent. The private reports—which were generally more thorough than the year books, but varied in quality depending on the reporter—came to be seen as authoritative.

Eventually, English courts came to see prior decisions as having precedential force in the modern sense: a court in a given case was obliged to follow the reasoning of the same or higher court in a prior, similar case, so long as there were no material differences between them.

Why were prior precedents deemed binding? First, judge-made law was thought to reflect the nation's customary rules and practices, which could only be changed by legislation. Second, lawyers reasoned that it would be unfair to judge the litigants in two relevantly similar cases by different rules or standards, so once the former case was resolved, the outcome in the latter case, for fairness reasons, became a foregone conclusion.

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Precedent and Case Reports in Early America

American courts in the colonial period imported many features of the English legal system, including the doctrine of precedent. There were, however, a number of important distinctions between British and American colonial practice.

For one thing, colonial judges frequently pointed to the different circumstances of a frontier outpost as a

reason to modify the rules followed in England.

In addition, published reports of court decisions were scarce in colonial and even post-Revolutionary America. Thus, widely available treatises like Blackstone's Commentaries on the Laws of England might in practice carry more weight than decisions of colonial and state courts.

These factors and others led American courts to adopt a less rigid notion of precedent than obtained in England. From the late nineteenth century through the middle of the twentieth century, English courts disclaimed any power to overrule prior decisions. By contrast, American courts consistently contended that they could overturn outdated, erroneous, or unworkable precedents.

The Relation of Precedent to Reported Cases

Nonetheless, even American courts gave considerable weight to precedent. Absent some very good reason not to, courts followed prior decisions.

And in one respect, precedents were followed more closely in the United States than in England. In England, it was customary for each judge of an appellate court to state his grounds for decision separately from the grounds stated by the other judges. Consequently, it was often difficult to identify the principle used to decide a case; only the facts and the outcome could be known with certainty. Each judge might cite a different principle; the court presented only the result.

By contrast, Chief Justice John Marshall of the U.S. Supreme Court established the practice of issuing an "opinion of the Court,"—a decision that gave the grounds on which a majority of the deciding judges agreed. This practice, which was also adopted by lower federal appeals courts and state courts, meant that the rules of law adopted by the American judiciary were relatively easy to identify.

Furthermore, as the nineteenth century progressed, the written opinions of American courts came to be collected in official reports. Thus, by the beginning of the twentieth century, all of the key parts of the system of American judicial precedent were in place: formal opinions spoke for the court as a whole; these opinions were usually available in official reports; and courts would routinely follow their prior rulings and those of higher courts.

The Emergence of Unpublished Opinions

Even after the advent of official opinion reporting systems, not every opinion was published, in the sense of appearing in the bound copies of books. Many appellate cases simply followed prior law without breaking new ground, or were otherwise routine, and thus did not warrant space on law library bookshelves.

Such "unpublished" opinions were, however, generally regarded as valid precedents. If a lawyer thought that a prior case, despite being unpublished, was nonetheless helpful to his client's cause, he could cite it, and if the court was persuaded by the comparison, it would follow the principles set forth in the unpublished opinion.

As caseloads increased in recent decades, however, the federal appeals courts began to draw a sharp distinction between published and unpublished opinions. The latter generally are not treated as authoritative precedents, and in some circuits, cannot even be cited as the source of a good argument, what lawyers call "persuasive authority." Moreover, it is up to the judges in each case to designate whether their decision will be deemed authoritative or not.

No-citation rules have led to the perverse result that in some of our federal appeals courts, one can now cite almost anything as persuasive authority—the opinion of a court in Canada, a newspaper editorial, a fictional closing argument from "Law and Order"—except for the unpublished opinions of the very court in which the case is being argued.

The Rule Change: Does It Go far Enough?

The proposed new Federal Rule of Appellate Procedure 32.1 would eliminate no-citation rules. That change is long overdue.

Prior to the widespread availability of computer databases and web publishing, no-citation rules were arguably justified on fairness grounds: only well-heeled clients could afford to hire lawyers with the time and wherewithal to search courthouse records for helpful unpublished opinions. But official court websites, free search engines like FindLaw and fee-based databases like Westlaw now put nominally unpublished opinions only a mouse-click away from most lawyers.

Welcome as the rule change would be, it would leave intact circuit rules that designate unpublished

opinions as lacking in precedential weight. Yet critics of the current regime argue that such non-precedential opinions are inconsistent with fundamental values.

Indeed, in the 2000 case of *Anastasoff v. United States*, a panel of the U.S. Court of Appeals for the Eighth Circuit ruled that its own rule denying precedential effect to unpublished opinions was unconstitutional. The doctrine of precedent, the court said, was well-accepted at the time of the adoption of the Constitution, and so when Article III of that document conferred upon federal courts "the judicial power of the United States," it constrained them to treat all of their decisions as valid precedents in future cases.

The *Anastasoff* ruling was later vacated as moot, and other circuits have held that their rules denying precedential effect to unpublished opinions are constitutionally permissible.

The U.S. Supreme Court has not ruled on the question. Although that Court considers all of its own opinions binding in the traditional sense, the vast majority of the decisions the Court makes set no precedent; these are decisions granting or denying review without any explanation. That practice suggests that the high Court would not be sympathetic to the argument that non-precedential opinions are unconstitutional.

Nevertheless, even if appellate rules authorizing unpublished, non-precedential opinions are constitutionally permissible, are they a good idea?

The Flawed Arguments In Favor of Non-Precedential Opinions

Let's consider the arguments in favor of rules allowing judges to deem their opinions non-precedential.

Most importantly, denying precedential effect to some category of decisions is one means of coping with crowded dockets. If every written decision of a court were to set a precedent, then courts would have to pay special care to every word they wrote, in each of the opinions they produce. As a result, they would need to spend more time on each case, and the judicial system would grind to a halt.

By designating a large proportion of the appellate courts' work as "non-precedential," the current rules permit these courts to save their effort for the difficult cases. In the run-of-the-mill cases, they can explain just enough to inform the parties of the grounds for their decisions, without having to worry that any view they express about the law will bind a future court.

That idea may sound attractive, and efficient. But in fact, this justification for the rule allowing non-precedential opinions rests on a contradiction. Opinions are designated as unpublished and non-precedential because they supposedly resolve no new questions of law. If that's true, what would be the harm of granting precedential effect to unpublished opinions? Even if published, a "no-brainer" opinion will be effectively non-precedential, for by definition, it adds nothing to the existing precedents. Thus, if this rationale is taken seriously, there is no need for a rule denying precedential force to unpublished opinions.

One suspects, therefore, that courts have been abusing the unpublished opinion.
And indeed, there is anecdotal evidence from lawyers and former law clerks that appellate courts frequently designate an opinion as unpublished (and thus non-precedential) because a case is difficult, not because it is easy. Rather than wrestle with hard questions, courts produce conclusory opinions that purport to treat unresolved issues as though they were well settled.

Accordingly, the argument for treating all opinions in fully litigated cases as precedential is strong. In those cases that truly do break no new ground, giving unpublished opinions full precedential effect would have no discernible impact. And in this kind of easy case, there is no rule against writing opinions that are short and to the point—thus saving judicial resources. But in other, harder cases, the requirement of publication will have a salutary effect: Knowing that all of their decisions will have an impact in future cases, courts will find it harder to use the unpublished opinion to disguise the fact that they are resolving novel and difficult questions.

The best argument for retaining the possibility of non-precedential opinions may be pragmatic. Courts appear to be under no obligation to write an opinion at all. If docket pressure is strong enough, courts could respond to a rule designating all their opinions as precedent-setting by issuing summary orders affirming or reversing the trial court judgments they review, without ever explaining the grounds for their decisions.

These orders would technically set precedents. But no one would be able to tell what they meant. In other words, perversely, the impact of a rule abolishing non-precedential opinions could be that courts produce even weaker, rather than stronger, justifications for their decisions.

In the end, however, this argument seems unconvincing. Although courts may not be constitutionally obligated to write opinions, our legal culture has come to understand a written opinion explaining the result of a case as a necessary element of a fair proceeding. The willingness to give a reasoned explanation distinguishes a court of law from a capricious decision maker.

If docket pressure makes fully reasoned explanation impractical, then the proper solution is to create more judgeships or curtail federal jurisdiction. (The war on drugs might be a good place to start.) The current practice instead results in a great many litigants in the federal courts receiving a form of second-class justice.
