

# CONTROLLING THE COMMON LAW: A COMPARATIVE ANALYSIS OF NO-CITATION RULES AND PUBLICATION PRACTICES IN ENGLAND AND THE UNITED STATES\*

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## INTRODUCTION

Finding a balance between growth and restraint has been a central tension in common law countries. Various practices have been employed to achieve a balance between growth and restraint. The nineteenth century legal treatise tradition, the American Law Institute's Restatement, the West Digest System, uniform laws, legal encyclopedias, and other devices have been used in the United States in an effort to bring order to the rapidly expanding common law. The Law Commission, Law Reform Committee, *Digest*, and *Halsbury's Laws of England* are examples of similar efforts in England.<sup>1</sup>

Publication practices and no-citation rules play an important and controversial role in controlling the growth of the common law. These practices seem fundamentally in conflict with a system that bases its very existence on widely available judicial decisions that are presumptively citable.<sup>2</sup> Common law systems have employed these measures in part to satisfy a bench and bar who complain of drowning in a sea of cases.

England and America have taken drastically different approaches to publication practices and no-citation rules. The English approach is found in a

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1. Some of the key aims of the Law Commission are "[t]o ensure that the law is as fair, modern, simple and as cost-effective as possible" and "[t]o codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes." The Law Commission, About Us (Oct. 2, 2006) <http://www.lawcom.gov.uk/about.htm>.

2. Common law systems cannot exist "until the decisions of its courts are regularly published and are available to the bench and bar." Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat*, 44 AM. U. L. REV. 757, 758 (1995) (citing GRANT GILMORE, *THE AGES OF AMERICAN LAW* 9 (1977)). The presumption judicial decisions are citable in a common law system is posited by Patrick J. Schiltz in *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 43 (2005) [hereinafter Schiltz, *Citation*].

combination of rules limiting the rights of lawyers to cite unreported judgments and giving judges the power to prospectively declare the precedential value of their judgments.<sup>3</sup> In contrast, American federal appellate courts are free to issue unpublished opinions and to decide their precedential value, but are prohibited from imposing any restrictions on the citation of unpublished opinions.<sup>4</sup>

This Article examines why England and America took divergent approaches and explores the potential consequences for the common law. Part I of this Article establishes a context for the discussion through a historical survey of publication and citation practices in England and the United States. Part I concludes with an explanation of the current rules in both jurisdictions. Part II examines efficiency arguments advanced to justify the practices employed in England and explores why these arguments were accepted in England and rejected in the United States. Part III addresses policy arguments made in each country over no-citation rules. Part III also compares the substantial differences in both the volume and substance of policy arguments made in each country. Part IV predicts the impact no-citation rules will have on the future of the common law through an examination of the precedential value of unreported and unpublished cases, the role of the judiciary in controlling the growth of the common law, jurisprudential theories, and the degree no-citation rules will be enforced in both jurisdictions.

This Article compares the publication practices and citation rules of the federal courts of appeals in the United States with the English House of Lords and Supreme Court of Judicature.<sup>5</sup> Accordingly, the legal system of England and Wales is addressed (hereinafter referred to as England for the sake of brevity and consistency).<sup>6</sup> This Article does not explore the practices of Scotland and Northern Ireland, the other countries comprising the United Kingdom,<sup>7</sup> or of American state or federal courts other than the Courts of Appeal.<sup>8</sup>

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3. Practice Statement (Court of Appeal: Authorities), (1996) 1 W.L.R. 854 (A.C.) (Eng.) [hereinafter Practice Statement (Court of Appeal)]. Practice Direction (Citation of Authorities), (2001) 1 W.L.R. 1001 (A.C.) (Eng.) [hereinafter Practice Direction]. Both are discussed more thoroughly *infra* notes 77-84 and accompanying text.

4. FED. R. APP. P. 32.1(a). Rule 32.1 is discussed more thoroughly *infra* note 134.

5. Under the Constitutional Reform Act 2005, a Supreme Court of the United Kingdom is being constituted and will take over the judicial functions of the House of Lords. Constitutional Reform Act, 2005, c. 4, § 40 (Eng.). The appellate jurisdiction of the English Court of Appeal, High Court, and Crown Court are part of the Supreme Court (of Judicature). Supreme Court Act, 1981, c. 54, § 1 (Eng.). TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS* 13 (9th ed. 2002). The courts comprising the Supreme Court of Judicature were selected for discussion in this article because the no-citation rules apply to these courts.

6. I acknowledge the House of Lords does in some instances hear cases from the Scottish and Northern Irish systems. However, for the purposes of this comparison, I will refer to the system as the English legal system.

7. Scottish courts issue unreported judgments which are available from the Court Service website and commercial publishers. According to Dr. Charlotte Waelde, of the University of

The volume of case law is much greater in the United States than in England.<sup>9</sup> This difference raises the methodological concern eloquently stated by Gutteridge “[l]ike must be compared with like; the concepts, rules or institutions must relate to the same stage of legal, political and economic development. . . .”<sup>10</sup> The disparity in the number of cases is not insurmountable and provides fertile ground for comparisons explored in Parts III and IV of this Article. Numerous other comparative studies of the American and English legal systems have exploited this disparity to posit more sophisticated conclusions than are offered in this Article.<sup>11</sup>

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Edinburgh, unreported Scottish judgments have the same precedential weight as other judgments and there are no restrictions on citing them. Email from Dr. Charlotte Waelde, Senior Lecturer, University of Edinburgh School of Law, to Lee Faircloth Peoples, Adjunct Professor of Law and Associate Director, Oklahoma City University School of Law Library (July 5, 2006, 10:11 CST) (on file with author). In Northern Ireland all judgments are widely available through print and electronic sources. Northern Irish judges frown upon over-citation of authority but there are no formal restrictions on citing unreported judgments. E-mail from Philip Leith, Professor of Law, Queens University Belfast, to Lee Faircloth Peoples, Adjunct Professor of Law and Associate Director, Oklahoma City University School of Law Library (July 30, 2006, 12:25 CST) (on file with author).

8. FED. R. APP. P. 32.1(a) is unique for the uniformity it promises to bring to the federal appellate courts on the issue of citation to unpublished opinions. There is little uniformity among the rules of other federal courts and state jurisdictions. Patrick J. Schiltz notes a trend among individual federal circuits and states toward abandoning no-citation rules. *See* Schiltz, *Citation*, *supra* note 2, at 35-39. For useful guides to the practices of other jurisdictions, see Melissa M. Serfass & Jessie W. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349 (2005); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003); and Jason B. Binimow, Annotation, *Precedential Effect of Unpublished Opinions*, 105 A.L.R.5th 499 (2003).

9. In 2002, 15,736 cases were filed with the appellate courts in England. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS, ENGLAND AND WALES 5 (2002). [http://www.dca.gov.uk/publications/annual\\_reports/2002/judstat02\\_ch01.pdf](http://www.dca.gov.uk/publications/annual_reports/2002/judstat02_ch01.pdf). The appellate courts include the Court of Appeals Civil and Criminal Divisions and the three divisions of the High Court: The Court of Chancery, Queen’s Bench Division, and Family Division. *See id.* In contrast, 60,860 cases were filed in the United States Courts of Appeals during this same time period. TIM REGAN ET AL., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 76 (2005). Professor A.L. Goodhart argued in 1939 that it was easier to find a case in America where 40,000 cases are published each year than it was to find a case in England where only 750 are reported annually. GEORGE S. GROSSMAN, LEGAL RESEARCH: HISTORICAL FOUNDATIONS OF THE ELECTRONIC AGE 27 (1994) (citing A.L. Goodhart, *Reporting the Law*, 55 L.Q. REV. 29, 30 (1939)). The pattern identified by Goodhart has held throughout history.

10. PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 218 (1995) (citing HAROLD C. GUTTERIDGE, COMPARATIVE LAW 73 (1949)). Over-reliance on a single and exclusive comparative law methodology was criticized by Vernon Palmer, who argues “there is a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs.” Vernon Palmer, *From Lerrotholi to Lando: Some Examples of Comparative Law Methodology*, 53 AM. J. COMP. L. 261, 290 (2005).

11. *See generally* RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA (1996) (offering complex observations about the legal systems of both countries supported with extensive data and discussing the volume of case law throughout). *See also* P.S.

The term “common law” is used throughout this Article to denote the body of judicial decisions that, along with other sources, make up the law in countries whose legal systems are described as having a common law basis. The English term “judgments,” the American term “opinions,” and the generic terms “decisions” or “cases” will be used throughout this Article. The term “no-citation rule” refers not only to rules related to citation of cases but also encompasses rules declaring the precedential value of cases.

It is useful to understand the meaning of the English term “unreported” and the American term “unpublished.” An “unreported” English case is one not selected by the law reporters to “appear[] in one of the generalised or specialised series of reports.”<sup>12</sup> An English court does not have any input into whether a case will be reported.<sup>13</sup> Many unreported English cases are available in electronic databases.<sup>14</sup> Conversely, an unpublished American case is designated as such by the deciding court.<sup>15</sup> The court deciding the case is often guided by specific rules defining the type of opinions that should be designated as unpublished.<sup>16</sup> The unpublished case may still be reported in the *Federal Appendix* or be available through an electronic database.<sup>17</sup> The precedential value and citation of unreported and unpublished cases will be explored in more detail below.

## I. THE HISTORY OF PUBLICATION AND CITATION

### A. *The History of Reporting and Citation in England*

English judges have delivered their judgments *ex tempore*, orally from the bench, throughout most of English legal history.<sup>18</sup> Before courts kept written records “knowledge of what was adjudicated could reach back in time only as far as the ‘living memory’ – the memory of the oldest living person.”<sup>19</sup> The advent of judges taking time for reflection before delivering their judgments or producing written judgments is a comparatively recent

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ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 128-30 (1987) (discussing the volume of case law); ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 101-74 (1990) (comparing the written and oral traditions and discussing increasing caseloads); DELMAR KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 87 (1964).

12. *Roberts Petroleum Ltd. v. Bernard Kenny Ltd.*, (1983) 2 A.C. 192, 202 (H.L.) (Eng.).

13. MARTINEAU, *supra* note 11, at 107.

14. Roderick Munday, *The Limits of Citation Determined*, 80 L. SOCIETY'S GAZETTE 1337 (May 25, 1983) (noting the Lexis database contained over 5000 unreported judgments by 1983) [hereinafter Munday, *Limits of Citation*].

15. See the section *Standards for Publication of Judicial Opinions*, *infra*.

16. *Id.*

17. *Id.*

18. MARTINEAU, *supra* note 11, at 106.

19. GROSSMAN, *supra* note 9, at 3-4 (citing R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 67 (2d ed. 1988)).

phenomenon.<sup>20</sup> As early as the reign of the first three Edwards, the practice was for judges and lawyers to cite cases from memory.<sup>21</sup> This practice developed from the early right of a barrister as *amicus curiae* to “inform the court of a relevant decision of which he was aware”<sup>22</sup> regardless of whether the decision appeared in printed form.<sup>23</sup> From the right to cite decisions from memory “followed the right to cite his written report of decisions to which he personally vouched as a member of the Bar.”<sup>24</sup> In essence, barristers could create written accounts of cases for which they personally vouched. These written accounts are an early form of unreported English cases.

The systematic reporting of cases in England is performed by lawyers working as law reporters.<sup>25</sup> These law reporters select cases to be “reported” in series of published reports.<sup>26</sup> The law reporters are the gatekeepers of the size and substance of English common law. In England the judge who decides the case has no input into whether the case will be reported.<sup>27</sup>

While case law is essential to the English system, case reporting has been undertaken in a careless and haphazard fashion.<sup>28</sup> Plea rolls commenced in the twelfth century and recorded the outcome of a particular case without any discussion of the issues or the reasons given for a decision.<sup>29</sup> Year books and abridgements containing summaries of discussions in court, first appeared

20. MARTINEAU, *supra* note 11, at 106.

21. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 57 (1968) (citing T.E. Lewis, *The History of Judicial Precedent*, 46 L.Q. REV. 341-55 (1930)). The first three Edwards reigned from 1272-1377 according to the Law Courts Libraries Table of Regnal Years, Oct. 14, 1999, <http://www.lawlink.nsw.gov.au/lawcourtslibrary.nsf/pages/regnal>.

22. MICHAEL ZANDER, *THE LAW-MAKING PROCESS* 308 (6th ed. 2004) (quoting GREAT BRITAIN, LORD CHANCELLOR’S DEPT., *REPORT OF THE LAW REPORTING COMMITTEE* 3-4 (1940) [hereinafter *REPORT OF THE LAW REPORTING COMMITTEE*]).

23. *See id.*

24. *Id.* As one judge remarked to a barrister citing an unreported case, “Mr. Robinson has followed the time honoured tradition of the Bar in stating a case which he knows neither the origin of nor the substance of nor the reference to. But he need not worry, we have all done it . . . He is following the true tradition.” Munday, *Limits of Citation*, *supra* note 14, at 1337 (citing *NOTABLE BRITISH TRIALS, THE TRIALS OF FREDERICK NODDER* 34 (1950)).

25. *See* ZANDER, *supra* note 22. Traditionally, only barristers could create reports of judgments. The privilege was recently extended to solicitors under the Courts and Legal Services Act, 1990, c. 41, § 115 (Eng.). The term “lawyer” is used to include both barristers and solicitors.

26. In the discussion over controlling the growth of case law, the terms “reported” and “unreported” are used consistently in England, while the terms “published” and “unpublished” are used in America. The American terms will be explored in the next section.

27. *See* ZANDER, *supra* note 22. “His Majesty’s Judges from time to time might for the public benefit and perhaps their private profit devote a part of their leisure to the compilation of reports.” *REPORT OF THE LAW REPORTING COMMITTEE* (1940), *supra* note 22, at 7.

28. Munday, *Limits of Citation*, *supra* note 14, at 1339.

29. J.H. Baker, *Records, Reports, and the Origins of Case-Law in England*, in *JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW* 15-21 (J.H. Baker ed. 1989), reprinted in GROSSMAN, *supra* note 9, at 4.

in the thirteenth century.<sup>30</sup> The era of nominate reports spanned approximately 1550 – 1790.<sup>31</sup> Nominate reports reproduced arguments of lawyers and judgments.<sup>32</sup> In the mid-1600s, “the supply of published reports of English court decisions suddenly changed from conditions of extreme poverty to a somewhat tarnished wealth.”<sup>33</sup> This “flood of reports” was due to the “insatiable curiosity” of lawyers creating a market for the reports.<sup>34</sup>

The quality and accuracy of reports produced during this time period varied widely.<sup>35</sup> Some were so poor that judges prohibited citations to them.<sup>36</sup> One judge has been quoted as saying, “[a] multitude of flying reports (whose authors are as uncertain as the times when taken . . .) have of late surreptitiously crept forth . . . we have been entertained with barren and unwanted products. . . .”<sup>37</sup>

For a brief period in the early 1800s, the central common law courts experimented with an early version of no-citation rules.<sup>38</sup> The courts appointed “authorized” reporters, gave the authorized reporters access to court records, and, in some instances, checked the reporters’ drafts.<sup>39</sup> The authorized reporters were also given a distinct market-advantage over other reporters of the day: courts allowed citation to their reports only.<sup>40</sup> This approach was abandoned because of the length of time it took for the authorized reporters to prepare their reports and the high prices charged for the reports.<sup>41</sup> It has also been noted that this early no-citation rule did not prevent other reports from being cited if the reports were simply attested to by a barrister.<sup>42</sup>

In 1848, the Special Committee on the Law Reporting System was formed to consider improvements to the system of reporting and publishing law books.<sup>43</sup> The Committee’s report details “a new evil” among reporters of over-reporting cases that do not announce new legal doctrines.<sup>44</sup> Other ills of the current system identified in the report include reporting cases without regard for the interests of the public or profession, inaccuracies and delays in

30. See GROSSMAN, *supra* note 9, at 6.

31. See DAWSON, *supra* note 21, at 65, reprinted in GROSSMAN, *supra* note 9, at 16.

32. See *id.*, at 65-79. The term “nominate reports” refers to accounts of cases reported under the name of the barrister who compiled them, *Plowden’s Reports*, for example. *Id.*

33. *Id.* at 75.

34. *Id.*

35. See *id.* at 77.

36. *Id.*

37. ZANDER, *supra* note 22, at 309 (quoting REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 7).

38. DAWSON, *supra* note 21 at 80-81.

39. *Id.*

40. *Id.*

41. *Id.* at 81.

42. REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 8.

43. W.T.S. DANIEL, THE HISTORY AND ORIGIN OF THE LAW REPORTS 4 (1884).

44. *Id.* at 6-7.

publication, and expense.<sup>45</sup> Identifiable reform did not occur until the Incorporated Council on Law Reporting was formed with the objective of reporting decisions “in a convenient form, at a moderate price and under gratuitous professional control,”<sup>46</sup> “independently of the Government’ under the direction of ‘an unpaid council.’”<sup>47</sup> The Council drew its membership from the bar with the Attorney General and Solicitor General also serving as members.

The Council began publishing the *Law Reports* in 1865. The *Law Reports* does not hold a monopoly on reporting, but it is thought to be extremely accurate and reliable. The *Law Reports* has long enjoyed the “privilege of primary citation”<sup>48</sup> and, in a Practice Statement issued in 1998, it was formally announced that lawyers should cite to cases as they appear in the *Law Reports* as it is the most authoritative.<sup>49</sup> One main feature of the *Law Reports* is selectivity. The Council employs a staff of lawyers who are very discerning in choosing cases for publication in the *Law Reports*.<sup>50</sup> The *Law Reports* policy of selectivity represents an effort in England to control the growth of case law by reporting only the most relevant decisions.

The creation of the Incorporated Council on Law Reporting and the *Law Reports* did not curtail England’s perceived over-reporting problems. In a 1939 article, Professor A.L. Goodhart noted eighteen law reports were then in publication, most of them reporting the same cases.<sup>51</sup> He argued it was easier to find a case in America, where 40,000 cases were published each year, than it was to find a case in England where only 750 were reported annually.<sup>52</sup> In

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45. *Id.*

46. ZANDER, *supra* note 22, at 310 (quoting REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 10).

47. GROSSMAN, *supra* note 9, at 25.

48. *Id.* at 32.

49. Practice Statement (Supreme Court: Judgments) (1998) 1 W.L.R. 825 (S.C.) (Eng.) [hereinafter Practice Statement: Supreme Court].

50. The criteria for reporting a case has remained largely unchanged since the *Law Reports* was first published. The criteria were first announced in a letter written by W.T.S. Daniel, Vice Chairman of the Special Committee on the Law Reporting System, in 1863. The criteria for reporting a case include:

(1) all cases which introduce or appear to introduce a new principle or rule, (2) all cases which materially modify an existing principle or rule, (3) all cases which settle or materially tend to settle a question upon which the law is doubtful, and (4) all cases which, for any reason, are peculiarly instructive.

Criteria for exclusion include: “(1) those cases which pass without discussion or consideration which are valueless precedents [and] (2) those cases which are substantially repetitions of what is reported already.” R. Williams, Address at Cambridge University Law Faculty Conference, Law Reporting, Legal Information and Electronic Media in the New Millennium 14-15 (Mar. 17, 2000) (transcript on file with author) [hereinafter R. Williams].

51. Goodhart, *supra* note 9, at 29.

52. GROSSMAN, *supra* note 9, at 27 (citing A.L. Goodhart, *supra* note 9, at 30. Roderick Munday has commented Goodhart’s thinking may not have represented the mainstream thought of his time. Comments of Roderick Munday (Aug. 25, 2006) (on file with author). Goodhart’s act of dissenting from the Report of the Law Reporting Committee is evidence of his position

1940, the Committee on Law Reporting was appointed to study some of the same problems examined in 1848.<sup>53</sup> Early on, the Committee addressed the creation of a no-citation rule, but never reached agreement on the issue.<sup>54</sup> The Committee also considered having a stenographer record every judgment given *ex tempore*, sending copies to the judge for correction and filing the judgment with the court.<sup>55</sup> The committee rejected this idea because of the financial costs associated with it, the notion most decisions worthy of reporting were already reported, and “[w]hat remains is less likely to be a treasure house than a rubbish heap in which a jewel will rarely, if ever, be discovered.”<sup>56</sup> The Committee’s report recommended no real reform except requesting the *Law Reports* to “speed up publication and to take a more generous view of what is reportable.”<sup>57</sup>

Following the Committee’s report, some commercial reports ceased publication because of market conditions, but, generally, the reporting of cases continued to grow.<sup>58</sup> In addition to publishing the *Law Reports*, the Incorporated Council of Law Reporting began publishing the *Weekly Law Reports* as an advance service including cases that would eventually appear in the *Law Reports*.<sup>59</sup> The *All England Law Reports*, the *Law Reports* main rival, commenced publication in 1936 as a generalist series reporting cases from all courts.<sup>60</sup> Reporting cases in newspapers also continued in the period after the Committee’s report.<sup>61</sup> A number of specialized reports focusing on specific areas of law and certain types of courts began to flourish in the period after the release of the Committee’s report.<sup>62</sup>

A 1963 comparative study of the appellate courts in the United States and England by Delmar Karlen addressed attitudes toward case reporting and citation in England.<sup>63</sup> The author concluded that most English lawyers and judges were content with the selective publication practices and preferred seeing even fewer decisions reported, but noted “counterforces working in the direction of fuller reporting.”<sup>64</sup> The danger of an important case being missed in this selective process is not as severe as in a more expansive system of

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outside of the mainstream.

53. GROSSMAN, *supra* note 9, at 27.

54. *Id.*

55. *Id.*

56. ZANDER, *supra* note 22, at 312 (quoting REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 20).

57. GROSSMAN, *supra* note 9, at 27 (citing REPORT OF THE LAW REPORTING COMMITTEE, *supra* note 22, at 22). Professor Goodhart, a Committee member, strongly dissented from the final report. *See id.*

58. *Id.* at 32.

59. *Id.*

60. *All England Law Reports* enjoyed success because it reported cases more quickly than the *Law Reports* and did a better job of indexing and cross-referencing cases than the *Law Reports*. *Id.* at 33.

61. MARTINEAU, *supra* note 11, at 105.

62. *Id.*

63. KARLEN, *supra* note 11.

64. *Id.* at 88.

reporting all cases where “vital cases might be overlooked in the masses of unimportant cases reported.”<sup>65</sup> Karlen noted that English judges depend on the discretion of the *Law Reports*’ editors, do not believe many cases have precedential value, and discourage the citation of unreported judgments.<sup>66</sup>

The seeds of “fuller reporting” alluded to by Karlen were sown in 1951 when the Lord Chancellor ordered that shorthand reporters would take down all judgments of the Court of Appeal and that copies would be retained in the court file and in the court’s library.<sup>67</sup> A basic index of these judgments was kept, but, in large part, the judgments were not extremely useful because copies of the judgments were not widely available.<sup>68</sup> The advent of computerized databases in the early 1980s changed things dramatically.

Writing in 1983, Roderick Munday discussed the transcripts of unreported judgments retained by the court, noting “their citation in court has become an everyday matter.”<sup>69</sup> When Munday’s article appeared, the Lexis database contained over 5000 unreported judgments and the “prospect of a Lexis terminal in every law library and lawyer’s office, inevitably impel[led] the legal system towards an extreme with which it [would] have to come to terms.”<sup>70</sup> Munday was fearful of “nightmarish possibilities” created by the Lexis database and of the English Bar acquiring “American vices,” including obsessive over-citation detailed in Karlen’s study.<sup>71</sup> Munday concluded by calling for “a fresh Committee to review the entire system of reporting, citation and storage of English case law” and to determine the “limits of citation.”<sup>72</sup>

Lord Justice Diplock called for a drastic departure from the English tradition of lawyers freely citing judgments that “[did] not appear in any series of published law reports” in the case of *Roberts Petroleum Ltd. v. Bernard Kenny Ltd.*<sup>73</sup> In a separate speech, equivalent to a concurring opinion in the United States, Lord Justice Diplock proposed that the House of Lords adopt:

the practice of declining to allow transcripts of unreported judgments of the civil division of the Court of Appeal to be

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65. *Id.* at 103.

66. *Id.* at 100.

67. MARTINEAU, *supra* note 11, at 105. These unreported judgments have been referred to as unexploded land mines. GROSSMAN, *supra* note 9, at 32.

68. Until the advent of electronic databases, researchers could only access the entire collection of unreported judgments at the Supreme Court Library. *See* Munday, *Limits of Citation*, *supra* note 14, at 1337.

69. *Id.* In another article written around the same time, Munday offers the idea of prohibiting citations to unreported decisions. *See* ZANDER, *supra* note 22, at 317 (citing R.J.C. Munday, *New Dimensions of Precedent*, J. SOC’Y PUB. TCHRS. L. 201 (1978)).

70. Munday, *Limits of Citation*, *supra* note 14, at 1337.

71. *Id.* at 1337-38.

72. *Id.* at 1339.

73. *Roberts Petroleum Ltd. v. Bernard Kenny Ltd.*, [1983] 2 A.C. 192, 200 (H.L.) (Eng.). Lord Justice Diplock declares citation to unreported judgments is “a growing practice” and “ought to be discouraged.” *Id.* at 201.

cited upon the hearing of appeals to this House unless leave is given to do so; and that such leave should only be granted upon counsel giving an assurance that the transcript contains a statement of some principle of law, relevant to an issue in the appeal to this House, that is binding upon the Court of Appeal and of which the substance, as distinct from the mere choice of phraseology, is not to be found in any judgment of that court that has appeared in one of the generalised or specialised series of reports.<sup>74</sup>

He argued this rule would save time as unreported judgments contain irrelevant material and usually provide no assistance to the court in reaching a decision.<sup>75</sup> He believed the current system of law reporting operated to effectively control the common law in England. “If a civil judgment of the Court of Appeal . . . has not found its way into the generalised series of law reports or even into one of the specialised series, it is most unlikely to be of any assistance to your Lordships.”<sup>76</sup>

The substance of Lord Justice Diplock’s proposal became a Practice Statement<sup>77</sup> applicable to the Court of Appeal Civil Division in 1996. The language was substantially similar to the language Lord Justice Diplock proposed in the *Roberts Petroleum* judgment:

Leave to cite unreported cases will not usually be granted unless counsel are able to assure the court that the transcript in question contains a relevant statement of legal principle not found in reported authority and that the authority is not cited because of the phraseology used or as an illustration of the application of an established legal principle.<sup>78</sup>

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74. *Id.* at 202.

75. *See id.* Lord Justice Diplock had been a vocal opponent of citation of unreported cases and of over-citation. *See Munday, Limits of Citation, supra* note 14, at 1338 (listing cases where Lord Justice Diplock expressed the opinion over-citation is “an ineradicable practice.” (quoting *Naviera de Canarias S.A. v. Nacional Hispanica Aseguradora S.A.*, (1977) 2 W.L.R. 442, 446 (H.L.) (Eng.)). *See also de Lasala v. de Lasala*, (1979) 3 W.L.R. 390 (P.C.) (Eng.); *Lambert v. Lewis*, [1981] 2 W.L.R. 713 (H.L.) (Eng.).

76. *Roberts Petroleum*, (1983) 2 A.C. at 202.

77. Practice Statements for the Civil Division are now known as Practice Directions and made by the Master of the Rolls as president of the Civil Division. They apply in addition to civil procedure rules. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, CIVIL PROCEDURE RULES: PRACTICE DIRECTIONS (2006), *available at* [http://www.dca.gov.uk/civil/procrules\\_fin/contents/frontmatter/raprnotes.htm](http://www.dca.gov.uk/civil/procrules_fin/contents/frontmatter/raprnotes.htm).

78. Practice Statement (Court of Appeal), *supra* note 3, at 854. The application of the rule was broadened to the High Court and Crown Court. *See Practice Statement: Supreme Court Judgments, supra* note 49. The rule was restated in the Practice Direction (Court of Appeal (Civil Division)), (1999) 1 W.L.R. 1027 (A.C.) (Eng.).

Justice Laddie's postscript in the case of *Michaels v. Taylor Woodrow Developments Ltd.* is further evidence of a desire to control the growth of the common law through publication and citation practices.<sup>79</sup> Justice Laddie wrote in 2001, having observed the increase in the size and use of electronic databases and their impact on the common law in the eighteen years since the *Roberts Petroleum* case. He lamented the loss of the law reporters' tradition of selectivity:

Now there is no preselection . . . . A poor decision of, say, a court of first instance used to be buried silently by omission from the reports. Now it may be dug up to support a cause of action or defence which, without its encouragement, might have been allowed to die a quiet death.<sup>80</sup>

He offered a solution in which *ex tempore* judgments are not to be cited, unless the court indicates to the contrary, as a way to prevent "the bulk of material from clogging up the system."<sup>81</sup>

Justice Laddie's sentiments appeared in the form of the 2001 Practice Direction which took the reforms announced in *Roberts Petroleum* and the 1996 Practice Statement even further. The Practice Direction prohibits citation of certain categories of reported judgments unless the judgment "clearly indicates that it purports to establish a new principle or to extend the present law."<sup>82</sup> Judgments given after the date of the Practice Direction are required to explicitly indicate whether they establish a new principle or extend present law and courts are instructed to search for such statements in judgments cited by lawyers.<sup>83</sup> The Practice Direction requires advocates to justify their citation to all categories of judgments, presumably including both reported and unreported judgments, which "only appl[y] decided law to the facts of the particular case; or otherwise as not extending or adding to the existing law."<sup>84</sup>

### *B. The History of Publication and Citation in the United States*

Early American court decisions were not published. American lawyers and judges relied upon English cases as precedent. After the Revolutionary war, the need for uniquely American jurisprudence led to the publication of the

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79. *Michaels v. Taylor Woodrow Dev. Ltd.*, [2001] Ch. 493 (Ch.D.) (Eng.).

80. *Id.* at 520.

81. *Id.* at 522.

82. Practice Direction, *supra* note 3, at 6.1. Section 6.2 spells out the specified categories: "[a]pplications attended by one party only, [a]pplications for permission to appeal[, and d]ecisions on applications that only decide that the application is arguable." *Id.* at 6.2.

83. *Id.* at 6.1.

84. *Id.* at 7.1.

first volume of American decisions in 1789.<sup>85</sup> In sharp contrast to the oral tradition followed in England, American judges have almost always produced their own written opinions;<sup>86</sup> however, many early American reporters followed the English tradition of reporting from their notes and observations instead of reprinting the written opinion of the court.<sup>87</sup> By the start of the twentieth century, reporters' duties shifted to merely obtaining written opinions produced by the court and publishing them.<sup>88</sup>

The appointment of official reporters at the federal and state levels in the United States is another distinct contrast to the English practice of leaving reporting to private enterprise. Excerpts from the Report of the Committee on Law Reporting of the Association of the Bar of the City of New York of 1873 reveal discontent with the system of reporting at the time.<sup>89</sup> The report cites an overwhelming number of law reports available in America as early as 1821, including an abundance of cases containing no new principles and selected without care.<sup>90</sup> The report pinned the blame on the for-profit publishers, interested in volume rather than quality, and called for the creation of an official reporter.<sup>91</sup> The United States Supreme Court and many states appointed official reporters.<sup>92</sup> Many states eventually abandoned the practice and designated West their official reporter.<sup>93</sup>

Another contrast with the English system of only reporting select judgments is the American practice of comprehensive reporting. In the latter part of the nineteenth century, the drastic increase in the number of reported cases prompted calls for reform of the American reporting system.<sup>94</sup> In 1871, *American Reports* and *American Decisions* were introduced as selective reports that included only the "real gems" of American law and excluded "redundant, regressive cases."<sup>95</sup> These reports included state cases of "established general authority" cited by text writers and excluded obsolete

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85. MORRIS L. COHEN ET AL., *HOW TO FIND THE LAW* 16 (9th ed. 1989).

86. A 1785 statute required Connecticut judges to produce written opinions. C. JOYCE, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1297-1362 (1985), reprinted in GROSSMAN, *supra* note 9, at 40-41. See also MARTINEAU, *supra* note 11, at 110. For a brief period of time in its earliest years, the Supreme Court gave oral opinions at the conclusion of arguments but soon abandoned this practice in favor of written opinions. Statutes requiring judges to produce written opinions in every case were later questioned as causing the unnecessary publication of too many cases. See John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 160 (1915).

87. ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 46-47 (1990).

88. *Id.*

89. GROSSMAN, *supra* note 9, at 59-65 (citing REPORT OF THE COMMITTEE ON LAW REPORTING OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1873)).

90. *Id.*

91. *Id.*

92. MARTINEAU, *supra* note 11, at 112.

93. *Id.* at 113.

94. GROSSMAN, *supra* note 9, at 66-67 (citing REPORT OF THE COMMITTEE ON LAW REPORTING OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1873)).

95. *Id.* at 69.

cases with no significance.<sup>96</sup> This concept of reporting was not successful, as lawyers eventually chose the comprehensive style.

John B. West was a pioneer of comprehensive reporting in America.<sup>97</sup> West first began publishing excerpts from the decisions of the Supreme Court of the state of Minnesota in 1876.<sup>98</sup> By 1887, his *National Reporter System* provided lawyers with comprehensive coverage of judicial opinions from all states.<sup>99</sup> Supreme Court decisions were available in the *Supreme Court Reporter* and federal appellate court decisions and select federal district court decisions were available in the *Federal Reporter*.<sup>100</sup> Under this system of comprehensive reporting nearly every appellate court decision, and some federal district court decisions, found their way into the law reports.<sup>101</sup>

By the end of the nineteenth century, the American legal profession was in a difficult situation. The operation of the common law system was strained by the yearly exponential growth in the number of cases. Lawyers could no longer master all the cases or rely on their memories.

Early calls for reform focused on reducing the number of opinions published but not on limiting lawyers' ability to cite opinions.<sup>102</sup> The Chief Justice of the Wisconsin Supreme Court complained about the volume of case law in 1915, remarking that lawyers' briefs are devoted to reciting precedent, many of which add nothing to the law.<sup>103</sup> The Chief Justice proposed that judges only write opinions in certain types of cases and prohibit publication of opinions with no precedential value.<sup>104</sup> The publication of only select opinions was again suggested in the late 1940s by judges of the Third and Fifth Circuits and several states including Texas and Alabama enacted rules dictating the criteria for published opinions.<sup>105</sup> The American reliance on judges to control

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96. *Id.* at 71 (citing *Object of the American Decisions*, 1 AM. DEC. v-x (1878)).

97. See SURRENCY, *supra* note 87, at 49.

98. *Id.*

99. *Id.*

100. J. MYRON JACOBSTEIN, ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 43-50 (7th ed. 1998).

101. *Id.*

102. SURRENCY, *supra* note 87, at 38. According to Surrency, "[c]iting unpublished decisions was common both before and after the Revolution, but now, it is difficult to determine with what frequency." *Id.*

103. Winslow, *supra* note 86, at 158-59.

104. *Id.* at 161-62. Chief Justice Winslow sagely predicted, "I confess that the question of how such an opinion [without precedential value] can be kept away from the pernicious activity of private reporting systems is a very difficult one." *Id.* at 162. For an even earlier complaint, see James Kent, *An American Law Student of a Hundred Years Ago*, in *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 837, 842 (1907). Kent, upon appointment to the Supreme Court of New York in 1798, complained, "I never dreamed of volumes of reports & written opinions. Such things were not then thought of." *Id.*

105. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent - Limited Publication and the No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1169 (1978) [hereinafter Reynolds & Richman, *Non-Precedential Precedent*]; see also Francis P. Whitehair, *Opinions of Courts: Fifth Circuit Acts Against*

the growth of the common law by selectively designating cases for publication is contrary to the English approach of letting the law reporters decide which cases merit reporting.

In 1964, the Judicial Conference of the United States resolved that the federal appellate and district courts should only authorize the publication of precedential opinions.<sup>106</sup> The 1971 report of the Federal Judicial Center also recommended limited publication practices and a no-citation rule.<sup>107</sup> The report was circulated to circuit judges who were requested to develop plans to implement the report's recommendations.<sup>108</sup> A few years later, the Federal Judicial Center's Advisory Council for Appellate Justice created a report containing standards for publication of opinions and a proposed no-citation rule. This report was later published as *Standards for Publication of Judicial Opinions*.<sup>109</sup>

The Judicial Conference decided to let each circuit develop its own publication and citation rules based on the *Standards for Publication of Judicial Opinions*. The individual circuits were left as "11 legal laboratories" accumulating experience with publication and citation rules.<sup>110</sup> The Judicial Conference left publication practices and citation rules undisturbed for several decades.<sup>111</sup>

Federal judges' designation of opinions as unpublished increased dramatically during this period. In 1984, only approximately forty percent of federal appellate decisions were issued as unpublished opinions.<sup>112</sup> Today over eighty percent of federal appellate decisions are issued as unpublished opinions.<sup>113</sup> Before the advent of computerized legal research, a decision designated as unpublished was not easily discoverable. Today, almost all unpublished opinions are available electronically through LexisNexis, Westlaw, free websites, or in print in West's *Federal Appendix*.<sup>114</sup> In 2001, West's *Federal Appendix* began publishing the unpublished opinions of

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*Unneeded Publication*, 33 A.B.A. J. 751, 754 (1947).

106. See Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 105, at 1169 n.17 (citing JUDICIAL CONFERENCE OF THE UNITED STATES REP. 11 (1964)).

107. *Id.*

108. *Id.* at 1170.

109. *Id.* at 1171.

110. Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1435 (2005) [hereinafter Schiltz, *Much Ado*].

111. See *id.* at 1435-41. Schiltz notes the issue was added to the Advisory Committee's agenda in 1991 where it remained dormant for a number of years until it was removed in 1998 and subsequently put back on the agenda in 2001. *Id.*

112. See Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1283 (2004) (citing Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 204 tbl. 2 (2001)).

113. *Id.* at 1283 (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2002 ANNUAL REPORT OF THE DIRECTOR 39 tbl. S-3).

114. Complete access to all unpublished opinions has not yet been achieved. See discussion in section *Substantive Policy Arguments, infra*.

federal appellate courts in volumes bound identically to West's other federal reports.<sup>115</sup> The availability of unpublished opinions has improved so much so that the term "unpublished" is only accurate as a term of art, and not as a description of physical location.

Rules on citing unpublished opinions were restrictive at first, but have been relaxed.<sup>116</sup> Initially, six federal circuits prohibited the citation of unpublished decisions; the Fourth Circuit disfavored it, the Tenth permitted relevant citations, and the Third and Fifth had no rules.<sup>117</sup> The rules became less restrictive over the next several decades. By June 2006, only four circuits banned citation of unpublished decisions (Second, Seventh, Ninth, and Federal).<sup>118</sup> Six circuits discouraged but allowed citation (First, Fourth, Sixth, Eighth, Tenth, and Eleventh).<sup>119</sup> Three circuits freely allowed it (Third, Fifth, and D.C.).<sup>120</sup>

No-citation rules were eventually challenged on a number of grounds in federal courts around the country.<sup>121</sup> Two cases are at the center of the controversy regarding no-citation rules. The first is *Anastasoff v. United States*.<sup>122</sup> In *Anastasoff*, the plaintiff appealed the district court's denial of her refund for overpayment of federal taxes. She argued her refund was not otherwise barred by the limitations period because of a statutory "mailbox rule" and the court was not bound by a previous unpublished decision directly on point.<sup>123</sup> Her argument relied upon Eighth Circuit Rule 28A(i) which provides in pertinent part, "[u]npublished opinions . . . are not precedent and parties generally should not cite them."<sup>124</sup> The court ruled against *Anastasoff* holding its own rule unconstitutional under Article III of the United States Constitution for "confer[ring] on the federal courts a power that goes beyond the 'judicial.'"<sup>125</sup>

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115. MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL 67 (8th ed. 2002).

116. Schiltz, *Much Ado*, *supra* note 110, at 1463.

117. The First, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits permitted citation as of 1978. Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 105, at 1180.

118. 2D CIR. R. 0.23 (2006); 7TH CIR. R. 53(b)(2)(iv), (e) (2006); 9TH CIR. R. 36-3(b) (2006); FED. CIR. R. 47.6(b) (2006). This terminology is adapted from Schiltz, *Much Ado*, *supra* note 110, at 1429.

119. 1ST CIR. R. 32.3(a)(2) (2006); 4TH CIR. R. 36(c) (2006); 6TH CIR. R. 28(g) (2006); 8TH CIR. R. 28A(i) (2006); 10TH CIR. R. 36.3(B) (2006); 11TH CIR. R. 36-2 (2006).

120. 3D CIR. I.O.P. 5.7 (2006); 5TH CIR. R. 47.5.4 (2006); D.C. CIR. R. 28(c)(1) (2006).

121. See generally Binimow, *supra* note 8 (listing cases in which courts have discussed unpublished opinions' precedential effects).

122. 223 F.3d 898, 899 (8th Cir. 2000), opinion vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000).

123. *Id.*

124. 8TH CIR. R. 28A(i)(2000).

125. *Anastasoff*, 223 F.3d at 899.

In contrast to the *Anastasoff* decision, the constitutionality of no-citation rules was upheld in *Hart v. Massanari*.<sup>126</sup> Judge Alex Kozinski, a long-time defender of limited publication practices and no-citation rules, wrote the opinion. The case arose from counsel's citation of an unpublished opinion contrary to the Ninth Circuit Rule stating "[u]npublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit."<sup>127</sup> Counsel relied on *Anastasoff* for the proposition that the Ninth Circuit Rule was unconstitutional.<sup>128</sup> The court found that counsel violated the rule but decided not to impose sanctions.<sup>129</sup> The *Hart* case held no-citation rules constitutional on the grounds that the principle of binding authority is not found in the constitution, but instead is a matter of judicial policy.<sup>130</sup>

In the wake of these decisions and with the efforts of the Solicitor General of the United States, the process of examining the no-citation rules of federal appellate courts began in 2002.<sup>131</sup> The issue was placed on the agenda of the Advisory Committee on the Federal Rules of Appellate Procedure.<sup>132</sup> This Committee makes recommendations for changes to the Federal Rules of Appellate Procedure. The Advisory Committee agreed that the citation of unpublished opinions in the federal appellate courts should be regulated by a consistent national rule.<sup>133</sup> After some debate, the Advisory Committee proposed the following amendment to the Federal Rules of Appellate Procedure (hereinafter Rule 32.1):

(a) Citation Permitted. A court may not prohibit or restrict 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.]<sup>134</sup>

The rule stirred up considerable controversy.<sup>135</sup> Rule 32.1 was

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126. *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001).

127. *Id.* at 1159 (quoting 9TH CIR. R. 36-3(2001)).

128. *Hart* 266 F.3d at 1158.

129. *Id.* at 1180.

130. *Id.* at 1175.

131. Schiltz, *Much Ado*, *supra* note 110, at 1441.

132. *Id.* at 1442.

133. Schiltz, *Much Ado*, *supra* note 110, at 1446.

134. FED. R. APP. P. 32.1(a). The Rule applies to all federal courts of appeals and effectively repeals any circuit rules prohibiting citation to unreported cases. *See* FED. R. APP. P. 1 and 28 U.S.C. § 2072(b) (2007).

135. *See Comparing the Policy Arguments – Volume*, *infra* notes 223-39 and accompanying text.

subsequently approved by the Advisory Committee, the Standing Committee, and the Supreme Court; and went into force on January 1, 2007.<sup>136</sup> The methodology used to create Rule 32.1 is chronicled by the Advisory Committee Reporter, Patrick J. Schiltz, in a law review article<sup>137</sup> and discussed in greater detail below in the section *Comparing the Policy Arguments - Volume*. Rule 32.1 only addresses the citation of unpublished opinions issued after the effective date of the Rule. It leaves a number of issues to the individual federal appellate courts, including whether to issue unpublished opinions and what precedential value to give unpublished opinions.

## II. THE EFFICIENCY ARGUMENTS

Some of the more practical arguments made in England and the United States in favor of no-citation rules focus on the assumed efficiency of such rules. The efficiency argument posits that prohibiting lawyers from citing unreported or unpublished cases saves the lawyers the time of staying up with, searching for, and including such cases in briefs and, in turn, saves clients money. Judges are also winners under the efficiency argument because they do not have to read unreported or unpublished cases or make sense of them if they are not cited by lawyers.

### A. English Efficiency Arguments

In England, the efficiency argument was advanced by Lord Justice Diplock in *Roberts Petroleum*. In his judgment he states that he gained nothing from reading the two unreported cases cited in the lower court's judgment. "None of them laid down a relevant principle of law that was not to be found in reported cases; the only result of referring to the transcripts was that the length of the hearing was extended unnecessarily."<sup>138</sup> Lord Justice Diplock's proposed rule in *Roberts Petroleum* and the subsequent 1996 Practice Statement sparked a flurry of discussion. One author conducted an inventory of recent cases and commentary on the issues of blanket reporting and concluded unnecessarily citing cases added nothing to the law, distracted lawyers from drawing principles from authorities, and wasted the time of judges and the money of parties.<sup>139</sup> Citation of unreported cases is said to give rise to "significant problems," including: making the lawyer's search for authority more difficult, geographically fragmenting the bar, complicating the study of law, and making the law less accessible.<sup>140</sup>

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136. Schiltz, *Citation*, *supra* note 2, at 64; William P. Murphy, *Alito, For Precedent: Federal Appeals Rule 32.1: A Strong Search Tool for the One True Law*, 30 PENN. L. WKLY. 1 (Mar. 26, 2007).

137. Schiltz, *Much Ado*, *supra* note 110, at 1434-58.

138. *Roberts Petroleum Ltd. v. Bernard Kenny Ltd.*, (1983) 2 A.C. 192, 201 (H.L.) (Eng.).

139. Munday, *Limits of Citation*, *supra* note 14, at 1338.

140. Roderick Munday, *supra* note 70, at 201, *reprinted in* ZANDER, *supra* note 22, at 316.

Lord Justice Diplock's proposal was criticized some years later by Justice Laddie in the *Michaels* case.<sup>141</sup> Justice Laddie shares Lord Justice Diplock's concerns about the effects of over-reporting and citation to unreported judgments and postulates the system will be "swamped with a torrent of material" if the problem is not tackled.<sup>142</sup> He laments the loss of efficiency when "courts are presented with ever larger files of copied law reports, thereby extending the duration and cost of trials, to the disadvantage of the legal system as a whole."<sup>143</sup> However, Justice Laddie disagreed with Lord Justice Diplock's proposed rule for a number of reasons, including the thought it would not reduce the burden on parties to search unreported judgments that might apply to their case. Justice Laddie mentioned the problem of citation to unpublished cases in the United States and quoted the language of the relevant Circuit Court rule.<sup>144</sup> Justice Laddie did not believe the American approach would work in England, but noted that it would prevent the "bulk of material from clogging up the system."<sup>145</sup>

The movement toward a no-citation rule in the English courts must be viewed against the backdrop of larger reforms occurring in the English legal system. Lord Woolf was commissioned by the Lord Chancellor to "evaluate the current status of civil litigation in England" in 1994.<sup>146</sup> Lord Woolf concluded the present system was too expensive, slow, fragmented, and unequal.<sup>147</sup> The problems Lord Woolf identified were not unlike the efficiency arguments in favor of no-citation rules. Although Lord Woolf's final report did not specifically address no-citation rules, he was responsible for the 2001 Practice Direction.<sup>148</sup> The introduction to the 2001 Practice Direction laments the problems for advocates and courts caused by the current volume of available material. It contends the Practice Direction is necessary to preserve recent efforts to "increase the efficiency, and thus reduce the cost of litigation."<sup>149</sup> This Practice Direction has been said to correspond to the main objectives of the Civil Procedure Rules, which include saving expenses and allotting an appropriate share of court resources to cases.<sup>150</sup>

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141. *Michaels v. Taylor Woodrow Dev. Ltd.*, [2001] Ch. 493 (Ch.D.) (Eng.).

142. *Id.* at 520-21.

143. *Id.* at 520.

144. *Id.* See also 4TH CIR. R. 47.6(b)(2001).

145. *Michaels*, [2001] Ch. at 522.

146. Kenneth M. Vorrasi, *England's Reform to Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England and the United States*, 30 J. LEGIS. 361, 365 (2004) (citing STEVEN M. GERLIS AND PAULA LOGHLIN, CIVIL PROCEDURE 1 (2001)).

147. LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 1 (1995), available at <http://www.dca.gov.uk/civil/interfr.htm>.

148. Justice Laddie was a member of the Working Party, which produced the 2001 Practice Direction, *supra* note 3.

149. WOOLF, *supra* note 147, at 2.

150. Roderick Munday, *Over-Citation: Stemming the Tide – Part I*, 166 JUST. OF THE PEACE, Jan. 5, 2002, at 6-7 [hereinafter Munday, *Over-Citation: Part I*]. The Civil Procedure

The efficiency argument for the English no-citation rules was advanced at a conference on law reporting held at Cambridge University in 2000. Lord Justice Buxton characterized the English system as economical on judge power because it looks to lawyers to cite only authority that actually informs judges about something in the law.<sup>151</sup> Lord Justice Buxton contemplated a shift to the American system placing less responsibility on lawyers but rejected the idea because it would require many more judges and would become “complicated and burdensome.”<sup>152</sup>

### B. *United States Efficiency Arguments*

Similar efficiency arguments were raised in the United States when no-citation rules were first enacted by the various federal circuit courts. Efficiency arguments appear in the 1972 Federal Judicial Centers Advisory Council for Appellate Justice’s Report, *Standards for Publication of Judicial Opinions*. According to the report, a no-citation rule will reduce costs because unpublished opinions will not have to be obtained and examined.<sup>153</sup> Additionally, costs and delays will be further reduced as cases will not be appealed only because they are at odds with unpublished cases.<sup>154</sup> The no-citation rule proposed in the report was a model for many of the rules adopted by the circuit courts of appeals.<sup>155</sup> Additional efficiency arguments raised shortly after the publication of the report include two new ideas. Without a no-citation rule judges will spend more time drafting opinions for wider audiences if all opinions can be cited, and a no-citation rule would reduce the market for unpublished opinions and discourage publishers from selling reports of unpublished opinions.<sup>156</sup>

Some of the local circuit rules on publication and citation make specific reference to efficiency. The Second Circuit Rule states the “demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively”<sup>157</sup> The Fifth Circuit Rule declares “[t]he publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.”<sup>158</sup>

Efficiency arguments were also made in the *Anastasoff* and *Hart* cases. In *Anastasoff*, Judge Arnold recognized that treating every opinion as precedent will be burdensome on the already over-worked system and judge,

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Rules were a product of Lord Woolf’s reforms.

151. Williams, *supra* note 50, at 9.

152. *Id.* at 11.

153. *Id.*

154. ADVISORY COUNCIL FOR APPELLATE JUSTICE, FJC RESEARCH SERIES NO 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, 19 (1973).

155. Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 105, at 1171.

156. *Id.* at 1189.

157. 2D CIR. R. 0.23 (2007).

158. 5TH CIR. R. 47.5.1 (2007).

but contends “the price must still be paid”<sup>159</sup> even if backlogs expand. One solution he offers is creating more judgeships and having judges take more time to handle cases competently.<sup>160</sup>

In *Hart*, Judge Kozinski takes a different approach. He contends courts do not have time to write every opinion for publication.<sup>161</sup> According to Judge Kozinski, no-citation rules and unpublished opinions are efficient because they allow judges to dispose of routine cases with unpublished opinions and spend time writing precedential opinions in significant cases.<sup>162</sup> “Writing a second, third or tenth opinion in the same area of law, based on materially indistinguishable facts will, at best, clutter up the law books and databases with redundant and thus unhelpful authority.”<sup>163</sup> Judge Kozinski posits that if parties are allowed to cite unpublished opinions, the time savings provided by unpublished opinions would vanish. Judges would spend more time writing opinions, lawyers would spend more time finding opinions, and, ultimately, clients would pay.<sup>164</sup> Judge Kozinski also disputes the suggestion in *Anastasoff* that more judges would cure the problem. He contends it would take a five-fold increase in the number of judges to fairly allocate the increased workload.<sup>165</sup> These additional opinions would have the negative effect of creating conflict within and among the federal circuit courts.<sup>166</sup>

Commentary defending and attacking efficiency arguments for no-citation rules is plentiful.<sup>167</sup> Steven R. Barnett devotes an entire section of a law review article to refuting Kozinski’s arguments.<sup>168</sup> The section is entitled “Vanishing Time: The Kozinski Defense of No-Citation Rules.” Barnett contends no-citation rules will not save judges time because judges already know that nearly all of their opinions, whether written for publication, will be made available on LexisNexis or Westlaw and will be read by attorneys. He notes that circuits with permissive citation rules have not experienced the fatal results Kozinski foretells.<sup>169</sup>

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159. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000) opinion vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000).

160. *Id.*

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

162. *Id.*

163. *Id.*

164. *Id.* at 1179.

165. *Id.*

166. *Id.*

167. See, e.g., Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW. MAG., June 2000, at 43; Boyce F. Martin Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215 (2004).

168. Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 17 (2002).

169. *Id.* at 20.

The Supreme Court's recent approval of Rule 32.1 marks the United States' move away from a no-citation rule at the federal appellate level. The process leading up to the rule's approval provides insight into the impact of efficiency arguments against no-citation rules. Rule 32.1 was published for comment in 2003 by the Advisory Committee on the Federal Rules of Appellate Procedure (Advisory Committee).<sup>170</sup> The Advisory Committee received over 500 comments on the rule.<sup>171</sup> Comments touched on efficiency arguments noted above. Comments from those opposed to the rule came from judges fearful of the increased workload caused by citations to unpublished opinions, a minority of attorneys worried about additional research obligations of searching unpublished opinions, and parties to the judicial process concerned that citing unpublished opinions will slow the judicial process and make it more expensive.<sup>172</sup> Schiltz commented that "predictions of doom came not from those who have experience with permitting the citation of unpublished opinions, but from the four circuits that continue to forbid it" and that such comments were largely speculative.<sup>173</sup>

These and other comments were discussed at the Advisory Committee's April 2004 meeting. The Advisory Committee was "more persuaded by the comments supporting Rule 32.1 than by the more numerous comments opposing it."<sup>174</sup> The Advisory Committee voted to approve the rule and sent the rule to the Standing Committee where the rule was returned to the Advisory Committee pending the outcome of several studies.<sup>175</sup>

The first study, conducted by the Federal Judicial Center, was a comprehensive survey of federal circuit judges and the attorneys practicing before them.<sup>176</sup> Judges in circuits with permissive, restrictive, and discouraging citation rules were asked whether changing the citation rules would affect the length of their opinions or the time they devoted to writing them. A large majority of judges from circuits with all three types of rules responded that changing the citation rules would not have an impact on the length of their opinions or the time they devoted to writing them.

The survey asked judges whether proposed Rule 32.1 would require them to spend more time writing unpublished opinions. The majority of judges in the six circuits that discourage citation to unreported cases responded that proposed Rule 32.1 would not change the amount of time they spend

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170. Schiltz, *Much Ado*, *supra* note 110, at 1431. See *id.* for a thorough history of FED. R. APP. P. 32.1(a).

171. Schiltz, *Citation*, *supra* note 2, at 29.

172. *Id.* at 35-39.

173. Schiltz, *Much Ado*, *supra* note 110, at 1464. Schiltz notes most judges who commented against the rule actually had below average workloads. *Id.* at 1479.

174. Schiltz, *Citation*, *supra* note 2, at 58.

175. *Id.*

176. TIM REGAN ET AL., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS (2005).

preparing opinions. The response to the same question from Judges in the circuits banning citation to unreported cases was mixed.

Judges in circuits permitting citation of unpublished opinions were asked how much additional work it takes to deal with briefs citing unpublished opinions. The majority said it creates “a very small amount” of extra work.<sup>177</sup> Finally, judges in the two circuits that recently relaxed their restrictions on the citation of unpublished opinions were asked if the change affected the time required to draft unpublished opinions or if their workload was affected in general. The vast majority of judges responded that they did not spend more time writing unpublished opinions and they noticed “no appreciable change” in the difficulty of their work.<sup>178</sup> Attorneys were asked what impact proposed Rule 32.1 would have on their overall workload. On average attorneys predicted that Rule 32.1 would not have an “appreciable impact” on their workload.<sup>179</sup>

The second study was conducted by the Administrative Office of the United States Courts. It focused on the amount of time it took courts to dispose of cases and how they disposed of those cases. The study examined circuits that allowed citation to unpublished opinions. Specifically, the study focused on whether relaxed citation rules affected the timeframe for disposition of cases. The study found that allowing citation to unpublished cases did not affect the length of time it took courts to dispose of cases or the number of summary dispositions issued.<sup>180</sup>

Claims that liberalizing no-citation rules would swamp the courts with work, increase the amount of time attorneys devoted to research, and slow down the entire judicial process were directly refuted by both studies. The Advisory Committee met to consider Rule 32.1 in April 2005, and all members agreed the studies “failed to support the main contentions of Rule 32.1’s opponents.”<sup>181</sup>

Efficiency arguments are not explicitly addressed in the text of Rule 32.1, but are mentioned in the Committee Note accompanying the Rule (the Note). The Note cites the current conflicting no-citation rules varying from circuit to circuit as inefficient because lawyers struggle to keep up with the different rules. The Note also states efficiency concerns over judicial time wasted drafting unpublished opinions are irrelevant under Rule 32.1 because the Rule takes no position on the precedential value of unpublished opinions. Individual circuits are free to declare unpublished opinions non-precedential and, thereby, conserve judicial energy from writing lengthy unpublished

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177. Schiltz, *Citation, supra* note 2, at 61 (citing TIM REGAN ET AL., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS 10 (2005)).

178. *Id.* at 62.

179. *Id.* at 63.

180. *Id.* at 64 (citing Draft Minutes of Spring 2005 Meeting of Advisory Committee on Appellate Rules 11 (Apr. 18, 2005)).

181. *Id.*

opinions.<sup>182</sup>

### C. Comparing the Efficiency Arguments

Efficiency arguments are the primary justification offered in favor of England's no-citation rules.<sup>183</sup> This contrasts with the experience in the United States where efficiency arguments were advanced but refuted by empirical studies.

One possible explanation for the success of efficiency arguments in England and their failure in the United States is the different phase each country is in with respect to no-citation rulemaking. Rule 32.1 was enacted in the United States with the benefit of hindsight. The modern era of experimentation with no-citation rules in the United States began with the Federal Judicial Center's 1971 report recommending limited publication practices and the subsequent call for each circuit to develop publication practices and citation rules.<sup>184</sup> As described in the previous section, different versions of no-citation rules operated in the federal circuits for a number of years. By using these circuits as "11 laboratories," the American bench and bar was able to see what worked and what did not.<sup>185</sup> This approach allowed the efficiency arguments to be tested, studied, and eventually refuted.

The modern era of no-citation rules began in England with Lord Justice Diplock's call for reform in the *Roberts Petroleum* case in 1983. In contrast, by the time *Roberts Petroleum* was decided, the United States had been experimenting with no-citation rules for over ten years. The process used to develop the English rules is described in more detail in the next section. The process did not involve any empirical studies testing the efficiency arguments.

Additionally, the volume of discussion over no-citation rules was substantially less in England than in the United States. These procedural differences and the stage each country was at in its experience with no-citation rules explains why efficiency arguments were relied upon in England and rejected in the United States. Perhaps, as judges, scholars, and the judiciary in England gain more experience with no-citation rules they will reexamine the efficiency of the rules.

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182. Advisory Committee's Note, FED. R. APP. P. 32.1(a) [hereinafter Advisory Committee's Note].

183. See sections on policy arguments and the precedential effect of unpublished opinions, *infra* notes 188-198 and accompanying text. These arguments were advanced in England in support of no-citation rules, but efficiency was the official justification for no-citation rules in England.

184. See *supra*, section on *The History of Publication and Citation in the United States*. Contrast the modern era with previous no-citation experiments in the United States, discussed *supra*. It is appropriate to begin this era with the 1971 Report because it is the first mention of both publication and citation rules, and is where scholars trace the development of Rule 32.1. See Schiltz, *Much Ado*, *supra* note 110, at 1437. Schiltz compares the length of time it took to reach agreement on Rule 32.1 to a film project languishing in "development hell." *Id.*

185. Schiltz, *Much Ado*, *supra* note 110, at 1435.

Comparative law methodology contains an underlying principle that legal systems must be compared at similar stages of their development. Gutteridge stated the principle as “[l]ike must be compared with like; the concepts, rules or institutions must relate to the same stage of legal, political and economic development.”<sup>186</sup> England and the United States are at different phases in their development of no-citation rules. A comparison of no-citation rules is, therefore, only meaningful after carefully placing the rules into historical context.<sup>187</sup>

### III. POLICY ARGUMENTS

In addition to the efficiency arguments outlined in the previous section, arguments regarding no-citation rules were raised in both countries on policy grounds. The volume of policy arguments was greater in the United States than in England, but different substantive policy issues were raised in each country. Policy arguments appeared to be more influential in America than in England. Insight into the divergent approaches toward no-citation rules taken by England and the United States can be gained by examining these differences.

#### A. *English Policy Arguments*

Concern over the impact of no-citation rules on the rule of law in England was scant. In a brief comment appearing shortly after the *Roberts Petroleum* judgment, Colin Tapper raised the fundamental rule of law concept that those governed by law have the right to know what the law is.<sup>188</sup> Tapper critiques Roderick Munday’s *Limits of Citation Determined* article because it does not address the simple fact “decisions of the superior courts *are* law.”<sup>189</sup> Munday does, in fact, touch on rule of law concerns with the admission that “[p]aradoxically, English law, despite its being in the main judge-made, has always been careless of its case law.”<sup>190</sup>

English commentators criticized the *Roberts Petroleum* judgment, and the general state of English law reporting, for perpetuating inequality of access to the law.<sup>191</sup> The practice of retaining transcripts of unreported Court of

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186. DECRUZ, *supra* note 10, at 218 (quoting HAROLD C. GUTTERIDGE, *COMPARATIVE LAW* 73 (1949)).

187. *Id.* at 226-27 (quoting Ferdinand Stone, “[w]e must study the history, the politics, the economics, the cultural background in literature and the arts, the religions, beliefs and practices, the philosophies, if we are to reach sound conclusions as to what is and what is not common.” *The End to be Served by Comparative Law*, 25 *TUL. L. REV.* 325, 332 (1951)).

188. Colin Tapper, *Commentary, The Limits of Citation Determined*, *THE LAW SOCIETY’S GAZETTE*, June 29, 1983, at 1636.

189. *Id.*

190. Munday, *Limits of Citation*, *supra* note 14, at 1339.

191. ZANDER, *supra* note 22, at 322-23.

Appeal judgments in the Supreme Court Library permits only those with time and the right of access to discover the law. The system of law reporting in general is also criticized for creating a situation making it difficult for the public or practitioner to “hack their way through the plethora of published law reports.”<sup>192</sup> The critique concludes by suggesting the answer to the problem lies not in restricting citations but in computer retrieval systems that provide easy access to the law for citizens and attorneys.

Fears over unreported judgments creating inequality of access to the law were substantiated in a 1992 study conducted by the American political scientist Burton M. Atkins.<sup>193</sup> The study adapted previous methodology used to compare United States appellate courts to the English Court of Appeal. The results revealed that unreported English Court of Appeal decisions were not “disposable” because they affected a lawyer’s advice to a client.<sup>194</sup> In other words, English lawyers’ advice to their clients would change if they were aware of unreported judgments. Atkins concluded that English reporting practices gave affluent and repeat litigants an advantage because they were more likely to be aware of unreported judgments.

Munday, writing in the third of a series of articles published shortly after the *Michaels* decision and 2001 Practice Direction, discussed the arousal of suspicion and lack of respect for courts and the judicial system created by certain publication practices.<sup>195</sup> He was critical of the use of de-publication by courts shaping the law while shielding themselves from dealing with controversial issues. He raised these policy concerns as an example of problems that can arise from the comparatively extreme de-publication practices of the State of California, but he did not specifically criticize the English no-citation rules based on these same policy concerns.

Strong criticisms of the no-citation rules were aimed at the rules’ invasion of the traditional rights and privileges of lawyers. Munday noted that the restrictions on a lawyer’s right to cite unreported decisions announced in *Roberts Petroleum* were “met with howls of protest.”<sup>196</sup> Robert Zander summarized responses to the no-citation rule proposed in *Roberts Petroleum* and critiqued the rule’s limit on the right of lawyers to make the best case possible.<sup>197</sup> Another commentator criticized the 1998 Practice Direction for curtailing the right of citizens through legal representation to conduct legal

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192. G.W. Bartholomew, *Unreported Judgments in the House of Lords*, 133 NEW L.J. 781, 782 (1983).

193. Burton M. Atkins, *Selective Reporting and the Communication of Legal Rights in England*, 76 JUDICATURE 58 (1992).

194. The phrase “disposable” and the underlying methodology of the study were adapted from Karen K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989).

195. Roderick Munday, *Over-Citation: Stemming the Tide – Part 3*, 166 JUST. PEACE 83, 86 (2002) [hereinafter Munday, *Over-Citation: Part 3*].

196. Munday, *Over-Citation: Part I*, *supra* note 150, at 8.

197. ZANDER, *supra* note 22, at 322-23.

proceedings in a manner they see fit.<sup>198</sup>

None of these policy concerns were voiced in the *Roberts Petroleum* or *Michaels* cases or in any of the Practice Directions. The only reasons given in the cases and Practice Directions for the English no-citation rules were the efficiency arguments outlined above.

### B. *United States Policy Arguments*

No-citation rules aroused markedly more debate in the United States than in England. In America, policy arguments appeared in scholarly articles, cases discussing no-citation rules, the text of Rule 32.1, and the accompanying Committee Note. Patrick J. Schiltz, Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure, received over five hundred comments on Rule 32.1, making it the second most commented on procedural rule in history.<sup>199</sup> A website created by a group supporting Rule 32.1 includes a comprehensive list of law review articles written on the subject of no-citation rules and unpublished opinions.<sup>200</sup> Prior to publication of this Article, the site listed 102 law review articles.

Schiltz devoted an entire law review article to explaining why the rules created so much controversy in the United States.<sup>201</sup> In the article, Schiltz shared the comments of one federal appellate judge who observed that trying to talk with his fellow judges about Rule 32.1 was akin to discussing sex or religion.<sup>202</sup> Schiltz argued “there was a disconnect between the relatively low level of importance of Rule 32.1 and the relatively high level of emotion surrounding it.”<sup>203</sup> His thesis was that no-citation rules are relatively unimportant but have aroused so much controversy because they sit “at the intersection of a surprising number of principles that are very important” to lawyers and judges.<sup>204</sup> The most significant policy arguments based on these principles are outlined below.

There has been considerable argument in the United States over whether no-citation rules are an unconstitutional restraint on the freedom of expression. Some argue the rules do not violate the First Amendment because they are

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198. F.A.R. Bennion, *Citation of Unreported Cases – A Challenge*, NEW L.J., Oct. 16, 1998, at 1520 (cited in ZANDER, *supra* note 22, at 322).

199. Schiltz, *Much Ado*, *supra* note 110, at 1432.

200. Committee for the Rule of Law, <http://www.nonpublication.com> (last visited March 23, 2007).

201. Schiltz, *Much Ado*, *supra* note 110, at 1432. As Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure, Schiltz’s job was to receive and summarize comments on Rule 32.1. His article does an excellent job of outlining the positions for and against no-citation rules in the United States. I will draw heavily on his discussion of the reasons of principle offered for and against the no-citation rules, instead of reinventing the wheel.

202. *Id.* at 1433.

203. *Id.* at 1434.

204. *Id.* at 1467.

similar to the multitude of other restrictions courts impose on attorneys, including rules dictating the length and format of briefs.<sup>205</sup> Others argue the rules infringe First Amendment rights by banning “truthful speech about a matter of public concern.”<sup>206</sup> Both sides see a distinction between no-citation rules limiting the substance of what can be argued from rules restricting the form in which arguments are made.<sup>207</sup>

The central holding of *Anastasoff* was that the no-citation rule in question was unconstitutional for limiting the precedential effect of prior decisions.<sup>208</sup> The *Hart* case explicitly rejected this proposition, concluding instead that the principle of precedent is not constitutional, but a matter of judicial policy.<sup>209</sup> Rule 32.1 takes a pass on the constitutionality issue, stating in the Committee Note, “[Rule 32.1] takes no position on whether refusing to treat an ‘unpublished opinion’ as binding precedent is unconstitutional.”<sup>210</sup>

Concerns over the lack of accountability created by no-citation rules were also voiced. The poor quality of unpublished opinions has been blamed on the lack of accountability they afford judges which in turn breeds “sloth and indifference.”<sup>211</sup> The unaccountability created by unpublished opinions has led to judges engaging in corrupt practices, including issuing an unpublished opinion to avoid a public debate over a contested issue and judges changing their minds on an issue on the condition that a non-precedential opinion be issued.<sup>212</sup>

Accountability concerns were also voiced by Judge Arnold in the *Anastasoff* decision. Judge Arnold contended no-citation rules, like the one at issue in *Anastasoff*, are unconstitutional because the court is, in effect, saying, “[w]e may have decided this question the opposite way yesterday, but this does not bind us today, and, what’s more, you cannot even tell us what we did

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205. Schiltz, *Citation*, *supra* note 2, at 32.

206. *Id.* at 50. Schiltz cites the following articles in support of this contention: Richard S. Arnold, *The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767, 778 (2003); David Greenwald & Frederick A.O. Schwarz Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1161-66 (2002); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287, 297-300 (2001); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 780-83 (2004); Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1227-30 (2003); Charles L. Babcock, *No-Citation Rules: An Unconstitutional Prior Restraint*, 30 LITIG. 33 (2004).

207. Schiltz, *Citation*, *supra* note 2, at 50.

208. *Anastasoff v. United States*, 223 F.3d 898, 905 (8th Cir. 2000), opinion vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000).

209. *Hart*, 266 F.3d at 1175.

210. Advisory Committee’s Note, *supra* note 182.

211. 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).

212. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1487 (2004) (recalling the comments of now-retired federal appellate judge Patricia Wald).

yesterday.”<sup>213</sup> Accountability concerns were addressed in the Committee Note accompanying Rule 32.1. The Note proclaims Rule 32.1 expands “the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public.”<sup>214</sup>

No-citation rules came under strong criticism in the United States for offending notions of equal justice. The rules have been said to create “two classes of justice: high-quality justice for wealthy parties represented by big law firms, and low quality justice for ‘no-name appellants represented by no-name attorneys.’”<sup>215</sup> The argument follows, wealthy parties and their high-powered lawyers receive careful consideration by the courts and a published decision written by a judge, while the disadvantaged receive less attention and an unpublished opinion written by a law clerk. These arguments are supported by numerous empirical studies summarized in Penelope Pether’s article *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*.<sup>216</sup>

The text of Rule 32.1 aims to achieve equality in citation practices by prohibiting courts from imposing citation restrictions on certain classes of opinions and not others. The Committee Note accompanying Rule 32.1 dismisses criticisms that no-citation rules favored large institutional litigants who, unlike other litigants, were able to collect and organize unpublished opinions. The Note contends such concerns are obviated by the widespread availability of unpublished opinions in the *Federal Appendix*, Westlaw, LexisNexis, and the Internet.<sup>217</sup> Pether took issue with this claim, arguing it would only be valid if all litigants had equal access to Westlaw and LexisNexis and if online searching advanced to the point that all unpublished opinions were easily accessible.<sup>218</sup>

Pether’s critiques are compelling even in light of recent advancements in the accessibility of unpublished opinions. The E-Government Act of 2002 requires all federal appellate and district courts to provide free electronic access to their written opinions including published and unpublished opinions.<sup>219</sup> However, mere access to unpublished opinions does not

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213. *Anastasoff*, 223 F.3d at 904. This statement of course must be contrasted with the following statement from *Hart*: “[no-citation rules] allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings.” *Hart*, 266 F.3d at 1160.

214. Advisory Committee’s Note, *supra* note 182.

215. Schiltz, *Citation*, *supra* note 2, at 49, (citing Letter from Beverly B. Mann, Attorney, to Samuel A. Alito Jr., Chair, Advisory Comm. on Appellate Rules 4 (Feb. 15, 2004), [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-408.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-408.pdf)).

216. Pether, *supra* note 212.

217. Advisory Committee’s Note, *supra* note 182.

218. Pether, *supra* note 212, at 1516.

219. Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. A statement on the PACER website provides insight into what will be available. Written opinions “have been defined by the Judicial Conference as ‘any document issued by a judge or judges of the court sitting in that capacity, that sets forth a reasoned explanation for a court’s decision.’ The

necessarily equate to an ability to discover relevant opinions.

The federal courts complied with the E-Government Act by providing the public with free access to pull up opinions via the Public Access to Electronic Court Records system (PACER). PACER works exceptionally well at retrieving dockets by known criteria such as party name, case number, or a few broadly defined case type categories, but it has no full text-searching capability. It is presently impossible to retrieve opinions containing text corresponding with a particular search query using PACER. Some federal courts of appeals make their opinions available from the court's website, but offer little or no search functionality.

The manner in which the federal courts have complied with the E-Government Act does little to provide the general public with relevant court opinions; instead, it perpetuates existing inequalities of access. Disadvantaged litigants will not be able to locate useful court opinions using the PACER system because they will not know the names of parties or case numbers of relevant cases. Wealthy litigants represented by well-informed lawyers are more likely to possess the requisite information necessary to retrieve relevant cases from the system.

In the wake of the Supreme Court's approval of Rule 32.1, LexisNexis made a startling announcement regarding access to unpublished opinions that will perpetuate the existing inequalities of access. The company announced it would begin charging additional fees to access unpublished federal and state cases previously available at no extra charge from the basic federal or state case database.<sup>220</sup>

Policy concerns were raised in the United States, similar to those raised in England, that no-citation rules unnecessarily infringe on the professional judgment and autonomy of lawyers.<sup>221</sup> Rule 32.1 expressly addresses these concerns and limits the power of courts to tell lawyers they cannot cite certain types of opinions. The Committee Note accompanying the Rule elaborates that lawyers will no longer worry about sanctions or accusations of unethical conduct for citing unpublished opinions and will no longer be restricted from "bringing to the court's attention information that might help their client's cause."<sup>222</sup>

### C. Comparing the Policy Arguments

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responsibility for determining which documents meet this definition rests with the authoring judge." Admin. Office of the U.S. Courts, [http://pacer.psc.uscourts.gov/announcements/general/dc\\_ecf\\_opinion.html](http://pacer.psc.uscourts.gov/announcements/general/dc_ecf_opinion.html) (last visited Apr. 16, 2007).

220. Posting of Marie S. Newman to Out of the Jungle, <http://outofthejungle.blogspot.com/2006/06/unpublished-opinions.html#links> (June 15, 2006, 15:23 CST).

221. Schiltz, *Much Ado*, *supra* note 110, at 1469-70.

222. Advisory Committee's Note, *supra* note 182.

### 1. *Volume of Arguments*

There was more discussion of policy issues surrounding no-citation rules in the United States than in England. Three possible reasons may account for this disparity in the volume of discussion. First, the American legal system has comparatively more experience with no-citation rules than the English legal system does. This point was fully explored in the previous section, *Comparing the Efficiency Arguments*, but is equally applicable here. American judges and lawyers had more experience with different versions of no-citation rules. Consequently, American judges had more to say about no-citation rules than English judges and lawyers. The methodological concern over comparing legal systems at similar points in development discussed above is also applicable to avoid false comparisons in explaining the difference in the volume of policy arguments surrounding the no-citation rules.

The second reason for the disparity in the volume of policy arguments relates to the nature of scholarly legal communication in England and in the United States. There is a substantial difference in the amount of scholarly commentary examining the policy issues of no-citation rules in the United States as compared with England. As noted above, over 102 American law review articles have been written on the issues surrounding no-citation rules and unpublished opinions. In contrast, only a few dozen English articles and book chapters have examined the issues. This difference is due in part to the difference in size between the American and English legal academies. There are over ten thousand law faculty members in the United States while England has roughly a fourth of the number of legal academics.<sup>223</sup> There is also a substantial difference in the number of law schools, with approximately 194 in the United States, and fifty-three in England.<sup>224</sup> Finally, the United States has approximately 832 law journals, roughly four times the 170 English journals.<sup>225</sup>

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223. The American Association of Law School's Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, Tables 2004 – 2005 listed the total number of faculty at 10,136. This figure includes all categories of professors, deans, and law library directors. The American Association of Law School's Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, Tables 2004 – 2005, [http://www.aals.org/statistics/0405/html/0405\\_T1A\\_tit4.html](http://www.aals.org/statistics/0405/html/0405_T1A_tit4.html) (last visited Apr. 16, 2007). The English Society of Legal Scholars had more than 2700 members as of August 2006. This figure includes academic and practicing lawyers, so the actual number of full time academics in the U.K. could be less. See The Society of Legal Scholars: An Introduction, <http://www.legalscholars.ac.uk/text/index.cfm> (last visited Apr. 16, 2007).

224. The American Bar Association's Section on Legal Education and Admission to the Bar reported the American figure as of December 2006. See ABA-Approved Law Schools, <http://www.abanet.org/legaled/approvedlawschools/approved.html>. The English figure was obtained from the legal website Hieros Gammos, <http://www.hg.org/euro-schools.html#england> (last visited Apr. 16, 2007).

225. John Doyle, a law librarian at Washington and Lee University School of Law maintains a web page listing legal journals by a number of factors including country. See Law Journals: Submissions and Ranking, <http://lawlib.wlu.edu/LJ/index.aspx> (last visited March 19,

The disparity in the volume of academic commentary over no-citation rules cannot be dismissed on purely methodological grounds. Gutteridge's observation that like must be compared with like is relevant; however, the disparity in volume is not a function of size alone, but may also be attributed to the nature of scholarly legal communication and the functions law faculty perform in each country.<sup>226</sup>

P.S. Atiyah and Robert Summers contend that English academic legal writing has traditionally focused on "black letter research and writing," purposely avoiding policy subjects, while many American scholars have taken the opposite approach, exploring public policy extensively in their scholarship.<sup>227</sup> Two factors are integral to understanding the differences. First is the sharp distinction between law and policy maintained in England. Second, until recently, courts would only entertain citations to academic writing once the author was deceased.<sup>228</sup> These factors give English legal academics few incentives to express policy views and little promise those views will be considered or accepted. In contrast, many American academics are public policy experts; they frequently publish policy-oriented articles in the multitude of American law journals, influencing both the legislatures and the courts. Viewed in this context, the comparative lack of English legal scholarship discussing the policy implications of no-citation rules is understandable.

The final reason for the difference in the volume of discussion is related to the methodology that produced the no-citation rules in England and the United States. In England, the rules were proposed in the *Roberts Petroleum* and *Michaels* cases, discussed in a few articles, and eventually enacted as a Practice Statement and Direction. The Notes on the Practice Directions explain their jurisdictional reach and who promulgated them, but give little insight into the process leading up to their enactment.<sup>229</sup> One English law researcher explained that individuals charged with making practice directions "consult widely" when making them.<sup>230</sup> Justice Laddie wrote the *Michaels* opinion and postscript discussing no-citation rules. As a result he was placed on the Working Party, which eventually produced the 2001 Practice Direction. Justice Laddie observed that the Working Party did not conduct any studies or circulate any notes or drafts of their work for comment.<sup>231</sup>

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226. DECRUZ, *supra* note 10, at 218 (citing HAROLD C. GUTTERIDGE, *COMPARATIVE LAW* 73 (1949)).

227. ATIYAH & SUMMERS, *supra* note 11, at 398-99.

228. *Id.* at 399, 403.

229. Department for Constitutional Affairs, Civil Procedure Rules, Practice Directions, [http://www.dca.gov.uk/civil/procrules\\_fin/contents/frontmatter/raprnotes.htm](http://www.dca.gov.uk/civil/procrules_fin/contents/frontmatter/raprnotes.htm) (2006).

230. E-mail from Elaine Wintle, Librarian, Blackstone Chambers, to Lee Faircloth Peoples, Adjunct Professor of Law and Associate Director, Oklahoma City University School of Law Library (May 4, 2006, 08:48 CST) (on file with author).

231. Telephone Interview with Sir Hugh Laddie, Retired Judge, High Court; Consultant, Willoughby & Partners, in London & Oxford (May 11, 2006).

The process employed in the United States to create Rule 32.1 was different from the process used in England to create Practice Directions.<sup>232</sup> Rule 32.1 and all other federal rules of civil and criminal procedure are technically promulgated by the Supreme Court and approved by Congress.<sup>233</sup> The Judicial Conference of the United States is the policy-making body responsible for proposing changes in the rules to the Supreme Court.<sup>234</sup> The Judicial Conference performs this duty through its Standing Committee on Rules of Practice and Procedure and Advisory Committees.<sup>235</sup> Making Rule 32.1 was a complex process and took an exceptionally long time, as described above.<sup>236</sup> The Advisory Committee surveyed judges, sought and received over five hundred comments, reviewed the empirical studies discussed above, and debated the proposed rule for several years.<sup>237</sup>

The method for adopting no-citation rules in the United States appears to have been more democratic than the English approach. The Advisory Committee's search for input from a wide variety of sources over a long period of time explains the exponentially greater volume of articles discussing the no-citation rules in the United States. The wealth of information at the disposal of the Advisory Committee also explains why more policy justifications were cited in the Committee Note accompanying Rule 32.1 than were cited in the 2001 English Practice Direction.

## 2. *Substance of Arguments*

Different substantive policy arguments over no-citation rules were made in each country. Significant concerns over the effects of the rules on the accountability of courts and the transparency of the judicial process were raised in the United States but not in England.<sup>238</sup> The apparent lack of concern over accountability and transparency are explained through close examination of the English judicial system and its judges.

Martineau contends the English oral tradition is not as accountable as the

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232. Critics of this comparison might again raise the observations of Gutteridge that like is not being compared with like, see *supra* note 10. The different approaches, once fully understood, are valid examples of the differences in the volume of discussion over no-citation rules.

233. Rules Enabling Act, 28 U.S.C. §§ 331, 2071-2077 (2007).

234. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1007 (3d ed. 2002).

235. *Id.*

236. Schiltz, *Much Ado*, *supra* note 110, at 1436-37.

237. Patrick J. Schiltz chronicled the Committee's work. See *id.* at 1434-58.

238. Munday discussed the arousal of suspicion and lack of respect for courts and the judicial system created by certain publication practices but raises them only as an example of the comparatively extreme de-publication practices of the State of California and isn't specifically critical of the English no-citation rules on these grounds. Munday, *Over-Citation: Part 3*, *supra* note 195.

U.S. system.<sup>239</sup> The English system of conducting court proceedings openly and orally with few written pleadings and decisions delivered *ex tempore* from the bench was traditionally thought of as highly transparent and accountable. Everything was done orally in open court giving the public complete access; however, Martineau contends that this confuses visibility with accountability. The oral tradition is not as accountable as the written because it requires attendance and perfect memory of what was said. According to Martineau, accountability and transparency are more completely achieved in the United States where nearly everything is recorded. Perhaps more policy concerns over the transparency and accountability of no-citation rules were raised in the United States than in England because American lawyers and judges, accustomed to the written system, demanded accountable and transparent no-citation rules.

Characteristics of the judiciary in England and the United States explain the different levels of concern over the accountability and transparency of no-citation rules. Atiyah and Summers posit that English judges have more trust in the political establishment and less trust in the public and juries.<sup>240</sup> In contrast, American judges trust the people and are skeptical of the establishment.<sup>241</sup> A relevant example is Judge Arnold's critique of his own jurisdiction's no-citation rule in *Anastasoff* for its lack of accountability.<sup>242</sup> Patrick J. Schiltz exclusively quoted the comments of judges in one law review article to illustrate opposition to restrictive no-citation rules on grounds of transparency and accountability.<sup>243</sup> The skepticism of American judges explains why they have been more vocal on the issues of transparency and accountability than their English counterparts.

An obvious area for further comparison is the difference over free speech arguments, which were copious in the United States but non-existent in England. An in-depth exploration of the right to free speech in the United States and England is beyond the scope of this article.<sup>244</sup> English law has

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239. MARTINEAU, *supra* note 11, at 118-20.

240. ATIYAH & SUMMERS, *supra* note 11, at 39.

241. Atiyah and Summers' observation confirms H.L.A. Hart's critique of the "extreme skepticism" of the instrumentalist movement in America. See ATIYAH & SUMMERS, *supra* note 11, at 259. English no-citation rules would not cause Hartians concern on policy grounds of accountability, transparency, or equal access to justice.

242. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000), opinion vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000). See also Pether, *supra* note 212, at 1487 (recounting the critique of retired Judge Patricia Wald).

243. Schiltz, *Citation*, *supra* note 2, at 48-49.

244. For an exploration of these issues, see generally, RONALD J. KROTOSZYNSKI, *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* (2006); Audrey C. Tan, *Employer Liability for Racist Hate Speech by Third-Parties: Comparison of Approaches in Great Britain and the United States*, 20 LOY. L.A. INT'L & COMP. L.J. 873 (1998); Gregory T. Walters, *Bachchan v. India Abroad Publications Inc.: The Clash Between Protection of Free Speech in the United States and Great Britain*, 16 FORDHAM INT'L L. J. 895 (1992/1993); EUROPEAN AND U.S. CONSTITUTIONALISM (Georg Nolte ed., 2006).

traditionally protected free speech. Scholars date the protection back to “the time of Blackstone and to the foundations of British democratic law.”<sup>245</sup> Freedom of expression is restricted by English common law and statutes in the areas of “defamation, sedition, censorship, contempt of court, obscenity and nondisclosure of official secrets.”<sup>246</sup> England comes closest to the United States’ First Amendment in the Human Rights Act of 1998, which gives “further effect to rights and freedoms guaranteed under the European Convention on Human Rights.”<sup>247</sup> The European Convention explicitly ensures the right to freedom of expression without interference by public authority.<sup>248</sup> Despite these protections, the English legal community did not object to no-citation rules on free speech grounds.

An explanation for the lack of English objection to no-citation rules on free speech grounds can be extrapolated from the observations of Professor Ronald Dworkin who posits that the rule of law as it exists in the United States has more of an individual rights flavor than is found in England.<sup>249</sup> Dworkin has also observed that England offers less formal protections to free speech and other civil rights than most European countries.<sup>250</sup> Dworkin’s observations explain the free speech fervor expressed in America over no-citation rules and the comparative paucity of concern in England. The lack of English free speech objection to no-citation rules also confirms the observations of Atiyah and Summers that the English judiciary has more trust in the political establishment than American judges.<sup>251</sup> If English judges trusted the establishment, they would be less likely to raise free speech concerns over no-citation rules.

Examining the volume and substance of policy arguments over no-citation rules illuminates the approaches taken in England and the United States. The volume of policy arguments over no-citation rules was greater in the United States than in England because America has comparatively more experience with no-citation rules. Differences in scholarly communication and the methods used to create the rules also explain the disparity in the volume of

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245. Susan F. Sandler, *National Security Versus Free Speech: A Comparative Analysis of Publication Review Standards in the United States and Great Britain*, 15 BROOK. J. INT’L L. 711, 741 (1989) (citing D. YARDLEY, INTRODUCTION TO BRITISH CONSTITUTIONAL LAW 85-86 (1978)).

246. *Id.*

247. Human Rights Act 1998, c. 42 § 1 (Eng.). Provisions giving effect to freedom of expression are found at § 12.

248. The European Convention on Human Rights, art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221.

249. ATIYAH & SUMMERS, *supra* note 11, at 52 (citing Ronald Dworkin, *Political Judges and the Rule of Law*, LXIV PROC. BRIT. ACAD. 259, 286 (1978)).

250. Michael L. Principe, *Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain*, 22 LOY. L.A. INT’L & COMP. L. REV. 357, 361 (2000) (citing RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN I (1990)).

251. ATIYAH & SUMMERS, *supra* note 11, at 39.

policy arguments. Substantive distinctions between policy arguments made in England and the United States are explained by the different oral and written traditions, characteristics of the judiciary, different conceptions of the right to free expression, and Dworkin's theories of individual rights.

#### IV. THE FUTURE OF THE COMMON LAW

The previous sections explored the past to explain why England and the United States took specific approaches to no-citation rules. This final section looks forward, to predict what effect these approaches will have on the common law. As this section will discuss both precedent and stare decisis, it is important to distinguish the two often confused terms.<sup>252</sup> Precedent is a decision of a court which may or may not be binding on courts in future cases.<sup>253</sup> Conversely, stare decisis is derived from the Latin "to stand firmly by things that have been decided."<sup>254</sup> Under the doctrine of stare decisis courts may be bound to follow a particular precedent.<sup>255</sup> A complete exposition of the differences between the terms in England and the United States is beyond the scope of this article.

##### A. *The Precedential Value of Unreported Judgments in England*

In England, unreported judgments were traditionally given the same precedential weight as reported judgments according to the strict English understanding of stare decisis.<sup>256</sup> The no-citation rule proposed in *Roberts Petroleum* and codified as a Practice Statement did not, on its face, limit the precedential value given to unreported judgments. The practical effect of early

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252. Martha Dragich Pearson argues the conflation of precedent and stare decisis can be blamed in part for the United States Courts of Appeals adherence to no-citation rules despite criticism. Dragich Pearson, *supra* note 112, at 1252.

253. The term is defined similarly in English and American legal dictionaries. The OXFORD DICTIONARY OF LAW 374 (2003) defines precedent as "[a] judgment or decision of a court, normally recorded in a law report, used as an authority for reaching the same decision in subsequent cases." The definition continues to distinguish between authoritative and persuasive precedent and to explain the concept of ratio decendi. BLACK'S LAW DICTIONARY 1214 (8th ed. 2004) defines precedent as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues."

254. The full Latin term is "*et non quieta movere*," which means "[t]o stand firmly by things that have been decided (and not to rouse/disturb/move things at rest)." RUSS VERSTEEG, ESSENTIAL LATIN FOR LAWYERS 159 (1992).

255. The OXFORD DICTIONARY OF LAW 475 (2003) defines stare decisis as "[a] maxim expressing the underlying basis of the doctrine of precedent, i.e. that it is necessary to abide by former precedents when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1442 (8th ed. 2004) defines stare decisis as "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation."

256. For an explanation of the operation of precedent in England, see ZANDER, *supra* note 22, at 215-305.

no-citation rules was to limit the precedential value of unreported judgments. If unreported judgments cannot be cited to the court except in limited circumstances, unreported judgments cannot have any force as precedent. This is especially true in England, where, traditionally, judges take a rather passive role and normally do not consider cases other than those discussed by lawyers in their arguments.<sup>257</sup>

The early no-citation rule announced in the 1996 Practice Statement was criticized for placing too much power in the hands of the law reporters.<sup>258</sup> Some commentators saw the early rule's restriction on citation of cases based only on their status as reported or unreported as making the law reporters, and not the judges, "arbiters of what is the law."<sup>259</sup>

The next phase of English no-citation rules developed in part from Justice Laddie's observation in *Michaels* of a weakness in the early no-citation rules.<sup>260</sup> According to the principles of stare decisis, lower courts in England would not be able to ignore unreported judgments of superior courts.<sup>261</sup> The 2001 Practice Direction remedied this problem, giving judges the power to declare the precedential value of certain cases the moment they are decided by including an overt statement to that effect in the judgment.<sup>262</sup> The rule also has the retroactive effect of requiring judges to look at cited cases to determine whether those cases extend or add to existing law, or merely apply decided law to the facts. Commentators view it as an extension of the judges' lawmaking role that takes power from the law reporters and gives it to the judges.<sup>263</sup>

#### *B. The Precedential Value of Unpublished Opinions in the United States*

The American system of comprehensive reporting produced fewer unpublished cases for lawyers to cite. Professor Bob Berring remarked that traditionally, if an American case did not appear in the West Reporter System, it was not a "real" case in the "eyes of legal authority" and could not be cited.<sup>264</sup> More unpublished cases appeared as a result of the movement to control publication during the latter half of the twentieth century.<sup>265</sup> The individual federal circuits were left to develop their own rules on the precedential value of unpublished cases. Currently, the rules among the

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257. See INGMAN, *supra* note 5, at 439.

258. ZANDER, *supra* note 22, at 323 (citing W. H. Goodhart, NEW L.J., Apr. 1, 1983, at 296).

259. *Id.*

260. *Michaels v. Taylor Woodrow Dev. Ltd.*, [2001] Ch. 493 (Ch.D.) (Eng.).

261. A possible exception would be a judgment conflicting with the European Convention on Human Rights. *Id.* at 255.

262. Practice Direction, *supra* note 3, at 6.1.

263. Munday, *Over-Citation: Part 1*, *supra* note 150, at 8.

264. Robert Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1692 (2000).

265. See *Publication of Judicial Opinions*, *supra*.

circuits are not consistent. Five circuits, the First, Fourth, Eighth, Tenth, and Eleventh, treat unpublished cases as non-binding precedent that may be cited for persuasive value.<sup>266</sup> Six circuits, the Second, Third, Seventh, Ninth, D.C., and Federal, have rules declaring unpublished opinions are not precedent.<sup>267</sup> In the Fifth circuit, unpublished opinions issued before January 1, 1996 are precedential but unpublished opinions issued after that date are not.<sup>268</sup> The Sixth circuit has no applicable rule.<sup>269</sup>

The precedential value of unpublished opinions was the central issue explored in both the *Anastasoff* and *Hart* cases. Judge Arnold's opinion in *Anastasoff* was an impassioned historical defense of the doctrine of precedent.

According to Judge Arnold, the framers of the U.S. Constitution intended the doctrine of precedent to limit judicial power.<sup>270</sup> He argued the framers' understanding of precedent was derived from the writings of Blackstone, Coke, and other authorities.<sup>271</sup> The opinion was filled with quotations from these authorities expounding a view of precedent as a limit on judicial power. According to Arnold, a judge adopting this view determines the law "not according to his own judgements [sic], but he determines it according to the known laws" and does not "pronounce a new law but maintain[s] and expound[s] the old."<sup>272</sup>

Conversely, Judge Kozinski offered an opposite perspective on the precedential value of unpublished opinions in *Hart*.<sup>273</sup> He devoted the bulk of the opinion to an eloquent defense of no-citation rules. He took issue with Judge Arnold's historical defense of precedent.<sup>274</sup> Judge Kozinski did not believe the framers had such a rigid view of precedent, contending there was lively debate over the issue and citing examples of flexibility in the common law.<sup>275</sup> The absence of a strict hierarchy of courts and reports, often rejected as unreliable, are examples of impediments to the strict system of precedent Judge Arnold portrayed. Judge Kozinski also cited examples of early American judges ignoring their own decisions to refute Judge Arnold's historical arguments.<sup>276</sup> Several law review articles examining the historical

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266. 1ST CIR. R. 32.1 (2007); 4TH CIR. R. 32.1 (2007); 8TH CIR. R. 32.1A (2007); 10TH CIR. R. 32.1(a) (2007); 11TH CIR. R. 36.2 (2007).

267. 2ND CIR. R. 0.23(b) (2007); 3D CIR. I.O.P. 5.3 (2007); 7TH CIR. R. 32.1(b) (2007); 9TH CIR. R. 36.3(a) (2007); D.C. CIR. R. 36(c)(2) (2007); and, FED. CIR. R. 47.6(b) (2007) Most circuit rules in this category expressly provide that unpublished opinions may be relevant to claims of issue preclusion, judicial estoppel, or law of the case.

268. 5TH CIR. R. 47.5.3-4 (2007).

269. 6TH CIR. R. 28(g) (2007).

270. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) opinion vacated as moot on rehearing en banc, 235 F. 3d 1054 (8th Cir. 2000).

271. *Id.*

272. *Id.* at 901.

273. *Hart v. Massanari*, 266 F.3d 1155, 1158-80 (9th Cir. 2001).

274. *Id.* at 1167 n. 20.

275. *Id.*

276. *Id.*

methods of both Judge Arnold and Judge Kozinski have concluded that Judge Kozinski's analysis is more sound.<sup>277</sup>

*Anastasoff, Hart*, and Rule 32.1 do nothing to resolve the question of the precedential weight of unpublished decisions in the United States. The Committee Note accompanying the text of Rule 32.1 states, "most importantly, [Rule 32.1] says nothing whatsoever about the effect that a court must give to one of its own 'unpublished' or 'non-precedential' opinions or to the 'unpublished' or 'non-precedential' opinions of another court."<sup>278</sup> Because Rule 32.1 does not restrict citing unpublished opinions, attorneys will cite them; consequently, courts will be called upon to decide the precedential value of the unpublished opinions. Patrick J. Schiltz believes the Committee is "naïve" in its position that the Rule allows courts to maintain a distinction between precedential and non-precedential opinions.<sup>279</sup> In his capacity as Reporter, Schiltz received and synthesized a number of comments on the Rule including comments from several judges who believed, "as a practical matter, [they] expect that [unpublished opinions] will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore previous decisions."<sup>280</sup> Similar to Justice Laddie's postscript in the *Michaels* case, Schiltz observed that lower courts will have to treat unpublished opinions of superior courts as binding under the doctrine of stare decisis.<sup>281</sup>

### C. Comparing the Operation of Stare Decisis

Atiyah and Summers' *Form and Substance in Anglo-American Law* compares the operation of stare decisis in England and the United States in support of the book's overall thesis the English legal system is more formal than the American legal system. English courts were historically bound to follow their own previous decisions and lower courts followed the decisions of higher courts. The practice relaxed somewhat in the late twentieth century, but English courts' approach to stare decisis is still very strict by American standards. In their comparison the authors explore several aspects of stare decisis.

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277. Christian F. Southwick, *Unprecedented: The Eighth Circuit Repaves Anitquas Vias with a New Constitutional Doctrine*, 21 REV. LITIG. 191, 275-84 (2002). Joshua R. Mandell, *Trees That Fall in the Forest: The Precedential Effect of Unpublished Opinions*, 34 LOY. L.A. L. REV. 1255 (2001).

278. Report of the Advisory Committee on Appellate Rules, Memorandum from Samuel A. Alito, Chair, Advisory Committee on Appellate Rules (May 22, 2003) available at <http://www.uscourts.gov/rules/Reports/AP5-2003.pdf>.

279. Schiltz, *Citation*, *supra* note 2, at 40.

280. *Id.* (citing letter from John L. Coffey et al., Circuit Judges, U.S. Court of Appeals for the Seventh Circuit, to Samuel A. Alito Jr., Chair, Advisory Comm. on Appellate Rules 1 (Feb. 11, 2004) available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-396.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-396.pdf)).

281. Schiltz, *supra* note 2, at 40. See also *Michaels v. Taylor Woodrow Dev. Ltd.*, [2001] Ch. 493, 521 (Ch. D.) (Eng.).

First, the authors contend United States courts have more power than English courts to disregard otherwise binding precedents.<sup>282</sup> United States courts can disregard an otherwise binding precedent if the precedent has not undergone a trial period to prove it is in fact settled law.<sup>283</sup> In contrast, English courts can be bound instantaneously by decisions.<sup>284</sup> Further, an American judge may disregard an otherwise binding case if it was not unanimously decided.<sup>285</sup> In England, however, judges devote a great deal of effort to dissecting the ratio decidendi of a plurality judgment before eventually following it.<sup>286</sup>

Second, the United States Supreme Court and the highest courts of each American state have always been capable of overruling their own previous decisions as well as the decisions of inferior courts. In contrast, the House of Lords has only enjoyed the power to overrule its own previous decisions since 1966.<sup>287</sup> The authors also argue that precedents have less mandatory formality in America; whereas, English judges are more willing to follow decisions they do not agree with and are not technically bound to follow.

These examples are used to support the conclusion that English judges approach stare decisis in this manner because it contributes significantly to the predictability of decisions and certainty in the law.<sup>288</sup> Atiyah and Summers are not alone in this contention. Delmar Karlen's book *Appellate Courts in the United States and England* also concluded that English judges follow a more rigid doctrine of precedent than American judges. The English approach keeps English law "simple and compact" as judges "enjoy broad discretion in molding the law."<sup>289</sup> Judge Richard Posner's *Law and Legal Theory in England and America* characterizes English judges as modest positivists with a firmer commitment to stare decisis than American judges.<sup>290</sup> Posner argues these characteristics of English judges combined with the proportionally smaller size of the English legal system, compared with the American system, are both "cause and effect of the greater certainty of English law."<sup>291</sup>

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282. ATIYAH & SUMMERS, *supra* note 11, at 120.

283. *Id.*

284. ZANDER, *supra* note 22, at 215 (citing *Re Schweppes Ltd's Agreement* (1965) 1 All E.R. 195 (Willmer L.J. dissenting)).

285. ATIYAH & SUMMERS, *supra* note 11, at 121.

286. *Id.* at 120-22. *But see* Roderick Munday, *All for One, And One for All: The Rise to Prominence of the Composite Judgment in the Civil Division of the Court of Appeal*, 61 CAMBRIDGE L.J. 321 (2002) (noting the decline of the plurality judgment in England).

287. Practice Direction (Judicial Precedent), [1966] 1 W.L.R. 1234 (H.L.) (Eng.).

288. ATIYAH & SUMMERS, *supra* note 11, at 133.

289. KARLEN, *supra* note 11, at 88-89.

290. POSNER, *supra* note 11, at 90.

291. *Id.* at 90, 94. Posner argues English cases "turn over" at a lower rate than American cases. *Id.* at 94. He proves this assertion by showing the average age of citations in English Court of Appeals decisions is 28.38 years compared to 9.9 years in United States Federal Court of Appeals decisions. For a discussion of the uncertainty caused by American no-citation rules, see Michael B.W. Sinclair, *Anastasoff v. Hart: The Constitutionality and Wisdom of Denying*

The theories of Atiyah and Summers, Karlen, and Posner are supported by Richard P. Caldarone's 2004 study of the judicial decisions of the House of Lords and United States Supreme Court. Caldarone found House of Lords decisions cited fewer and more relevant cases, cited the same cases more often, and gave more deference to lower court decisions than United States Supreme Court decisions.<sup>292</sup> Caldarone concluded that English judges are more formal and give more respect to previous decisions in contrast with American judges who operate more freely in a more flexible system.<sup>293</sup>

The provisions of the 2001 Practice Direction, enabling the English judiciary to determine the precedential force of certain judgments, appear to confirm its role as a system shaper that contributes to the predictability and certainty of the common law. However, a critical analysis of the operation of this rule casts doubt on the power it gives English judges to use the rule for these purposes. From a purely technical point, the statements required by the rule may lack the force of law. Traditionally, only the ratio decidendi of a case is binding. The ratio decidendi of a case is defined as "the principle or principles of law on which the court reaches its decision."<sup>294</sup> Statements that a particular judgment should be binding precedent do not form the ratio decidendi; therefore, courts would not be bound to follow the judgment in the future.<sup>295</sup>

Others have questioned the ability of judges to meaningfully control the growth of the common law by declaring the precedential value of a decision the moment the decision is written. Judges, as mere mortals who lack omniscience, are limited in their ability to use this rule to control or shape the common law in a meaningful way.<sup>296</sup> How could any judge envision the myriad of uses and applications for a particular case the day it is decided? The English commentator G. W. Bartholomew eloquently described this difficulty:

The somewhat amoeboid principles of the common law grow or are restrained by their application, re-application or non-application to varying fact situations. They are re-phrased, re-stated and re-iterated over and over again, and what eventually emerges is often startlingly different from that from which one started. The great principle of the common law in this context is that "great oaks from little acorns grow" – this is the *leitmotif* of the judicial process. It is the essence

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*Precedential Authority to Circuit Court Decisions*, 64 U. PITT L. REV. 695, 701 (2003).

292. Richard P. Caldarone, *Precedent in Operation: A Comparison of the Judicial House of Lords and the US Supreme Court*, 2004 PUB. L. 759, 778-71. Because the House of Lords and Supreme Court do not hear the same types of cases, the author limited his study to cases reviewing administrative actions. *Id.* at 759.

293. *Id.* at 766.

294. THE OXFORD DICTIONARY OF LAW 407 (5th ed. 2002).

295. Munday, *Over-Citation: Part I*, *supra* note 150, at 8.

296. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 773 (2004).

of the common law system that freedom, and all other principles of law, broaden down from precedent to precedent.

The fact that a so-called principle of law applies in this situation rather than that, is in fact part and parcel of the principle itself. The fact that a so-called principle is phrased in one way rather than another – something which Lord Diplock tended to dismiss as a ‘mere choice of phraseology’ – is not separable from the principle itself. To paraphrase Wittgenstein: the principle is its statement.<sup>297</sup>

Roderick Munday also discussed the difficulty of determining which cases will be precedential “in a common law system where the facts of the cases are inextricably intertwined with statements of principle, such a dichotomy [between precedential and non-precedential cases] cannot be systematically maintained.”<sup>298</sup> Attempting to prospectively declare the precedential value of cases is uncharacteristic of a common law system and seems more appropriate to a civil law system. When discussing *Roberts Petroleum*, Munday emphasized this point by quoting Pierre Legrand: “The common law awaits the interpretive occasion. It is reactive and not, like the civil law, proactive or projective.”<sup>299</sup> Another English commentator argues “there has been no plan in the development of the common law” and “the absence of a plan has been a condition of progress.”<sup>300</sup>

In England, the failures of law reporters to accurately select all precedential cases for publication demonstrates the impossibility of the task. Munday cites several cases that had material effects on the law but were not selected for publication by the law reporters.<sup>301</sup> Given adequate time, the same criticism could likely be leveled against English judges declaring the precedential value of their opinions under the 2001 Practice Direction.

American commentators have echoed these sentiments, arguing that rules purporting to deny the precedential authority of a case in advance misunderstand the concept of precedent and the role of the precedent court and subsequent courts.<sup>302</sup> The role of the precedent-making court is to characterize

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297. ZANDER, *supra* note 22, at 322 (citing G.W. Bartholomew, *Unreported Judgments in the House of Lords*, NEW L.J., Sept. 2, 1983, at 781). Interestingly, Bartholomew was writing to criticize the rule proposed in *Roberts Petroleum* and not Justice Laddie’s proposals in the *Michaels* case.

298. Munday, *Over-Citation: Part 3*, *supra* note 195, at 86.

299. Munday, *Over-Citation: Stemming the Tide – Part 2*, 166 J.P.R. 29, 30 (2002) [hereinafter Munday, *Over-Citation: Part 2*] (citing Pierre LeGrand, *What Can Borges Teach Us?*, in FRAGMENTS ON LAW-AS-CULTURE 69 (W.E.J. Tjeenk Willink ed., 1999)).

300. S.F.C. Milsom, *The Development of the Common Law*, 81 L. Q. REV. 496, 497-98 (1965).

301. Munday, *Over-Citation: Part 2*, *supra* note 299, at 31.

302. Dragich Pearson, *supra* note 112, at 1255-59. See also Cappalli, *supra* note 296. Frederick Schauer also has noted, “[a]t the moment we consider the wisdom of some currently contemplated decision, however, the characterization of that decision is comparatively open.

its decision broadly, narrowly, or in any way it chooses, but it is not to decide “for one place and time only.”<sup>303</sup> It is up to subsequent courts to determine the extent to which it is bound by previous decisions. Patrick J. Schiltz also questioned the ability of judges to predict the future precedential impact of their decisions, citing the comment of one American lawyer who called the practice “hero-worship taken beyond the cusp of reality.”<sup>304</sup>

American courts, like English law reporters, have not always accurately predicted the precedential value of a case the moment it was published. Schiltz notes a number of unpublished American cases reviewed by the Supreme Court (which is an indication that something important was discussed in the case), which resolve unsettled questions of law and that declare acts of Congress unconstitutional.<sup>305</sup>

Rule 32.1’s silence on the precedential value of unpublished opinions does nothing to clarify the issue in America. Circuits that allow judges to issue unpublished opinions and subsequently treat those opinions as non-precedential achieve the same results as the English courts under the 2001 Practice Direction. Issuing an unpublished decision and not giving it precedential value accomplishes essentially the same result as including a statement in a judgment that the case establishes no new principle of law and should not be extended beyond the instant case.

American courts also possess numerous other devices that allow them to control the common law by disposing of cases without writing a potentially precedential opinion. Appellate relief from the Supreme Court is notoriously rare. The Court refuses to hear most cases by issuing a brief order denying certiorari. Such orders provide no insight into the Court’s refusal to accept the appeal. Courts use summary dispositions to decide cases with one or two sentences; these dispositions fail to give any insight into the court’s reasoning.

Vacatur upon settlement is a practice whereby courts destroy their decisions based on a settlement reached by the parties.<sup>306</sup> California, Hawaii, and Arizona state courts depublish opinions by retrospectively removing them from the record and rendering them worthless as precedent after they have been published.<sup>307</sup>

The ability of judges in both England and America to control the common law by prospectively predicting the precedential weight of their decisions is questionable. It remains to be seen whether English law will remain predictable and certain through the exercise of this power.

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There is no authoritative characterization apart from what we choose to create.” Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 574 (1987) (internal citations omitted). “Thus, only the precedents of the past, and not forward looking precedents, stand before us clothed with generations of characterizations and re-characterizations.” *Id.*

303. Dragich Pearson, *supra* note 112, at 1257.

304. Schiltz, *Citation*, *supra* note 2, at 46.

305. *Id.* at 46-47. See also Cappalli, *supra* note 296, at 797.

306. Dragich, *supra* note 2, at 764.

307. Pether, *supra* note 212, at 1479.

*D. Hart and Dworkin*

The opposite approaches taken in England and America to no-citation rules confirm the dichotomy between the jurisprudential theories of Herbert Lionel Adolphus Hart and Ronald Dworkin. The late Oxford Professor of Jurisprudence H.L.A. Hart is credited with re-energizing English positivism.<sup>308</sup> Hart was a formalist in many respects, especially in his view of the comprehensiveness of existing law.<sup>309</sup> For Hart, the “life of the law” consisted of rules which “d[id] *not* require . . . a fresh judgment from case to case.”<sup>310</sup> Hart believed the “central or core cases, falling fair and square within the scope of a rule, [gave] rise to no indeterminacy, and c[ould] be dealt with by those whose business it [was] to apply the law without falling back on any element of discretion.”<sup>311</sup> Pre-existing rules are common, cases of first impression are rare, and judges do not need to go beyond the plain meaning of the text or grapple with substantive meaning.<sup>312</sup>

The English no-citation rules echo Hart’s positivist and formalistic approach to a judge’s task. The rules allow English judges to maintain a neat and tidy closed common law universe. Judges operating in this universe can resolve most cases by relying on well-known and settled precedents. These judges do not want or need lawyers citing unpublished judgments that serve to only clutter up the common law. The rules allow judges to keep the common law in order by selecting which judgments will have precedential value in the future and which will not.

Ronald Dworkin, a student of Hart’s at Oxford, offered an opposing view critical of Hart’s positivism. Dworkin’s “noble dream” was for judges to come to the correct answer in deciding cases by providing the closest fit with existing laws, rules, and principles.<sup>313</sup> Dworkin’s theory of what to do in “hard cases” meshes well with the American approach to no-citation rules expressed in Rule 32.1.<sup>314</sup> Under Dworkin’s approach, judges faced with hard cases where existing rules do not seem to fit, should not stick with the rules as Hartian formalists but should instead search for new rules that improve the law.<sup>315</sup>

For Dworkin’s theory to work, a judge must be able to find new rules to fit hard cases. Rule 32.1’s approach to unpublished opinions is the perfect

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308. ATIYAH & SUMMERS, *supra* note 11, at 258.

309. *Id.* at 259.

310. H.L.A. HART, *THE CONCEPT OF LAW* 132 (2d ed. 1961).

311. ATIYAH & SUMMERS, *supra* note 11, at 260. In a postscript discovered posthumously and published in a second edition, Hart softens his position stating that when “existing law fails to dictate any decision as the correct one . . . the judge must exercise his lawmaking powers” subject to constraints. HART, *supra* note 310, at 273.

312. ATIYAH & SUMMERS, *supra* note 11, at 259.

313. *Id.* at 263.

314. *See id.*

315. *Id.* at 264.

match for judges dreaming the noble dream. It allows lawyers to bring unpublished decisions containing new and unique solutions to the attention of the judge. Scholars contend that Hart's theories are more closely aligned with the English legal system, while Dworkin's theories appropriately describe the American system.<sup>316</sup> Examining Hart and Dworkin's theories through the lens of no-citation rules supports these characterizations.

### *E. Enforcement of the Rules*

When examining the impact no-citation rules have on English and American common law, it is important to determine how stringently courts follow and enforce the rules. In England, it appears courts largely ignore the rules. Only a handful of English cases, in addition to *Roberts Petroleum* and *Michaels*, contain any reference to lawyers citing an inappropriate number of cases or citing unreported cases unnecessarily.<sup>317</sup> None of these cases impose any sanctions or restrictions on lawyers for this behavior; rather, the courts merely complain about the practice.

Munday admits the rule called for in *Roberts Petroleum* has only had a limited impact, has not stopped lawyers from citing unreported cases, and only a few judges have commented on the practice in "relatively isolated *dicta*."<sup>318</sup> The comments of several speakers at the conference Law Reporting, Legal Information and Electronic Media in the New Millennium held at Cambridge University in 2000, confirm these observations. Mr. Behrens, a barrister, commented that the limit on citation announced in *Roberts Petroleum* and codified in the 1996 Practice Statement is ignored, no one has ever faced a challenge based on the rule, and "the rule really has gone."<sup>319</sup> This situation is confirmed through the additional comments of Lord Justice Buxton.<sup>320</sup> Justice Laddie, author of the *Michaels* postscript and member of the Working Party that produced the 2001 Practice Direction, commented that the Practice Direction is not being followed by lawyers or enforced by the courts.<sup>321</sup>

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316. POSNER, *supra* note 11, at 36; ATIYAH & SUMMERS, *supra* note 11, at 264.

317. Munday, *Limits of Citation*, *supra* note 14, at 1338 (citing *Naviera de Canarias SA v. Nacional Hispanica Aseduradora SA*, (1977) 2 W.L.R. 442, 446 (Eng.); *de Lasala v. de Lasala*, (1979) 2 All E.R. 1146 (Eng.); *Lambert v. Lewis*, [1982] A.C. 274 (Eng.); *Pioneer Shipping Ltd. v. BTP Tioxide Ltd.*, (1981) 2 All E.R. 1030, 1046 (Eng.); *MV Yorke Motors v. Edwards*, (1982) 1 All E.R. 1024 (Eng.)); Munday, *Limits of Citation: Part 2*, *supra* note 299, at 31 (citing *Dep't of Health & Social Security v. Evans*, (1985) 2 All E.R. 471, 479 (Eng.); *Vodafone Cellular Ltd. v. Shaw*, [1995] S.T.C. 353 (Eng.); *R (In re Carroll) v. Sec'y of State for the Home Dep't*, [2001] EWCA Civ. 1224 (Eng.)).

318. Munday, *Over-Citation: Part 2*, *supra* note 299, at 31. Munday has subsequently commented English lawyers avoid excessive citation to irrelevant unreported cases because such practices do not persuade judges irrespective of whether they are prohibited by no-citation rules. Comments of Roderick Munday (Aug. 25, 2006) (on file with author).

319. R. Williams, *supra* note 50, at 49.

320. *Id.* at 9.

321. Telephone interview with Sir Hugh Laddie, Retired Judge, High Court; Consultant,

Additional research confirms the anecdotal evidence that no-citation rules are largely ignored. A search of the Westlaw database United Kingdom Reports All (UK-RPTS-ALL)<sup>322</sup> for the citations to the relevant Practice Statements and Directions reveals no reported or unreported case where an English lawyer, who has violated the no-citation rules received any form of punishment other than a verbal reprimand from the court.<sup>323</sup>

In the United States, it appears that most lawyers observe no-citation rules. Schiltz received numerous comments from attorneys complaining of the difficulty of sorting through the no-citation rules of each local jurisdiction.<sup>324</sup> Schiltz contended attorneys have wasted thousands of billable hours each year and have charged clients millions of dollars in fees for picking through these rules. The fact that attorneys took time to complain about locating no-citation rules is an indication that most of them feel obliged to follow the rules. American attorneys are ethically obliged to comply with no-citation rules. The American Bar Association's Committee on Ethics and Professional Responsibility issued an ethics opinion declaring it "ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished opinions']".<sup>325</sup> The Committee Note accompanying Rule 32.1 implicitly recognizes the research frustrations and ethical concerns of American attorneys as justifications for Rule 32.1.<sup>326</sup>

In the United States, when lawyers violate no-citation rules, courts usually require an explanation for the transgression; however, similar to the practice in England, no federal court has imposed sanctions for violation of a no-citation rule in a published or unpublished opinion.<sup>327</sup> Federal courts have refused to consider cases cited in violation of no-citation rules.<sup>328</sup> Rule 32.1

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Willoughby & Partners, in London & Oxford (May 11, 2006).

322. This is the most comprehensive database of United Kingdom cases available on Westlaw. It contains "court decisions from the Law Reports series published by the Incorporated Council of Law Reporting for England and Wales, Lloyd's Law Reports published by LLP Reference Publishing, the Scottish Council of Law Reporting, and the Sweet & Maxwell series of law reports on Westlaw. Coverage begins with 1865." Description retrieved from Westlaw, June 23, 2006.

323. This search strategy was adopted under the hypothesis that a court would cite the rule violated if a lawyer was sanctioned for violating a no-citation rule.

324. Schiltz, *Much Ado*, *supra* note 110, at 1471.

325. *Citing of Unpublished Opinions Where the Court Rules Prohibit Such Usage*, 1994 ABA Comm. on Ethics and Professional Res. Formal Op. 94-386R (1994).

326. See Advisory Committee's Note, *supra* note 182.

327. It is possible a court has issued sanctions through a minute order or another mechanism that would not result in a published or unpublished opinion. *Hart* is the most obvious example of a court finding a technical violation of a no-citation rule but declining to impose sanctions. *Hart v. Massonari*, 266 F.3d 1155, 1180 (9th Cir. 2001). See also Schiltz, *Citation*, *supra* note 2, at 31; *Holgate v. Baldwin*, 425 F.3d 671, 680 (9th Cir. 2005); *Sorchini v. City of Covina*, 250 F.3d 706, 709 (9th Cir. 2001); *White Hen Pantry, Div. Jewel Companies, Inc. v. Johnson*, 599 F. Supp. 718, 719 (E.D. Wis. 1984).

328. *Reynolds & Richman, Non-Precedential Precedent*, *supra* note 105, at 1180 nn. 77-78 (citing *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975); *United States v. Joly*, 493 F.3d

makes questions of compliance and enforcement moot, at least on citation grounds.

#### *F. Implications for the Future*

The fact that no-citation rules are largely ignored in England calls into question the thesis of Atiyah and Summers's *Form and Substance in Anglo-American Law* that the English legal system is more formal than the American.<sup>329</sup> A central tenant of formalism is that rules are followed.<sup>330</sup> Is the practice of ignoring no-citation rules in England evidence of a departure from formalism?

A review of Atiyah and Summers's work questioned whether England had, in fact, cast off formalism in favor of substance.<sup>331</sup> The review contends that England will adopt the American version of substantive reasoning.<sup>332</sup> This raises the broader question of whether ignoring no-citation rules will transform English common law from a small, well-tended garden into something more American.<sup>333</sup> Will the English system trade its clarity and predictability for more individual rights? Will the multitude of American theories in recent years including feminism, race theory, and critical legal studies become more prevalent in the English legal system?<sup>334</sup> Is this practice just another example of the Americanization of English law?<sup>335</sup>

A recent article by Munday demonstrated that unreported English judgments have created uncertainty in English criminal law.<sup>336</sup> Munday contemplates that uncertainty could be discovered in other areas of English law by lawyers who have the time and ambition to pour through the mass of readily available unreported judgments.<sup>337</sup> The result could be the

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672, 676 (2nd Cir. 1974)).

329. ATIYAH & SUMMERS, *supra* note 11, at 1. It should be noted that *Form and Substance* was written in 1987 and does not discuss *Roberts Petroleum* (decided in 1983) or no-citation rules.

330. This is an oversimplification of the theory. For a complete exposition of formalism, see Martin Stone, *Formalism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166-205 (Jules Coleman et al. eds., 2002).

331. David F. Partlett, *The Common Law as Cricket*, 43 VAND. L. REV. 1401, 1403-04 (1990). Others also contend British Formalism is yielding to other ideologies. See Jonathan D. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347, 377 (1994).

332. Partlett, *supra* note 331, at 1405-16.

333. The allusion to English judges tending a garden was borrowed from LOUIS L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 59 (1969).

334. I thank Professor Arthur G. LeFrancois for illuminating this point.

335. MARTINEAU, *supra* note 11, at 129 (discussing the use of skeleton arguments in England as a step toward the Americanization of English law).

336. Roderick Munday, *Law Reports, Transcripts, and the Fabric of the Criminal Law: A Speculation*, 68 J.C.L. 227, 234-235 (2004).

337. *Id.* at 243.

reconfiguration “of what were assumed to be settled legal principles.”<sup>338</sup> Munday terms this “a heady, and frankly disturbing prospect.”<sup>339</sup>

In the United States, Rule 32.1’s removal of restrictions on the citation of unpublished opinions could act to perpetuate the current state of the legal system. The rule is silent on the precedential effect courts must give these opinions, but judges and scholars have predicted these opinions will be increasingly accorded precedential authority.<sup>340</sup> As more unpublished opinions are given precedential weight, American law will continue to grow and expand. Rule 32.1 represents only an incremental departure from earlier efforts to control the growth of the common law in America. The rule leaves American judges with many devices to control the common law including criteria for publication, issuance of unpublished opinions, and the ability to ignore an unpublished opinion as non-precedential.

#### CONCLUSION

England and America have adopted two divergent approaches to no-citation rules. The English restrictive approach is a sharp break from the tradition of lawyers freely citing authority and was adopted primarily for efficiency reasons to control the perceived flood of citations to unreported judgments. In contrast, the American approach eliminates restrictions on citation to unpublished cases and was adopted after years of experimentation and vigorous policy debates.

The inequality of experience with no-citation rules between the two countries and the lack of empirical data on their impact in England explains the reliance on efficiency arguments in England and their rejection in America. There was markedly more discussion over the policy implications of no-citation rules in America than in England. Reasons for this difference include the countries’ disparity in experience with the rules, the divergent nature of scholarly communication in the two countries, and the different methodologies used to enact the rules. Different substantive policy arguments over no-citation rules were made in each country. Concerns over no-citation rules impact on transparency, accountability, and freedom of expression were expressed in America but not in England. Distinctions between the oral and written traditions, unique traits of each countries judiciary, and differences in rights explain the varying levels of concern.

English no-citation rules attempt to regulate the precedential value of certain judicial decisions, while the American Rule 32.1 does not address the issue. On their face, the English rules confirm existing theories about the character of the English judiciary, ongoing efforts to control the common law, and the nature of English law. In reality, however, the rules are ignored, which

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338. *Id.* at 229.

339. *Id.* at 243.

340. *See supra* note 280 and accompanying text.

calls into question traditional notions of English formalism and the ability of England to meaningfully control the growth of its common law.

Additional research could be conducted into the implications of the English practices. It would be interesting to examine if and how English law is changing through principles handed down in unreported judgments. Critics and supporters of no-citation rules will closely monitor the implementation of Rule 32.1 in the United States, as its implementation will certainly not mark the end of the debate in that country.

It remains to be seen whether publication practices and no-citation rules are effective devices for controlling the growth of the common law. Perhaps Joseph Story was correct when he remarked over one hundred and seventy years ago, “[i]n truth, the common law, as a science, must forever be in progress; and no limits can be assigned to its principles or improvements.”<sup>341</sup>

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341. Joseph Story, *The Miscellaneous Writings of Joseph Story*, in QUOTE IT COMPLETELY 166 (Eugene C. Gerhart ed., 1998).