Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?

By Kenneth J. Schmier and Michael K. Schmier

Stare decisis is fundamental to our judicial system, and our judicial system is part of the foundation of our democracy.

Stare decisis (Latin for "let the decision stand") is legal shorthand for considerations judges must give when both following and making legal precedent. *Stare decisis* controls not just how cases are to be decided in light of existing cases, but also controls the caprice of judges by requiring them to suppose that all similar future cases will be decided according to their instant decision. This accountability is not only sobering, but also encourages the examination of decisions from all perspectives, ensuring a result consistent with legal principles. *Stare decisis* is a bureaucracy buster, since it does not allow issues to be swept under carpets.

The constraints of *stare decisis* are fundamental to the judicial process. The late Judge Arnold of the United States Court of Appeals for the Eighth Circuit (hereinafter 8th Circuit) recognized this when he wrote that "principles of ... decision[s] are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence." [1]

Are you aware of what the judiciary has done to *sare decisis*?

You might not know that 93% of California appellate court opinions are illegal to mention in California courts. Pursuant to a California court rule, "[a]n opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party." [2] This practice is not confined just to California. The United States Court of Appeals for the Ninth Circuit [hereinafter 9th Circuit] has a similar rule, Rule 36-3(b), which provides that "[u]npublished dispositions and orders of this court may not be cited to or by the courts of this circuit, [except under certain circumstances]." [3] In the 9th Circuit, 87.2% of decisions are unpublished, and therefore illegal to mention. You may have thought that lawyers are free to select pertinent authorities from all past appellate court decisions, but this is no longer true. In fact, the vast majority of appellate decisions are no longer precedents, or even academic opinions of the content of our law, but rather mere legal nullities.

Stare decisis, which "serves to take the capricious element out of law and to give stability to a society," [4] is rendered completely ineffective and "cannot operate as a 'workable doctrine' as long as courts . . . are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of publishing one set of results but not the other." [5]

You are not alone if you were not aware of this. No-citation rules are largely unknown by politicians, journalists, attorneys general, and even most lawyers, not to mention the general public. We will explain and illustrate how the *stare decisis* doctrine is affected by no-citation rules, lay out a brief history of no-citation rules, provide some of their claimed justifications, and argue that no-citation rules undermine vital democratic processes to an extent that compels their abolition.

An example of s*tare decisis* abandonment

Ninth Circuit Court Judge Kozinski appears to be the leading apologist for no-citation rules and is one of the few judges to defend no-citation rules in writing. In *Sorchini v. City of Covina*, 250 F.3d 706, 708-09 (9th Cir. 2001), he held counsel for the City of Covina's cite of a prior unpublished 9th Circuit opinion to be a violation of Rule 36-3(b) that warranted punishment. Counsel for the City of Covina had attempted to cite *Kish v. City of Santa Monica*, No. 98-56297 (9th Cir. Apr. 13, 2000) (unpublished disposition), a case which directly relieved the City of Covina of liability for a dog bite where police did not announce the release of a dog during the chase of a hidden suspect. Counsel advised the court that *Kish* was unpublished. *Kish* was the only prior decision of the 9th Circuit squarely on point. Judge Kozinski explained in the citable portion of *Sorchini* that:

> [b]ecause *Kish* is not precedent, neither *Kish's* holding, nor *Kish's* observations about the state of the law, have any bearing on this inquiry. The only way *Kish* could help counsel's argument is prohibited by ... Rule 36-3—by persuading us to rule in the City's favor because an earlier panel of our court had ruled the same way." *Sorchini*, 250 F.3d at 708-09

Curiously, despite appellate resolutions of the "unannounced police dog biting arrestee" issue in both *Kish* and the unpublished portion of *Sorchini*, the existence of Rule 36-3 has allowed the legal issue to remain unresolved. While the appellate court cries loudly about the volume of litigation, it has left future litigation, which should be made unnecessary by these decisions, all but inevitable.

Does *Sorchini* mark the end of Common Law as we know it?

Lawyers are supposed to cite cases showing the court what it has done with similar facts in the past. In turn, courts are supposed to respect past decisions. How is it then that *Kish*, a prior holding of the court on exactly the same facts, cannot be mentioned to the Sorchini court? Judge Kozinski tells us *Kish* cannot be mentioned because Rule 36-3 makes it not precedent. But Rule 36-3 does not deny precedential value to *Kish*; it only prohibits citation of unpublished cases. It is circular for Judge Kozinski to say *Kish* is not precedent solely because it is not citable and that it is not citable solely because it is not precedent. Missing from Judge Kozinski's rationale is some reason *Kish* is not precedent, and no reason is stated.

Precedents, by definition, are the prior holdings of the courts regarding similar fact patterns. To say that *Kish* is not precedent for *Sorchini* is to say *Sorchini* is unprecedented. The court, however, already decided in *Kish* the issue presented in *Sorchini*, so by logic *Sorchini* is precedented. Only by redefining the meaning of precedent can Judge Kozinski make *Sorchini* unprecedented and *Kish* not precedent.

Something is obviously amiss here. Denying opinions of appellate courts prospective application without compelling reasons should raise some suspicion. Selective prospectivity, or limiting the prospective application of an opin-

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> prospectively binding.... The Framers consciously continued the common-law judicial system, placing their faith in the rule of law and in judges to follow their interpretations of the law in later cases.

Johanna S. Schiavoni, Comment, Who's Afraid of Precedents?, 49 UCLA L. Rev. 1859, 1877 (2002) (citations omitted).

17 See *Faulder v. Tx. Bd. of Pardons & Parole*, 178 F.3d 344 (5th Cir. 1999), cert. denied, 527 U.S. 1017 (1999) (recounting procedural history).

18 Neither of the opinions relating to the clemency issue in the *Barber* litigation has been published. The Supreme Court's denial of relief is located at 525 U.S. 1132 (1999). I have previously criticized the refusal of the courts - both state and federal - to publish their opinions in death penalty cases. See David Dow, The State, the Death Penalty, and Carl Johnson, 37 B.C. L. Rev. 691 (1996). The details in the text are based on my first-hand knowledge of the cases.

19 The opinion is unpublished. The Supreme Court did eventually stay Faulder's execution, though the legal basis for that decision remains unclear. *Faulder* was subsequently executed, as was Barber.

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ion, has been held unconstitutional in both civil and criminal matters. [6] Can the contrivance of making the same opinions merely uncitable avoid the ban of selective prospectivity?

Litigants are entitled to the respect of having their matters ultimately decided by law — that is, according to rules that are to be the same for everyone. Before no-citation rules, this requirement was met. Our common law legal system could (theoretically) be described as intrinsically just, because each decision became law for all. But this facade of intrinsic justness cannot be maintained when 93% of decisions are not law for everyone. We consider this a major change — indeed an abandonment — of the common law system.

Foreseeable damage caused by abandonment of the Common Law system

Even if courts can make decisions that are not considered precedents, it seems unfair that they can make their own decisions entirely unmentionable in our judicial system, no matter how enlightening those decisions might be. What honorable judge can really be comfortable preventing a criminal defendant from truthfully arguing that the appellate court has already determined that the acts he is charged with do not constitute a criminal offense? Defendant City of Covina may not elicit the same compassion as a criminal defendant, but defendants in civil cases should be entitled to show how the courts have treated others so that they won't be treated differently without explanation. We see another constitutional issue here — the right to free speech and we are disappointed that California and Judge Kozinski reject this right. It is a right that exists in our courts; indeed, it is linked inextricably to equal protection and due process. They cannot exist if litigants and courts are legally bound to ignore previous court decisions, and without them, the foundation of our judicial system is compromised.

If the judicial branch of our government system can make its prior actions of no consequence in its treatment of present litigants, can other branches of government make their treatment of others irrelevant? Our nation's founders and early judges recognized that unbridled discretion is the root of corruption in government. William Cranch, an early DC circuit court judge, writing about the necessity of reporting cases (which we think is analogous to the necessity of citing cases) recognized:

> In a government, which is emphatically styled a government of laws, the least possible range ought to be left to the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps, nothing induces more to that object than the publication of reports. Every case decided is a check upon the judge: he cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues of corruption are thus obstructed, and the sources of litigation closed. William Cranch, 1 United States Reports (5 U.S.) iii (1803).

We predict that if every government branch has the power to treat citizens as it pleases without a common standard, then there will be no stopping corruption of our government functionaries.

A very brief history of uncitability

During the 1960s, lawyers objected that too many appellate precedents were being issued, unnecessarily filling bookshelves. In response, judiciaries across America decided they would not publish "routine" decisions of their courts. California Court Rule 976 was established in 1964. California's constitutional revision of 1966 (CAL. CONST. art. VI, § 16) allowed the California Supreme Court to selectively publish appellate court decisions but the revision commission expressly rejected including a no-citation provision fearing it would constitute a "prohibition on enlightenment." [7]

The rule (and similarly that of the 9th Circuit) did not mandate that any decision be published for any reason — even if it constitutes a marked departure from existing law. The decision of whether to publish or not was left principally with the deciding judges. This led to specialized attorneys searching court files for generally unknowable aberrant decisions and using them to ambush opponents. In 1977, California no-citation Rule 977 (CAL. CT. R. CODE §977) was added to address fairness concerns raised regarding these tactics. By prohibiting both parties to lawsuits and the judge from citing unpublished opinions, the judicial council deemed the legal contest fair. But no public hearings appear to have ever taken place, nor was the new rule publicized outside of legal circles.

Plenty of objections to no-citation rules were raised in and out of court. Notably, Judge Cole believed:

> [A] fair reading of rule 977 of the California Rules of Court surely allows citation to the unpublished opinion. To hold otherwise leaves us in the Orwellian situation where the Court of Appeal opinion binds us, under Auto Equity Sales . . . but we cannot tell anyone about it. Such a rule of law is intolerable in a society whose government decisions are supposed to be free and open and whose legal system is founded on principles of the common law . . . with its elementary reliance on the doctrine of *stare decisis*. *County of Los Angeles v. Wilshire Ins. Co*., 103 Cal. App. 3d Supp. 1, 5, 163 Cal. Rptr 123 (1979).

An appellate department of the Superior Court of Los Angeles held the rule unconstitutional, but the appellate court removed the case on its own motion and vacated the decision. [8] Law professors bemoaned the serious decline in quality of appellate decision making. A study by Professors William Richmond and William Reynolds indicated that in three federal circuits at least sixty percent of unpublished appellate decisions failed to meet minimal standards of quality. [9]

No one seems to have voiced concern that the fairness of applying a rule equally to all sides in a contest, which is considered fair in sport and perhaps trial by fire, had no application to a judicial system promising justice under law. Judges fearing making bad precedent had a whole new decision option. A case could be resolved and, by law, only affect the present litigants. As Justice Thompson recognized:

> An imperfectly reasoned and generally result-oriented opinion may be buried in a non-publication grave. A panel may avoid public heat or appointing authority disapprobation by interring an opinion of real precendential [sic] value. More frequently, a panel may make a mistake . . . and fail to publish an opinion. [10]

The scary responsibility of appellate judging was lifted. No longer accountable to the common law with public consequences of their decisions, appellate courts became comfortable deviating from law. Courts routinely began delegating decision-making authority to staff, and except for public formalities, largely did away with three perspectives, judicial or otherwise. Where judges did not totally delegate to staff, they began casually determining results for clerks to backfill with opinions. All of this allowed appellate courts to process ever-larger numbers of cases. As a result, the use of uncitable decisions skyrocketed.

Lawyers and parties disgruntled by apparently wrong appellate opinions have coupled their petitions for rehearing with alternative demands that the appellate court make its decision citable as law for all. They reason that if their clients are to be burdened by a certain result, the decision should represent law for all. Such petitions have been uniformly denied.

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When charges were brought that the appellate process was creating logical conundrums instead of clarifying the law — they were dismissed. [11] Lawyers complaining that their profession requires them to ascertain law for clients from appellate decisions, and that no-citation rules render the law uncertain, unpredictable, or even unknowable, have nonetheless been denied standing to question no-citation rules. Notably, the decision in a lawsuit filed by the authors of this article resolving the free speech issue presented by the application of the no-citation rule is itself uncitable, and both the California and U.S. Supreme Courts denied it review. [12]

Attempts to challenge no-citation rules legally have been met with the refusal of courts to force any part of the judiciary to answer questions as to the no-citation practice. Perhaps more troubling to us than no-citation rules themselves has been the refusal of so many lawyers to involve themselves due to of fear of judicial retribution.

Federal 8th Circuit Court Judge Richard Arnold criticized no-citation rules and held the making of nonprecedential opinions unconstitutional, writing:

> [Some] courts are saying to the bar: "We may have decided this question the opposite way yesterday, but that does not bind us today, and what's more, you cannot even tell us what we did yesterday." *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir.2000). As we have tried to explain in this opinion, such a statement exceeds judicial power, which is based on reason, not fiat.

But *Anastasoff* was vacated as moot after en banc review was granted. [13]

Justifications given for no-citation rules

What reasons are given to justify no-citation rules? "There would not be enough books to hold the unpublished opinions," says Justice Werdegar. [14] Chief Justice George explains that uncitable opinions "are a necessary evil to chill the development of the law." [15] California Assembly member Hannah Beth-Jackson defended California's no-citation rule to the Assembly Judiciary Committee, stating that it was unreasonable to require lawyers to search through large numbers of unpublished opinions to find the law. [16] The Western Center for Law and Poverty has said that were unpublished opinions citable the additional research would be burdensome on less affluent litigants.

After Judge Kozinski told *The New York Times* that uncitable opinions are "garbage," [17] he wrote to the Federal Appellate Rules Committee (FARC) that "when the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway." [18] But according to Judge Kozinski, it is acceptable for the appellate court to issue garbage, because all that matters in an uncitable case is that the result is correct. [19] In short, the argument is the sheer volume of cases handled by the appellate courts necessitates issuing uncitable opinions.

Kozinski points out that trying to parse an unpublished opinion to determine the thinking of judges is futile because most likely, *the judges have had little if anything to do with the opinion*. [20] Holding the judiciary responsible for writing an opinion that is reasoned according to law just because three judges signed it is, to him, unreasonable. [21] Startled by his candor, the Federal Judicial Center (hereinafter FJC) issued a press release to disclose (belatedly) the judiciary's delegation of most decision-making to non-judicial staff. [22] Many judges have argued that eliminating no-citation rules will fundamentally change operations in appellate court systems. [23] While this has not proved to be true, we think no-citation rules hide quality control problems resulting from the delegation of appellate decision making to law clerks.

Judge Thompson argues that *appellate courts need more judges and far less staff because the appellate task is not fit for delegation*. Having judges dictate right results to be supported by clerk-drawn opinions, he says, is "posterior backward," resulting in legal analysis that often falls short of its conclusions. [24] Privately he has poignantly observed that in ghost-writing opinions, law clerks will extend their judge's known proclivities beyond those the judge himself might allow in search of approbation. [25]

Whether it is appropriate for the judicial function to be delegated to staff is outside the scope of this article, but language lifted from Judge Kozinski's dissent in *Pincay v. Andrews*, No. 02-56577 15897 (November 15, 2004), indicates that Judge Kozinski should be the last person to justify no-citation rules on this basis. He stated, "While delegation may be a necessity in modern law practice, it can't be a lever for ratcheting down the standard for professional competence." Id. at 15916 That standard is evidenced in the California Constitution, which requires written decisions with reasons stated. From litigants' point of view, the elimination of any prospective authority from those stated reasons leaves the analysis untrustworthy.

Judge Kozinski justifies no-citation rules by a separation of "error correction" and "law-making" functions. [26] Judge Kozinski asserts that precious judge time must be reserved for the law-making function. He defines a judicial methodology contrary to the practice commonly taught in the United States:

> "[The lower courts and appellate courts not sitting en banc] responsibility in applying the law is to analyze and apply the published opinions of this court and opinions of the Supreme Court. They are not relieved of this duty just because there is an unpublished circuit disposition where three judges have applied the relevant rule of law to what appears to be a similar factual situation. The tendency of lower court judges, of course, is to follow the guidance of the court of appeals, and the message we communicate through our noncitation rule is that relying on an unpublished disposition, rather than extrapolating from published binding authorities, is not a permissible shortcut. We help ensure that judges faithfully discharge this duty by prohibiting lawyers from putting such authorities before them, and thereby distracting the judges from their responsibility of analyzing and reasoning from our published precedents." [27]

Our response to the justifications

Inconsistency in human knowledge forces thought. Judge Kozinski holds that no-citation rules foster consistency of the published precedent. But the inconsistencies of unpublished opinions do not go away. Litigants are hurt and courts inculcate into themselves bad precedent nonetheless. [JD Note: Judge Kozinski's analysis is fatally flawed because it doesn't take into account that the uncitability of non-published decisions gives judges a blank check in those cases to ignore applicable circuit and Supreme Court precedents with impunity without public or professional accountability.]

Viewed over time, common law processes chart a path that is a better way to improve consistency. Under that method, conflicting authorities are brought to judges who give reasons supporting the better precedent. Thus, the law is continuously improved by countless judges through the ongoing weighing of precedents, arguments, and issues, together with reasoned adherence to *stare decisis*. The law is found not from any one source, but from the ongoing discussion.

There can be no question that the abilities of judges to weigh wisely these considerations vary greatly. But the purpose of the judiciary

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is to employ common sense (born of individual human judgment) with historical experience born of precedent, as a last check over all of our laws and those with power. We use the judiciary as such a check with the hope that one or a few thinking persons can keep us from an illogical or unjust stampede. Precedents, and the making of precedent, force thought. Judge Learned Hand wanted the following slogan emblazoned over the portals of every courthouse: "I beseech ye ... think ye may be mistaken." [28]

There is a measure of chaos here that might offend those that want a perfectly consistent, hierarchical system of judicial decision-making. But, as Dee Hock profoundly explains in *Birth of the Chaordic Age* (Berrett-Koehler Publishers, 1999, 264), institutions work best when the human beings comprising them are freest to use the limits of their abilities to advance the goals of the organization. Hock's word "chaordic" is a blend of chaos and order. It is intended to describe institutions that harness the human capacity to *think* creatively (limited only by a firm commitment to common goals and standards). Nowhere, in our view, does *stare decisis* compel any court to follow any historical rule, even of higher courts. But it does direct judges *to think carefully* about considerations that should be given in deciding to follow or not follow such historical rules. We trust that by *thinking carefully*, judges will appreciate the need for consistent application of law and will only depart from consistent application when certain that they can enlighten the community with an approach that yields better justice or demonstrates appropriate mercy. We trust that as the chaordic process of individual judges continually valuing competing precedents continues over time, constant refinement of our law will be the result.

Many distinguished scholars, bar associations, and a few judges have carefully highlighted compromises to the legal system, constitutional rights, and respect for individuals that result from no-citation rules. (A vast selection of these articles can be linked via http://www.nonpublication.com. Most documents referenced herein can be found at that web site.)

We believe the making of decisions that carry no precedential effect whatsoever violates the constitutional prohibition of selective prospectivity. We also believe no-citation rules are insidiously poisoning our democratic system. We realize this is an extreme statement, but if consideration is given to the centrality of voluntary obedience by the citizenry to a known body of accepted law, the destructive potential should become apparent.

Citability provides feedback to our government system

Citation of appellate opinions is a *sine qua non* for a government system worthy of trust. Any system must have feedback of its real world performance so it can correct itself. Heaters, for example, have thermostats for this purpose. Citability provides an elegant manner of feedback to our governmental system.

Our "system" could be described thus: The judiciary is where democratically created law is made to affect individuals. No person can be subject to government force except with the sanction of a court. Every person subject to an order of a court has the right to appeal to a higher court which is required to issue a written decision with supporting reasons stated. Because the resulting decision is citable and because of *stare decisis*, that decision potentially affects all persons that are, or even might become, similarly situated. Relying upon the reality that most of us are far more concerned about potential impact of court decisions on our own lives than actual impact upon faceless others, our system can count on journalists to spread word of appellate decisions. Informed as to an appellate court decision, a very large community of court watchers drawn from the public, having skills in many areas, monitors and criticizes those court actions.

The community of court watchers includes lawyers, judges, academics, journalists, industry groups, politicians, social workers, and clergy — in a word, everyone. These court watchers protect individual litigants because they can be expected to, and often do, join with litigants to raise the issue of an incorrect judicial resolution to a supreme court or to executive or legislative bodies. Via the threat and promise of equal application of law made real by *stare decisis*, our "system" of government makes sure not only that individuals subject to bad law are unlikely to stand alone, but that constituencies sufficient to amplify cries of error form around such individuals such that the body politic has to take notice.

To use a physical analogy, the citation of opinions is like water. Unlike other materials, the solid form of water floats in its liquid form. Were it not so, water frozen each winter would not be raised to be thawed by the sun in the spring and our earth could be frozen solid. So too, error should not be allowed to sink out of view, lest we be frozen in error, but should be attached to a mechanism likely over time to bring the error to light. The citation of opinions is that mechanism. This feedback system regulates the democracy. It is our essential warranty to protect us by striving for enlightenment and equal treatment. It stood as a substantial quality control system, not just for the courts, but for the entire society.

What is left of this system in the presence of no-citation rules? Little. The public is discouraged from monitoring unpublished opinions not just because they do not readily appear with the court's work, but because judges often eliminate any statement of facts from these decisions, supposedly to save time in the decision-writing process. [29] Without a statement of facts, the effort to review a court decision becomes unreasonably difficult for all but the parties.

It has been reported to us that some judges view statements of facts and legal analysis minimally necessary for citability as "make work." First year algebra students often decry "showing their work" as unnecessary, too. But it certainly makes error easier to isolate. Would any court find the requirement in our California Building Code that structural engineers show their calculations to be too onerous? No, because somebody could get hurt by error, and we know that error happens when process is not followed. Appellate courts can cause immeasurable harm by embracing an apparent result without the process of testing that result with step by step analysis resting on a careful fact statement. A careful fact statement shows the litigants that the judges know the facts, and serves as the basis upon which court watchers can evaluate the rightness of a decision.

No-citation rules keep the judiciary from learning

Citation is the method by which our judiciary, even our entire society, learns as a whole. Any person may write a comment regarding a judicial opinion. Through modern research techniques, any comment containing a case citation can be discovered. That comment may cause a court to decide a subsequent case a different way, criticize the old authority, and make the law wiser and more defined over time. Any person writing superior logic can truly expect to influence the law.

Over time we can expect our communal knowledge base to identify right, and, perhaps more important to the communal learning process, clarify why errors are wrong. No-citation rules sedate this process. In short, no-citation rules operate as a ban on enlightenment.

Because no-citation rules disconnect the amplification equal protection would otherwise bring to unpublished judicial actions, systematic feedback of the problems encountered in the enforcement of our laws to those

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that can correct those problems is greatly inhibited. Before error becomes apparent, judiciaries are likely to have established firmly rooted but hidden precedents, calcifying not only the error of their decision, but the bureaucratic practices established or preserved in accordance with those decisions.

Full citation allows us to expect a better future

The formation of precedent at the highest level of review of right asserts over our legal system the moral authority of the Golden Rule: "Treat others as you would like to be treated in the same situation." It makes certain that our judges never subject any one of us to that which the court is not willing to subject others, were another person similarly situated. Full citability encourages respect for the inestimable value of every individual. This in turn reinforces the core systemic strength of our democracy — that so long as all are treated equally, issues will ultimately be made right.

Citation should be unimpeded, and we should continue to have faith that with open discussion of all our law our democracy shall, one day, achieve the ideal of liberty and justice for all.

Recent developments

A hearing on no-citation rules was held before the House of Representatives Subcommittee on the Courts, Intellectual Property and the Internet in 2002. The Subcommittee encouraged FARC to create proposed Federal Rule of Appellate Procedure (hereinafter FRAP) 32.1, which would eliminate no-citation rules in the federal judiciary. The text of FRAP 32.1 reads:

> Rule 32.1 Citation of Judicial Dispositions
>
> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
>
> (b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

A letter-writing campaign against the new rule led by Judge Kozinski failed to avert endorsement of the new rule by the Subcommittee. However, the proposed rule was delayed one year by the Standing Committee on rules of the judicial conference so a study could be conducted by the Federal Judicial Center of the operation of no-citation rules in the federal courts. The study was completed on April 14, 2005. On April 18, 2005 FARC approved FRAP 32.1. Then on June 15, 2005, the Standing Committee unanimously approved FRAP 32.1. Then on September 20, 2005, The Judicial Conference of the United States voted to approve FRAP 32.1. The Supreme Court will review it by May 2006. As a member of the Advisory Committee on Appellate Rules, Chief Justice John Roberts has twice voted in favor of adopting FRAP 32.1. After the Supreme Court approves FRAP 32.1, Congress will have the opportunity to review its adoption. If there is no congressional opposition, the new rule will apply to decisions issued on or after January 1, 2007.

The Judicial Conference's vote is indicative that in the past few years there has been a trend toward questioning the advisability of non-citation rule experiments, while no jurisdiction has recently adopted such a rule. As of April 2006, the 9th Circuit and the California systems remain committed to enforcing their no-citation rules.

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Endnotes:

1 *Anastasoff v. United States,* 223 F.3d 898, 903-04 (8th Cir. 2000) (quoting Joseph Story, Commentaries on the Constitution of the United States §§377-78 (1833)), *vacated as moot.*

2 CAL. CT. R. CODE §977 (West Supp. 2004).

3 28 U.S.C §36-3(b) (2004).

4 William Douglas, Stare Decisis, 49 COLUM. L. REV. 735, 736 (1949).

5 Gideon Kanner, The Unpublished Appellate Opinion: Friend Or Foe?, 48 CAL. ST. B.J. 386, 445 (1973) (quoting Seligson & Warnloff, The Use of Unreported Cases in California, 24 HASTINGS L. J. 37, 53 (1972)).

6 See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) and *Griffith v. Kentucky*, 479 U.S. 314 (1987).

7 Constitutional Revision Commission, Minutes (n.d.) (on file with authors)

8 See generally *People v. Valenzuela*, 86 Cal. App. 3d 427, 150 Cal. Rptr 314 (1978).

9 "In a study conducted fifteen years ago, we found that twenty percent of unpublished opinions in nine of the eleven circuits failed to satisfy a very undemanding definition of minimum standards, and that sixty percent of the opinions in three circuits failed to meet those standards. There is no reason to think that the situation has improved in the years since." William L. Reynolds & William M. Richman, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 CORNELL L. REV. 273, 284 (1996) (referring to 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, 602 (1981)).

10 Robert S. Thompson, Mitigating the Damage, One Judge and No Judge Appellate Decisions, CAL. ST. B. J., Nov.-Dec. 1975, at 476, 480.

11 See *In re Michiko Kamiyama*, No. G022 140 (Cal. Ct. App. 4th Dist. May 29, 1998), http://www.nonpublication.com/newfiles/kamiyama.html.
An example of a reversal of a lower court in an appellate decision of first impression. What should a trial judge do if the same fact pattern comes before the court again? Stare decisis requires the court to act the same way. The court knows it has been reversed, but the no-citation rule prohibits the court from taking that into consideration. The law, by law, becomes unknowable.

12 See *Schmier v. Sup. Ct. of Cal*., No. A101206.

13 We attempted to buy Mrs. Anastasoff's claim for its full amount, $6,436 which would have avoided the opportunity for vacation by *en banc* panel. Had her counsel not refused the offer, the law on this point might be different.

14 Video tape: Marin Meet Your Judges Night (October 28, 1998) (on file with authors).

15 Peter Blumberg, Publish Is His Platform, DAILY J., March 19, 1998, at 1.

16 Appellate Opinions: New Publication and Citability Rules Hearing before the Assembly Judiciary Comm. on A.B. 1165, 2003 Leg., 2003-2004 Sess. 2 (Cal. 2003) (statement of Hannah Beth-Jackson, Assembly member), http://www.nonpublication.com/1165analysis.htm.

17 See William Glaberson, Ideas & Trends: Unprecedented; Legal Shortcuts Run Into Dead Ends, N. Y. TIMES, October 8, 2000, (Week in Review), at 44, http://www.nonpublication.com/glaberson.htm.

18 Letter from Alex Kozinski, U.S. Circuit Judge, 9th Cir., to Samuel Alito, Jr., U.S. Circuit Judge, 3d. Cir., Jan. 16, 2004, at 2, http://www.nonpublication.com/kozinskiletter.pdf.

19 "To cite [unpublished opinions] as if they were—as if they represented more than the bare result as explicated by some law clerk or staff attorney — is a particularly subtle and insidious form of fraud." Id. at 5, 7.

20 "Dispositions bearing the names of three court of appeals judges are very different in that regard. Published opinions set the law of the circuit, and even unpublished dispositions tend to be viewed with fear and awe, simply because they, too, appear to have been written (but most likely were not) by three circuit judges." Kozinski, *supra* note 18, at 2.

21 *Id*. at 6.

22 Press Release, Federal Judicial Center, Staff Attorney Offices Help Manage Rising Caseloads (issued undated), http://www.uscourts.gov/newsroom/stffattys.htm.

23 "This is insufficient reason to alter the status quo in an area so fraught with consequence for the judiciary, for the orderly development of precedential case law, for the practice of law, and for persons who pay legal bills." Judge Diane S. Sykes, Supreme Court of Wisconsin, at http://www.nonpublication.com/wise.pdf.

24 Robert S. Thompson, Courts Shouldn't Put Publishable Data in Unpublished Opinions, DAILY J., Apr. 22, 2004, http://www.nonpublication.com/thompson.html.

25 Judge Thompson told this to Kenneth Schmier in private discussion at his home. Judge Thompson's telephone number is (858) 456-8092.

26 "Court of appeals judges perform two related but separate tasks. The first is error-correction: We review several thousand cases every year to ensure that the law is applied correctly by the lower courts, as well as by the many administrative agencies whose decisions we review. The second is development of the circuit's law: We write opinions that announce new rules of law or extensions of existing rules." See Alex Kozinski & Stephen Reinhardt, Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions, California Lawyer, June 2000.

27 Kozinski, *supra* note 18, at 6. (Moreover, Judge Thompson has told this author that clerks often excessively embrace certain positions they think a judge favors, whereas the judge himself would recognize the limits.)

28 Learned Hand, The Spirit of Liberty: Papers and Addresses of Learned Hand 229-30 (Irving Dilliard ed., Alfred A. Knopf, Inc., 1963) (1952).

29 In the 9th Circuit, e.g., judges are forbidden to set out the facts of the unpublished cases they decide. See U.S.C.A. 9th General Order 4.3 (a).