

# LAW LIBRARY JOURNAL

## ARTICLES

Correcting the Record: Post-publication Corrections  
and the Integrity of Legal Scholarship [2020-13]

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To Cite or Not to Cite: Is That Still a Question? [2020-14]

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## Correcting the Record: Post-publication Corrections and the Integrity of Legal Scholarship\*

Janet Sinder\*\*

*In the age of e-publication, post-publication corrections seem a simple matter. But the lack of standardized policies and practices has created numerous problems. This article examines a sampling of articles and suggests standardized policies law journals should adopt to preserve the integrity of the scholarship they publish and ways that law journals could work together to provide a uniform solution.*

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### Introduction: Defining the Problem

¶1 Imagine you have just published an article in a law journal. Reading it over, you discover errors in the published version. Maybe they are your errors or maybe they were accidentally introduced by the journal.<sup>1</sup> What would you ask the journal to do? Alternatively, imagine you are a law journal editor, most likely a third-year law student, and an author tells you she wants you to fix a problem with an article she published in your journal. What do you do? What if a published article contains data errors or plagiarizing material? What should be done then?

¶2 In the age of electronic publication, making post-publication corrections to law journal articles might seem like a simple technical problem with an equally simple solution: post a corrected electronic version of the article and move on. Unfortunately, the ease of posting a new version online allows multiple versions of articles to coexist, and the lack of standards for retractions means that erroneous or plagiarizing articles remain unnoted. Law journals appear to lack policies about how to handle post-publication corrections, and authors and editors probably never consider the consequences of issuing revised versions or retractions.<sup>2</sup>

¶3 As this article shows, current practices for correcting errors discovered after publication appear to be ad hoc and not very effective. They lack both consistency in individual cases (i.e., corrections are not made to all versions of an article) and consistency between cases (i.e., corrections are handled differently each time), and they often lack transparency as to what the error and its correction are. The absence of standardized practices significantly impacts the integrity of legal scholarship.

¶4 Law students are taught to rigorously check primary sources, making sure that, among other things, all court opinions cited are still valid. Yet, for law journal articles, often nothing tells readers that an article has been revised or retracted. Even if some sort of notification is made (perhaps an errata notice or a footnote in

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1. Justifiably or not, law professors are famously skeptical of the editorial quality of student-edited law reviews. See, e.g., Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1318–19 (2018).

2. This article considers the issue only as it relates to law journals. As is discussed *infra* ¶¶ 51–70, disciplines other than law have developed robust systems for making post-publication corrections.

the article), readers still cannot verify which is the latest, most “correct” version of the article or whether the article has been retracted. Finally, whatever specific changes were made to an article often are not indicated, leaving even innocent authors open to charges of concealing errors or impolitic statements.

¶5 Without clear and specific notifications of revisions and retractions, readers can unknowingly rely on erroneous materials and are likely to pass those errors along in their own writing, opening themselves up to criticism, affecting the validity of their conclusions, and causing similar problems for the next round of readers. The lack of a system for tracking post-publication corrections leads to the same problems that Richard Lazarus describes in his article about revised U.S. Supreme Court opinions<sup>3</sup> or that depublished state court opinions cause.<sup>4</sup>

¶6 In the predigital age, print journals had several possible solutions when errors were discovered after publication. If the error was minor or limited to a very small portion of the article, the journal could publish an erratum in a later issue, indicating the errors and corrections.<sup>5</sup> Alternatively, the journal could mail corrected pages to subscribers to be “tipped in” to the issue<sup>6</sup> or even send subscribers stickers to be pasted over the text or in the margins of the volume.<sup>7</sup> For situations involving very serious errors, a journal could republish the issue in its entirety, either with a revised version of the article, or without the article at all. It would then mail the issue to subscribers with instructions on how to replace the older version.

¶7 Digital publication has made this problem not easier to solve but more complicated—and more inconsistently addressed, at least judging by the examples examined in the section on the current status of post-publication corrections. Correcting the electronic version of an article for typographical or factual errors seems simple: revise the document, and replace the previous version with the revised one. Despite its apparent simplicity, this seemingly obvious solution raises a multitude of questions, the most overarching of which are: how should editors determine whether they will issue a revised version of an article, and what process should they follow if plagiarism, factual errors, or falsified data require a retraction?

¶8 If the editors decide to revise an article after publication, they must also consider the following: (1) how to ensure that all electronic versions are updated and that readers of the uncorrected print version will know it has been superseded by the corrected electronic version; (2) how readers of the revised electronic version

3. Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540 (2014). The article, which focuses on changes made to Supreme Court opinions after initial publication, is discussed in more detail *infra* ¶¶ 52–54.

4. For example, “[t]he [California] Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order depublishing of part of an opinion at any time after granting review.” CAL. R. CT. 8.1105(e)(2) (2019). While the opinions are removed from the official state court reports, they still remain in West’s *California Reporter* and on Lexis and Westlaw. *Depublication of California Cases*, UNIV. OF S.F. SCH. OF LAW, <https://legalresearch.usfca.edu/depublishing> [<https://perma.cc/JEZ6-C6KB>].

5. Admittedly, many readers did not see the errata notices, but the difficulty of making effective changes made it less likely that authors would request changes and journals would agree to make them.

6. See *Tipped-In Page*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tipped-in\\_page](https://en.wikipedia.org/wiki/Tipped-in_page) [<https://perma.cc/XG53-WUNG>].

7. On the early use of what are called “cancel slips,” see Sarah Werner, *Correcting with Cancel Slips*, COLLATION (Apr. 14, 2015), <https://collation.folger.edu/2015/04/correcting-with-cancel-slips/> [<https://perma.cc/BR5M-2YRR>].

will know it has been revised from the original version and what revisions were made; and (3) how readers will know which version is the “version of record,” i.e., the most up-to-date, correct version. All of this boils down to one important concern: when technology allows for the easy revision of articles after publication, how will law journals ensure that readers do not rely on the “wrong” version?

¶9 Unfortunately, as the case studies below demonstrate, the lack of best practices when correcting publication errors means that those relying on law journal articles to support their own work cannot currently determine whether the version of an article they are reading is the current one, when and what changes were made when an article was revised, or whether the article is known to contain serious errors and should be retracted.

¶10 Fields other than law have instituted systems that address many of these problems.<sup>8</sup> Law has followed only slowly, perhaps because of the much-debated but relatively unchanged system of student-edited law journals.<sup>9</sup> This article does not enter into that debate, but it considers the scope of the problem related to post-publication corrections in law journals and suggests some possible solutions that are designed to work with the publication system currently in place for law journals.

¶11 The article proceeds as follows: first, I discuss the characteristics and values of scholarly integrity and consider whether these values are threatened by the current state of post-publication corrections. This discussion is followed by case studies of how errors in law journals have been handled when they were discovered after publication. Next, I briefly outline a typology of the errors being corrected, and then discuss post-publication correction systems used by other disciplines and whether these would make sense for law journals. Finally, I recommend ways law journals could begin to work, both individually and in a coordinated way, to create a system that improves the integrity of legal scholarship.

### Characteristics of Scholarly Integrity

¶12 The term “scholarly integrity” often means different things in different contexts.<sup>10</sup> For example, in 2008 the Council of Graduate Schools issued a report in which it described academic integrity, which includes scholarly integrity, this way:

In the broader academic context, integrity is a concept rich with connotations that encompass understanding the minimal standards of compliance in research, the personal ethical decision-making processes of individuals, and ultimately the ways in which our institutions reflect the highest aspirations and broadest commitment on the part of the academic profession to the principles of truth, scholarship, and the responsible education of future scholars.<sup>11</sup>

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8. Some sections of this article distinguish between corrections and retractions, but generally a reference to post-publication corrections can be assumed to include article retractions as well.

9. For a recent article in that persistent debate that includes both criticism of and recommendations to improve current law review practices, see Friedman, *supra* note 1.

10. See, e.g., Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 238–43 (2012) (analyzing norms of scholarly integrity and noting differences from norms governing lawyers representing clients).

11. COUNCIL OF GRADUATE SCHOOLS, THE PROJECT FOR SCHOLARLY INTEGRITY IN GRADUATE EDUCATION: A FRAMEWORK FOR COLLABORATIVE ACTION 3 (Apr. 28, 2008), [https://www.cgsnet.org/ckfinder/userfiles/files/PSI\\_framework\\_document.pdf](https://www.cgsnet.org/ckfinder/userfiles/files/PSI_framework_document.pdf) [<https://perma.cc/829C-RP28>].

¶13 The National Academy of Sciences followed with these guidelines on scientific research:

Some mistakes in the scientific record are quickly corrected by subsequent work. But mistakes that mislead subsequent researchers can waste large amounts of time and resources. When such a mistake appears in a journal article or book, it should be corrected in a note, erratum (for a production error), or corrigendum (for an author's error). Mistakes in other documents that are part of the scientific record—including research proposals, laboratory records, progress reports, abstracts, theses, and internal reports—should be corrected in a way that maintains the integrity of the original record and at the same time keeps other researchers from building on the erroneous results reported in the original.<sup>12</sup>

¶14 When relating scholarly integrity to post-publication corrections, integrity encompasses two separate issues: consistency of corrections and transparency about corrections. The emphasis on consistency fits with one of the dictionary definitions of *integrity*: “the state of being whole and undivided,” which is further defined as “the condition of being unified or sound in construction” and “internal consistency or lack of corruption in electronic data.”<sup>13</sup> Transparency fits under the other definition of integrity: “the quality of being honest and having strong moral principles.”<sup>14</sup> Consistency is easier to see, discuss, and agree on because it is uncontroversial: a corrected version should be available to readers of all formats of the article and in all databases containing the article. This does not mean that the original version should not also be available (a somewhat controversial position involving transparency, discussed below), but all readers looking at the article in any database or website should find the same corrected version.

¶15 Transparency is more problematic. Not everyone appears to agree that every corrected article should indicate exactly what has been corrected, or that retracted articles should continue to be available,<sup>15</sup> or that all retractions should be publicly noted. This apparent disagreement is evident in the ways that some corrections are hidden, for example, by simply withdrawing an article from a database, making it unfindable; by stating that an article has been corrected but not showing the corrections; or by failing to note instances of plagiarism.<sup>16</sup>

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12. NAT'L ACAD. OF SCIENCES ET AL., ON BEING A SCIENTIST: A GUIDE TO RESPONSIBLE CONDUCT IN RESEARCH 13–14 (3d ed. 2009); see also Joseph S. Francisco et al., *Scholarly Integrity*, 56 ANGEWANTE CHEMIE (INT'L ED.) 4070, 4070 (2017) (defining scholarly integrity).

13. *Integrity*, OXFORD DICTIONARY OF ENGLISH (3d online ed., 2015), [http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m\\_en\\_gb0415130](http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0415130) [<https://perma.cc/D9RF-UVV3>].

14. *Id.* *Black's Law Dictionary* has a similar take on the word, defining “integrity” as “1. Freedom from corruption or impurity; soundness; purity. 2. Moral soundness; the quality, state, or condition of being honest and upright.” *Integrity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

15. See, e.g., Jeffrey Brainard & Jia You, *What a Massive Database of Retracted Papers Reveals About Science Publishing's "Death Penalty"*, SCIENCEMAG.ORG (Oct. 25, 2018), <https://www.sciencemag.org/news/2018/10/what-massive-database-retracted-papers-reveals-about-science-publishing-s-death-penalty> [<https://perma.cc/G5D5-JKRJ>].

There are numerous examples of retracted articles that continue to be cited for various reasons, including as authority. See, e.g., Judit Bar-Ilan & Gali Halevi, *Post Retraction Citations in Context: A Case Study*, 113 SCIENTOMETRICS 547 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5629243/> [<https://perma.cc/F4R8-VUXX>] (examining the context of citations to retracted articles and focusing on articles cited 10 or more times after retraction). This problem could be ameliorated by deleting retracted article from databases.

16. See *infra* ¶¶ 31–34 for examples.

¶16 This article argues that to preserve scholarly integrity, transparency is required to implement consistency. Readers can know that a version has been corrected or retracted only if it is marked as such and if they can see what changes have been made when they look at the revised version. Transparency also supports a more substantive norm of scholarly integrity, *individual responsibility*.<sup>17</sup> Given that scholars are responsible for the content of their articles, any mistakes or more serious failings for which they are responsible should be corrected if possible; or, if necessary, the article should be retracted and responsibility ascribed to the author. Conversely, if the mistakes were introduced by the journal's editors, that should be made clear to protect the author's reputation.

### **Current Status of Post-publication Corrections in Legal Scholarship: Case Studies**

¶17 In considering whether law journal publication practices harm the integrity of legal scholarship, it was important to first determine whether law journals already had processes in place to alert readers to post-publication corrections in ways that sufficiently protected the integrity of scholarly research in law. That is, were all the questions posed in the introduction already being answered satisfactorily?

¶18 I began by examining what readers would see when looking at corrected or retracted law journal articles in both print and online formats. Would the print journal contain a correction notice in a later issue? Would the online versions be corrected? If so, would this be indicated somewhere? Were readers told what corrections had been made? Did all the electronic versions reflect the corrections? Were there any consistent processes being followed in the ad hoc world of student-edited law journals?<sup>18</sup> I looked at each journal article examined in a number of formats/databases, which varied based on the type of correction that was made and what I found in the initial versions.<sup>19</sup>

¶19 I also queried representatives from the three major online legal databases that contain law journal articles: HeinOnline, LexisNexis, and Westlaw. All three providers respond to requests for corrections by replacing one version of the article with another.<sup>20</sup>

17. Fallon, *supra* note 10, at 238–40 (positing that authors must be responsible for their research and for the contents of sources they rely on).

18. I deem the student-edited law journal world ad hoc primarily because student editors are in their positions for only one year and receive only rudimentary training, most of which is based on information handed down, formally or informally, from the outgoing editors. Oftentimes the request to make corrections after publication is sent to a group of editors who did not publish the original article and have no knowledge of the article's publication process or what might have caused the error.

19. For each article, I checked, at a minimum, LexisNexis, Westlaw, HeinOnline, and the journal's website or the institutional repository run by the journal's law school. If it seemed relevant, I looked at other online or print sources, and my findings for those are included.

20. The Integration Specialist at HeinOnline noted that this is done "regularly" and that HeinOnline simply replaces the article with a revised version. E-Mail from Brandon Wiseman, HeinOnline Integration, to author (May 16, 2018) (on file with author). This is the same process that is followed by LexisNexis, E-Mail from Catherine Cabang, Content Specialist, LexisNexis, to author (June 26, 2018) (on file with author), and Westlaw, E-Mail from Laura C. Nutzmann-Hoyt, Thomson Reuters, to author (Aug. 28, 2018) (on file with author). The only revision information made available is what is provided by the journal within the article itself. According to Brandon Wiseman of HeinOnline, "Sometimes the Journal will include an extra Errata on the article which we would include in the online product, but we would not create one ourselves." E-mail from Brandon Wiseman, HeinOnline Integration, to author (May 22, 2018) (on file with author).

¶20 For the case study, I examined print and electronic versions of six articles that had been corrected, retracted, or disavowed in some other way. A few were selected from the results of searches run in HeinOnline for **errata or erratum**. I found others by searching news stories or following colleagues' suggestions. The case studies in this section describe what readers currently see when looking at these articles.<sup>21</sup> The corrections range from a change to one sentence, to corrections involving multiple sections of the article, to data errors and plagiarism, and finally to withdrawal of an article for unspecified reasons. In all six cases, the description of what happened and the resulting revisions to the article, if any, are from documents that are available either in print or online. The dates of the articles studied range from 1998 to 2018. One might expect processes to have improved as electronic publication of and access to law journal articles became more pervasive, but that does not appear to be the case. I avoid speculation as to the cause of the original error or why the revisions were handled the way they were. All six examples demonstrate a lack of consistency in how electronic versions were changed after errors were discovered, and most demonstrate a lack of transparency about the post-publication correction process. I did not find any cases where revisions were made consistently and transparently, although I presume (and hope) there do exist some articles where this is the case.<sup>22</sup>

### Example 1: Minor Text Changes

¶21 I began my research with a simple correction to a 2017 article in the *California Law Review: Technoheritage* by Sonia Katyal.<sup>23</sup> The article defines “technoheritage” as “the marriage of technology and cultural heritage”<sup>24</sup> and considers what types of intellectual property issues might arise from using technology to digitally reproduce items of cultural heritage. In the original article, one sentence on page 1130 read: “In 2009, the Smithsonian decided to scan and digitize its collection of over 137 million objects in 3-D, including an ancient Cosmic Buddha sculpture, a rare orchid, and a series of modern art installations.”<sup>25</sup>

¶22 Two issues later in the same volume of the print journal, following the final article in that issue, the journal published a *Notice of Errata*:

At the request of the author, the text on page 1130 of *Technoheritage* by Sonia Katyal, appearing in Volume 105, Number 4 of the *California Law Review*, is revised to read:

In 2009, the Smithsonian decided to scan and digitize parts of its collection of over 137 million objects, including some objects in 3-D.

The *California Law Review* apologizes to the author and to readers for any inconvenience or confusion its error may have caused.<sup>26</sup>

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21. Like authors, journals may also have an interest in repairing their reputations *ex post facto*. To that end I have used Perma.cc to preserve documents as I saw them during my research; where that was not possible, I have retained printed or downloaded copies of PDF files.

22. While it may seem that my selection is skewed to support the idea that the process is broken, the examples I discuss here were the first and only examples I examined. I began work on this article planning to consider only whether correcting articles online would cause problems because of a discrepancy between the print version and the online versions. Perhaps naively, I did not initially think that I would discover inconsistencies between online versions, much less that I would fail to find an example where corrections to online versions were made consistently and transparently.

23. Sonia K. Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111 (2017). I found the article by searching the Most Cited Law Journals database on HeinOnline for **errata or erratum**.

24. *Id.* at 1114.

25. *Id.* at 1130.

26. *Notice of Errata*, 105 CALIF. L. REV. at [unnumbered page following page 1910].

¶23 While there is a huge factual difference between the Smithsonian having 137 million objects, all of which are 3-D, and all of which are being digitized, and the Smithsonian digitizing some of its 137 million objects, only some of which are 3-D, the statement was simply an example and not crucial to the author's thesis.

¶24 I examined the following versions of the article: the print journal, HeinOnline, the *California Law Review* in the Berkeley Law Scholarship Repository,<sup>27</sup> SSRN, Lexis+, Westlaw Edge, and a PDF version of the article found through a Google search. Only Westlaw contained the corrected version of the sentence noted above, and it did not contain any language indicating that the article had been updated or corrected. LexisNexis contained the original, uncorrected version. HeinOnline contained the original version and also contained the *Notice of Errata* following the last article in volume 105, no. 6.<sup>28</sup> The Berkeley Law Scholarship Repository links to the uncorrected version of the article<sup>29</sup> and did not have the *Notice of Errata* on its website for volume 105, no. 6. A PDF copy of the article on the *California Law Review* website<sup>30</sup> contained the uncorrected sentence.<sup>31</sup> The version on SSRN, dated September 1, 2017, is also the uncorrected version.<sup>32</sup>

¶25 In this case study, a seemingly simple correction process resulted in both versions of the article being available with no indication about the correction anywhere other than the *Notice of Errata* published in the print version and in HeinOnline. Even the scholarship repository at Berkeley Law, whose mission of preserving scholarship<sup>33</sup> would seem to include posting the "version of record,"<sup>34</sup> provided the uncorrected copy. Readers of any of the online versions—other than,

27. BERKELEY LAW SCHOLARSHIP REPOSITORY, <https://www.law.berkeley.edu/library/ir/> [<https://perma.cc/XHP8-4LGD>].

28. HeinOnline did not list this in the table of contents but included it at the end of the PDF of the preceding article, Emma Mclean-Riggs, Note, "*locked together / in this small hated space*": *Recognizing and Addressing Intimate Partner Violence Between Incarcerated Women*, 105 CALIF. L. REV. 1879 (2017). There is no listing in the PDF of the journal's table of contents for the *Notice of Errata*. The errata notice was returned in a full-text search in the Law Journal Library of HeinOnline for **errata** or **erratum**.

29. CALIFORNIA LAW REVIEW, <https://www.law.berkeley.edu/library/ir/clr/> [<https://perma.cc/LW5L-S2KY>] (the link to the article, <https://lawcat.berkeley.edu/record/1127986> [<https://perma.cc/KQG8-P3AS>]), can be found by browsing the contents of volume 105).

30. Sonia K. Katyal, *Technoheritage*, <http://www.californialawreview.org/wp-content/uploads/2017/08/3Replacement-Katyal-36.pdf> [<https://perma.cc/5EGL-DY3E>].

31. *Id.*

32. Sonia Katyal, *Technoheritage*, UC Berkeley Public Law Research Paper (Sept. 1, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3030437](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030437) [<https://perma.cc/6XFG-HJL2>].

33. Many law schools have open access repositories designed to be permanent archives and containing scholarship written by their faculty members as well as articles published in their journals. Berkeley Law says of its repository: "The Berkeley Law Scholarship Repository provides free and permanent online access to published articles, works-in-progress, conference papers, lectures, reports, and workshop presentations produced by Berkeley Law School faculty, centers, programs, and journals." *About the Berkeley Law Scholarship Repository*, BERKELEY LAW, <https://scholarship.law.berkeley.edu/about.html> [<https://perma.cc/D42Q-AP98>].

34. Unlike some other disciplines, law journals have no accepted or implicit idea of a version of record. See *infra* notes 118–121 and accompanying text for definitions recommended for use by the National Information Standards Organization. At a workshop where I presented an early draft of this article, several faculty members stated that they considered LexisNexis or Westlaw to be the version of record, an opinion that left the librarians in attendance somewhat aghast. In fact, three of the examples I looked at had different versions in LexisNexis and Westlaw. See Katyal, *supra* note 23; Flynn, *infra* note 35; Sohoni, *infra* note 76.

perhaps, HeinOnline, which contains the errata notice in a later issue—would not know that a correction had been made, what that correction was, or whether they were looking at the corrected or uncorrected version.

### Example 2: Major Text Changes

¶26 A recent example of an article that was significantly revised after publication is *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)* from a 2017 volume of the *Notre Dame Law Review*.<sup>35</sup> The journal published an errata notice in issue 3 of the next volume, which said:

Sean Patrick Flynn, Note, *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*, 92 NOTRE DAME L. REV. 2179 (2017), appeared in Volume 92, Issue 5 of the *Notre Dame Law Review*. A revised version of this Note, with corrections, is available at [www.ndlawreview.org](http://www.ndlawreview.org).<sup>36</sup>

The *Notre Dame Law Review*'s website contained a PDF file of Flynn's Note with an asterisked footnote on the first page that reads: "This is an updated version of the Note that appears in the print edition of this volume of the *Notre Dame Law Review*."<sup>37</sup> This same updated version was available on HeinOnline and Westlaw. LexisNexis, though, contained the original version, as did the law school's digital repository, *NDLScholarship*.<sup>38</sup>

¶27 The revised version does not indicate what changes were made to the original article. I reviewed the two PDF versions (the version on the *Law Review*'s website and the version in the law school's digital repository) side by side. The two versions have the same number of pages, but the revised version has 10 fewer footnotes, and there are two places in the article where multiple paragraphs have been deleted and replaced with alternative text.<sup>39</sup>

### Example 3: Data Errors

¶28 In 2008, the *Tulane Law Review* published *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*.<sup>40</sup> In the article, the authors claimed that:

35. Sean Patrick Flynn, Note, *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*, 92 NOTRE DAME L. REV. 2179 (2017).

36. *Errata*, 93 NOTRE DAME L. REV. at [unnumbered page following 1414]. As with *Katyal*, *supra* note 23, the errata is not listed in the table of contents of the print journal or on HeinOnline. Based on these two examples, it appears that HeinOnline uses the journal's table of contents to create the one on its site.

37. See Sean Patrick Flynn, Note, *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*, <http://ndlawreview.org/wp-content/uploads/2018/03/Updated-Flynn.pdf> [<https://perma.cc/Y76U-2H8E>].

38. See Sean Patrick Flynn, Note, *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*, <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4745&context=ndlr> [<https://perma.cc/GE39-7G36>].

39. Compare Flynn, *supra* note 37, at 2179–80, 2195–97, with Flynn, *supra* note 38, at 2179–80, 2195–97. I did not compare the articles word for word but did notice other places where minor changes were made, including changes to section headings. Compare Flynn, *supra* note 37, at 2182 (sec. I.B. "Complaints with the *Current System*"), with Flynn, *supra* note 38, at 2183 (sec. I.B. "Complaints with the *Military System*") (emphases added).

40. Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008).

[t]his empirical and statistical study of the Louisiana Supreme Court over a fourteen-year period demonstrates that some of the justices have been significantly influenced—wittingly or unwittingly—by the campaign contributions they have received from litigants and lawyers appearing before these justices. Statistically speaking, campaign donors enjoy a favored status among litigants appearing before the justices.<sup>41</sup>

¶29 Unsurprisingly, the article received substantial publicity.<sup>42</sup> Several critiques soon appeared questioning the study,<sup>43</sup> and the chief justice of the Louisiana Supreme Court issued a statement responding to the article's claims and criticizing the authors' data analysis.<sup>44</sup> In September 2008, the dean of Tulane Law School wrote a letter of apology to the justices, stating in part that “[b]ecause of the miscalculation in the underlying data, the reliability of some or all of the authors' conclusions in the study as published has been called into question.”<sup>45</sup> The dean also wrote that “notice about the errors will be posted on the law review's Web site, and the same notice will go out with hard copies of the law review's next edition, and if possible, hyperlinked to electronically archived versions of the article.”<sup>46</sup> According to an article in the *Times-Picayune*, many of the errors were discovered by one of the authors, who claimed that even with the data errors corrected, “the study's conclusions, broadly speaking, are the same.”<sup>47</sup>

¶30 At the end of its November 2008 print issue, the *Tulane Law Review* included this errata notice:

The Louisiana Supreme Court in Question: An Empirical Statistical Study of the Effects of Campaign Money on the Judicial Function, published in Volume 82 of the *Tulane Law Review* at 1291 (2008), was based on empirical data coded by the authors, but the data

41. *Id.* at 1292.

42. See, e.g., Debra Cassens Weiss, *Study Says La. Supreme Court Justices Apparently Swayed by Campaign Cash*, A.B.A. J. (Jan. 29, 2008), [http://www.abajournal.com/news/article/study\\_says\\_la\\_supreme\\_court\\_justices\\_swayed\\_by\\_campaign\\_cash/](http://www.abajournal.com/news/article/study_says_la_supreme_court_justices_swayed_by_campaign_cash/) [<https://perma.cc/5EVC-AM56>]; Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/us/29bar.html> [<https://perma.cc/5JKP-6WVW>].

43. See, e.g., Robert Newman et al., A Critique of “The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function,” [http://www.lasc.org/press\\_room/press\\_releases/2008/Critique\\_of\\_Tulane\\_Law\\_Review.pdf](http://www.lasc.org/press_room/press_releases/2008/Critique_of_Tulane_Law_Review.pdf) [<https://perma.cc/3G5X-FNMG>]; Kevin Tully & E. Phelps Gay, Rebuttal of “The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function,” [http://www.lasc.org/press\\_room/press\\_releases/2008/Rebuttal\\_revised.pdf](http://www.lasc.org/press_room/press_releases/2008/Rebuttal_revised.pdf) [<https://perma.cc/7TFF-W7BQ>], revised version published as Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281 (2009).

44. Press Release, Statement of Chief Justice Pascal F. Calogero, Jr., La. Sup. Ct. (June 12, 2008), [https://www.lasc.org/press\\_room/press\\_releases/2008/Statement\\_of\\_Chief\\_Justice\\_Calogero\\_June\\_12\\_2008.pdf](https://www.lasc.org/press_room/press_releases/2008/Statement_of_Chief_Justice_Calogero_June_12_2008.pdf) [<https://perma.cc/TZX6-9V83>].

45. Dan Slater, *Dean Apologizes to Louisiana Supremes for Errors in Law Review Article*, WALL ST. J. LAW BLOG (Sept. 18, 2008), <https://blogs.wsj.com/law/2008/09/18/dean-apologizes-to-louisiana-supremes-for-errors-in-law-review-article/> [<https://perma.cc/K86A-HX4T>] (quoting Susan Finch, *Tulane Law School Issues Apology to Louisiana Supreme Court*, NOLA.COM (updated Nov. 23, 2009), [https://www.nola.com/news/index.ssf/2008/09/law\\_school\\_issues\\_apology\\_to\\_h.html](https://www.nola.com/news/index.ssf/2008/09/law_school_issues_apology_to_h.html) [<https://perma.cc/6CLR-2J7F>]).

46. Letter from Lawrence Ponoroff, Dean, Tulane Law Sch., to Hon. Pascal F. Calogero, Jr. et al., Justices of the La. Sup. Ct. (Sept. 10, 2008), [https://www.lasc.org/press\\_room/press\\_releases/2008/AR-TU\\_APOLOGY\\_LETTER.pdf](https://www.lasc.org/press_room/press_releases/2008/AR-TU_APOLOGY_LETTER.pdf) [<https://perma.cc/9TRA-K285>].

47. Finch, *supra* note 45.

contained numerous coding errors. Tulane Law Review learned of the coding errors after the publication. Necessarily, these errors call into question some or all of the conclusions in the study as published. The Law Review deeply regrets the errors.<sup>48</sup>

Examining the various electronic versions of this article was particularly troubling because the data errors discovered after publication were serious enough that the article's conclusions were called into question. On HeinOnline, the original article was included in volume 82, but there was no errata notice included with the online version of the November 2008 issue, either separately in the table of contents or as the last page of the preceding article, as there was for the Katyal and Flynn errata notices.<sup>49</sup> Neither of the other electronic versions (Westlaw and LexisNexis) contained a notice about the errors as conditionally promised by the dean.<sup>50</sup> The *Tulane Law Review's* website contained only volumes 84 (2009–2010) through 92 (2018), so the article was not available on that site.<sup>51</sup> There is no scholarly repository at Tulane Law School or Tulane University containing *Tulane Law Review* articles. Without searching news articles or reading the erratum notice in the printed copy of the *Tulane Law Review*, readers would have no notice of the serious problems with the article.

#### Examples 4 and 5: Plagiarism

¶31 Two of the articles examined were ones in which plagiarism was discovered after publication. While it is likely that many instances of plagiarism are discovered before publication,<sup>52</sup> discovery also often comes after publication, sometimes many years later.<sup>53</sup>

¶32 In 2004, the *Supreme Court Economic Review* published an article by Michael Edmund O'Neill, *Irrationality and the Criminal Sanction*.<sup>54</sup> Three years after publication, the article was retracted with a statement reading: "Substantial portions of *Irrationality and the Criminal Sanction*, 12 SCER 139 (2004), by Michael E. O'Neill, were appropriated without attribution from Anne C. Dailey's book review, *Striving for Rationality*, 86 *Virginia Law Review* 349 (2000). Professor O'Neill's article is therefore withdrawn."<sup>55</sup>

¶33 The retraction appeared as a separate item in the table of contents for volume 15, so regular readers of the print version of the journal were given notice, but

48. *Erratum*, 83 TUL. L. REV. at [unnumbered page following 284] (2008).

49. See *Notice of Errata*, *supra* note 26; *Errata*, *supra* note 36. As with these two examples, no listing for the errata notice is in the print table of contents for the issue.

50. See Letter from Laurence Ponoroff, Dean, Tulane Law Sch., *supra* note 46.

51. *Issues: All Volumes*, TUL. L. REV., <http://www.tulanelawreview.org/category/volumes/> [<https://perma.cc/DA9D-QG48>].

52. Of necessity, this statement is based on anecdotal evidence—journals do not publicize information they discover about plagiarism before an article is published.

53. See, e.g., Jonathan Martin, *Plagiarism Costs Degree for Senator*, N.Y. TIMES, Oct. 11, 2014, at A14 ("The Army War College rescinded the master's degree of Senator John E. Walsh on Friday [Oct. 10, 2014], determining that Mr. Walsh, a Montana Democrat, plagiarized his final paper there in 2007."); Jonathan Bailey, *Should There Be a Statute of Limitations on Plagiarism Claims?*, PLAGIARISM TODAY (Mar. 19, 2013), <https://www.plagiarismtoday.com/2013/03/19/should-there-be-a-statute-of-limitations-on-plagiarism-claims/> [<https://perma.cc/G3UR-T3SN>].

54. Michael Edmund O'Neill, *Irrationality and the Criminal Sanction*, 12 SUP. CT. ECON. REV. 139 (2004).

55. *Retraction of Irrationality and the Criminal Sanction 12 SCER 139 (2004) by Michael E. O'Neill*, 15 SUP. CT. ECON. REV. 1 (2007).

other readers would not see any evidence that the article was retracted. On Westlaw and LexisNexis, the article is simply not there (although if you begin typing the article author and title into the search bar on Westlaw, it will suggest a link to the retraction notice). The article remains on HeinOnline, as does the retraction, but there is no link between the two.<sup>56</sup> The same is true for the University of Chicago Press journals site<sup>57</sup> and the JSTOR database,<sup>58</sup> both of which contain the article and the later retraction in different issues. In 2008, a year after the article was retracted, the retraction received publicity when O'Neill was nominated by President George W. Bush for a federal district court judgeship.<sup>59</sup> Users of Westlaw and LexisNexis will not come across the O'Neill article, but that is not the case for those using other databases or doing a Google search.<sup>60</sup>

¶34 Another plagiarism case resulted in a public censure by the Michigan Supreme Court,<sup>61</sup> but not a retraction of the article. In 1989, Michigan district court judge Thomas E. Brennan, Jr., was censured by the Michigan Supreme Court for plagiarizing material from two different articles in his 1987 article, *Dismissal and Prearraignment Delay: Time Is of the Essence*, published in the *Cooley Law Review*.<sup>62</sup> The article can be found on Westlaw and HeinOnline, and there is nothing noted there about plagiarism.<sup>63</sup> LexisNexis's coverage of the *Cooley Law Review* begins with 1994, so the 1987 article is not in the database. Cooley Law School's law review archives go back only to 2013.<sup>64</sup>

### Example 6: Retraction and Withdrawal

¶35 The final example is an article that was retracted and withdrawn from the *Denver Journal of International Law and Policy*. The article, which criticized the actions of Boise Cascade Corporation, was published in 1998.<sup>65</sup> In 2000, the

56. Listing the retraction notice in the print journal's table of contents also meant that HeinOnline included it in the issue's online table of contents. See *Retraction of Irrationality and the Criminal Sanction 12 SCER 139 (2004) by Michael E. O'Neill*, 15 SUP. CT. ECON. REV. 1 (2007), <https://heinonline.org/HOL/P?h=hein.journals/supeco15&i=11>. HeinOnline does not have a way to connect the errata notice with the original article, although one might expect HeinOnline's ScholarCheck function to list the retraction, as it lists all articles that cite the original article. This, however, was not the case. The retraction does appear when searching for the title of the article in EBSCO's Legal Source database.

57. Michael Edmund O'Neill, *Irrationality and the Criminal Sanction*, UNIV. OF CHI. PRESS JOURNALS, <https://www.journals.uchicago.edu/doi/abs/10.1086/scer.12.3655320> (last visited Dec. 11, 2020).

58. Michael Edmund O'Neill, *Irrationality and the Criminal Sanction*, JSTOR, <https://www.jstor.org/stable/3655320> [<https://perma.cc/9QAG-RDHD>].

59. Adam Liptak, *Copying Issue Raises Hurdle for Bush Pick*, N.Y. TIMES, July 4, 2008, at A1.

60. A Google search for **O'Neill Irrationality and the Criminal Sanction** retrieves the retraction as well as the article, but some users may not see the retraction link and will just follow the direct link to the article.

61. *In re Brennan*, 447 N.W.2d 712 (Mich. 1989).

62. *Id.* at 713–14; see also Thomas E. Brennan, Jr., *Dismissal and Prearraignment Delay: Time Is of the Essence*, 4 COOLEY L. REV. 493 (1987).

63. I searched the *Cooley Law Review* on HeinOnline for **errata or erratum or retraction** and for **"Brennan, Jr."**

64. *WMU-Cooley Law Review Archives*, W. MICH. U. COOLEY LAW SCH., <https://www.cooley.edu/lawreview/archives> [<https://perma.cc/M8YR-TZXT>].

65. William A. Wines et al., *The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere*, 26 DENV. J. INT'L L. & POL'Y 453 (1998).

authors were informed that months earlier the university had ordered the article retracted and pulled from both Westlaw and LexisNexis.<sup>66</sup> The errata notice stated:

After further review of this article, the editorial staff has determined that the article was not consistent with the editorial standards of the Journal or of the University of Denver, and the portions of the article relating to Boise Cascade were clearly inappropriate and require elimination, revision or correction. Although the editors are committed to publishing articles on controversial issues of public importance, we are retracting portions of the article and have requested that the article be removed from on-line sources pending its re-editing.<sup>67</sup>

The authors sued in federal district court for defamation, breach of contract, and breach of the covenant of good faith and fair dealing.<sup>68</sup> The case was settled before trial.<sup>69</sup> As of this writing, the article remains available on HeinOnline.<sup>70</sup> A 2005 article coauthored by William Wines, a coauthor of the *Denver Journal of International Law and Policy* article, discusses the situation in more detail.<sup>71</sup> It states that the original article is inaccessible on LexisNexis and Westlaw but that a draft is available on the journal's website.<sup>72</sup> At the time of this writing, the link to that draft no longer works.<sup>73</sup> Other than the news and law review articles discussing the incident, there is no notice in online versions of the journal that the article was retracted.<sup>74</sup> Instead of making the retraction public, the journal seems to have done its best to make both the article and the retraction notice disappear.

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66. Peter Monaghan, *A Journal Article Is Expunged and Its Authors Cry Foul*, CHRON. HIGHER EDUC. (Dec. 8, 2000), <https://www.chronicle.com/article/A-Journal-Article-Is-Expunged/15905> [<https://perma.cc/D694-BKRE>].

67. *Errata*, 27 DENV. J. INT'L L. & POL'Y [unnumbered page following 544] (1999). Unlike other errata notices in the *Denver Journal of International Law and Policy*, this one was not listed in the issue's table of contents. See, e.g., *Errata*, 27 DENV. J. INT'L L. & POL'Y 723 (1999). Instead, it appears as though it were a continuation of *Errata: Vijayashri Sripati, Human Rights in India—Fifty Years After Independence (1947–97)*, 27 DENV. J. INT'L L. & POL'Y 541 (1999). One might conclude the page was designed to be hidden since the Sripati errata ends on page 544 and the following issue of the journal begins on page 545. See Thomas E. Carbonneau, *Introduction*, 27 DENV. J. INT'L L. & POL'Y 545 (1999) (article following errata notice).

68. Complaint, *Wines v. Univ. of Denver*, No. 1:00-cv-00488-EJL (D. Idaho, Aug. 31, 2000).

69. See William A. Wines & Terrance J. Lau, *Can You Hear Me Now? Corporate Censorship and Its Troubling Implications for the First Amendment*, 55 DEPAUL L. REV. 119, 137 & n.124 (2005).

70. William A. Wines et al., *The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere*, 26 DENV. J. INT'L L. & POL'Y 453 (1998), <https://heinonline.org/HOL/P?h=hein.journals/denilp26&i=465> (last visited Dec. 11, 2020).

71. Wines & Lau, *supra* note 69, at 139–41.

72. *Id.* at 141.

73. See *id.* at 141, n.167; *Page Not Found*, UNIV. OF DENV. STURM COLL. OF LAW, [http://www.law.du.edu/ilj/online\\_issues\\_folder/wines.pdf](http://www.law.du.edu/ilj/online_issues_folder/wines.pdf) [<https://perma.cc/YH8C-3MFT>].

74. The errata notice appears in the print version of the journal. *Errata*, *supra* note 67. However, that page (which is unnumbered) has been omitted from the HeinOnline version of the issue. The Wines and Lau article cites to an article in the *Chronicle of Higher Education* when quoting the errata notice. Wines & Lau, *supra* note 69, at 140, nn.157–160 (citing Monaghan, *supra* note 66).

## Case Study Results

¶36 Overall, the examples I examined demonstrate a wide range of issues related to post-publication corrections. In no instance was the correction consistently made to all copies of the article. Rather, in every case, some of the available copies were uncorrected or available without being marked as revised or retracted. The examples varied in their transparency—some indicated an attempt at transparency but were inconsistent about it, and others showed no attempt at all or even an effort to keep the problem hidden. A few of the journals appeared to be following a procedure for publishing corrected electronic copies, but without sufficient attention to consistency and transparency.

¶37 Even this small set of examples shows that the possible problems and variations with post-publication corrections are almost infinite.<sup>75</sup> While some law journals appear to be considering these issues (e.g., the corrected version of Flynn's Note with its initial footnote directing readers to the version on the journal's website),<sup>76</sup> the lack of a standard set of practices makes it difficult for journals to provide the type of consistency and transparency researchers require and scholarly integrity demands. Eliminating print versions of law journals and publishing only electronic versions would not solve the problem: inconsistencies between electronic versions are likely to remain, along with the issue of revised versions failing to indicate what has been changed. Finally, the *Tulane Law Review* and *Denver Journal of International Law and Policy* examples highlight that even when the errors are considered to be substantial and the article worthy of retraction, legal scholarship has no standardized practice for retraction similar to that which exists in other fields.<sup>77</sup>

¶38 Most examples of plagiarizing law review articles are not publicized—perhaps because they often involve student authors, and law schools do not have an interest in publicizing that type of information about their students. Unless the student later seeks political office or appointment, there is a good chance the pla-

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75. Far from basing my selection on outliers that were corrected in a problematic fashion, I chose a number of examples where I would have expected the corrections to have been undertaken carefully, since many of them had extensive publicity.

76. Flynn, *supra* note 37. Unfortunately, the *Notre Dame Law Review* has taken a step backward. For example, after publication, Mila Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419 (2018), was revised and an errata notice published. *Errata*, 94 NOTRE DAME L. REV. at [unnumbered page following p. 472] (2019). Unlike Flynn, the revised version is not marked as such. See Mila Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419 (2018), <http://ndlawreview.org/wp-content/uploads/2018/10/2-Sohoni.pdf> [<https://perma.cc/SQJ7-E2DG>]. Only by comparing the print version with versions found online was I able to determine that HeinOnline, Westlaw, SSRN, the law review's website, and the Notre Dame Law School digital repository contain the revised version, while LexisNexis and several Gale databases contain the original version. The errata notice listed another article that had been revised from volume 93 of the *Notre Dame Law Review*. *Errata, supra*. Rather than moving toward making its revisions more transparent, the journal is making them harder to detect, while seemingly changing an increasing number of articles after publication.

77. It is also possible to speculate about political explanations for both situations. Perhaps the dean at Tulane apologized to respond to the complaints of the Louisiana Supreme Court justices but allowed the article to remain in circulation because he believed the authors when they said their conclusions remained the same even after the data errors were taken into account. See Finch, *supra* note 45. With respect to the Boise Cascade article, the University of Denver may have tried to withdraw the article as quietly as possible to avoid threatened litigation and do as little damage to its own reputation as possible.

giarism will not be made public, although it likely will be recorded in the student's academic record and reported to the state bar character and fitness committee.<sup>78</sup>

¶39 Neither of the plagiarism situations discussed here resulted in complete notice to readers, but the *Supreme Court Economic Review*, which is a faculty-edited journal,<sup>79</sup> does appear to have made more of an effort to notify readers of the problem. The lack of experience and deep knowledge of scholarly standards and expectations likely leaves student editors without sufficient expertise on how to deal with these situations<sup>80</sup>—and the lack of standard procedures common to law journals only exacerbates the situation. This article's final section on recommended policies and practices contains suggestions for how law journals might begin to develop a set of common standards.

¶40 In the print-only era, if a journal published an errata notice, it could expect at least some portion of its readership to see the notice when paging through the journal. At that time, errata were sometimes published to correct even the smallest of typographical errors.<sup>81</sup> Today, when articles are found in multiple locations and authors have limited control over where their articles are archived, it is almost impossible for researchers to know that an article has been corrected or withdrawn if that information is not somehow connected to the article itself. If anecdotal evidence can be trusted, the number of post-publication corrections being made without notice to readers is quite large.<sup>82</sup>

¶41 My study looked at only a small number of examples, but it demonstrated that none of the questions posed in the introduction are currently being answered satisfactorily. With the current lack of standardized policies or best practices, readers lack the tools necessary to verify the continuing validity of a scholarly law journal article. Lawyers expect to do this verification for primary sources of law, and citators exist specifically for this purpose. It does not seem reasonable, though, to expect researchers to try to determine whether the journal article they are relying on has since been revised or retracted without tools for doing so. Law reviews must therefore adopt standards and best practices for notifying readers when articles have been revised or retracted.

## A Typology of Errors

¶42 Before considering possible correction procedures for law journals, it is worth thinking about why corrections are issued and whether this should make a difference in how (or whether) an article is corrected. When creating the policies

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78. See Roger Billings, *Plagiarism in Academia and Beyond: What Is the Role of the Courts?*, 38 U.S.F. L. REV. 391, 399 (2004) (“[L]aw schools tend to allow a student who has plagiarized to graduate, knowing that their respective state’s board of bar examiners . . . will receive a record of the plagiarism incident.”).

79. *About*, SUP. CT. ECON. REV., <https://www.journals.uchicago.edu/journals/scer/about> [<https://perma.cc/67L7-DXGC>].

80. Most student-edited law journals have faculty advisors, but we cannot know how often they are queried or whether an advisor would suggest a standardized procedure to follow if they were asked.

81. See *Errata*, 46 COLUM. L. REV., at ii (1946) (e.g., “Page 32, line 32 : for ‘fradulent’ read ‘fraudulent.’”). Some readers might consider this type of errata to be excessive and unnecessary.

82. Several people I spoke to in the course of writing this article had corrected published articles of their own, and they admitted that no public notice of the correction was given.

and practices proposed in the last part, journals may want to have different policies for different types of errors. Also important is the role of the person requesting the correction (author, editor, other), the type and magnitude of the error and the correction required, the reason for making the correction, and the identity of the responsible party (i.e., whether the errors are attributable to the author or the journal editors).<sup>83</sup>

¶43 The journal should also consider the seriousness of the error and whether a correction is worth all the possible attendant problems, some of which are detailed here. The journal might decide not to correct minor typographical errors unless these could have serious consequences for the author—for example, if the misspelled word were part of the article title or author’s name and could affect later attribution and citation. Finally, journals must consider the motivation for the correction. Journals may not want to allow authors to correct their own errors of reasoning, understanding, or even poor word choice simply to avoid criticism.

¶44 Perhaps if journals consider the type of error, its magnitude, and the reason for possibly correcting it, they will find it easier to implement a policy that provides transparency and consistency. The first two subsections below focus on specific types of errors; the following subsections are concerned more with the reasons for requesting corrections.

### Typographical Errors

¶45 Most of the time, journal articles are corrected for a simple reason—to fix typographical errors.<sup>84</sup> Articles go through various rounds of editing, and it is not unusual for errors to slip in or for an error that was thought to have been corrected to show up in the final version because of a mix-up. Minor errors might be corrected after publication because of the journal’s or author’s perfectionism or, if more substantial, to protect the reputation of the author or the journal. Errors might be noticed by the author or by readers, and then brought to the author’s or journal’s attention. In instances of typographical errors, journals must decide whether the error is substantial enough to warrant correction, either by a simple errata notice or by publishing a corrected electronic version.

¶46 The cost of correcting minor typographical errors that do not interfere with comprehension may be greater than the benefit of having a “perfect” article. No matter how diligent the journal is in publicizing its corrections, there will still be two versions of the article in existence, raising the possibility of confusion. In the past, journals often published errata to correct simple misspellings,<sup>85</sup> but should that same correction be considered appropriate today if it means that two different versions of an article will now be circulating online?

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83. A distinction is sometimes made between the two types of errors: errors introduced by the publisher are labeled *errata*, while author’s corrections are labeled *corrigenda*. See, e.g., *Policy and Best Practice: Errata & Corrigenda*, ELSEVIER (Aug. 2016), <https://www.elsevier.com/editors/perk/policy-and-best-practice-errata-And-corrigena> [<https://perma.cc/U2GP-SXXX>].

84. See, e.g., Email from Laura C. Nutzmänn-Hoyt, *supra* note 20 (“The changes are usually very minor (a misspelled or missing word, incorrect citation, etc.)”).

85. See *Errata*, *supra* note 81.

### Errors of Fact

¶47 Corrections may also be warranted if the author or journal made an error of fact. Factual errors can be the fault of the author, or errors can creep in during the editing process.<sup>86</sup> Factual errors may be caught by the author or by a reader who realized the original statement was mistaken. Again, journals must decide whether a correction is warranted, but here they may be subjected to more pressure from either the author or the person who discovered the error.<sup>87</sup>

¶48 Errors of fact can range from very minor, such as that in the Katyal article,<sup>88</sup> to errors with significant impact on the entire article. For example, if the author made an error of “fact” in assuming a case was decided one way, when the opposite was actually true, and then based an argument on that fact, the correction might invalidate the author’s argument. In this latter sense, errors of fact are also errors of interpretation and reasoning since the author has perhaps misunderstood the import of a court decision or statute, which then affects the article’s thesis and conclusions.

### Expedient Corrections

¶49 The unregulated system of corrections that now exists for law journals can create issues even more serious than the possibility of researchers using an uncorrected version of an article. The lack of transparency in what has been corrected, the date of corrections, or who requested them leaves scholarship open to manipulation by authors who might want to “correct” past statements, perhaps for political reasons (e.g., an author who is applying for a new job or running for political office). Without a tracking or versioning system in place, authors and journals are free to change the record to their benefit. The current system allows changes to be made with no notification even that an article had been changed—only someone who thought to compare the print (if it exists and is available) with the online version word by word would ever know. And fixing what are said to be small errors could in reality be making significant changes.<sup>89</sup>

### Errors Requiring Retraction

¶50 Plagiarism and other serious errors often require retraction rather than correction. The lack of a standard process for retractions in law journals not only allows researchers to unknowingly use articles that may have been discredited for a variety of reasons, but it also protects the authors from investigations of malfeasance since the article can be made to disappear from the online universe without a trace.<sup>90</sup> Journals that allow “silent” retractions (deleting an article from an online

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86. In the Katyal article, the journal editors apologized to the author and to readers for the error. *Notice of Errata*, *supra* note 26.

87. For example, the subject of the erroneous statement might want it corrected. One could imagine a request by the Smithsonian for a correction of the statement about its collection in Katyal, *supra* note 23, at 1130.

88. See *Notice of Errata*, *supra* note 26, and accompanying text.

89. See Lazarus, *supra* note 3, at 611 (noting that substantive legal changes have resulted from corrections of “formal error” in U.S. Supreme Court opinions).

90. The “withdrawal” of Wines, Buchanan & Smith, *supra* note 65, from LexisNexis and Westlaw was an imperfect version of this. One can find references to the article (it was cited several times), but those citations in LexisNexis and Westlaw are not linked to the article because the article is no longer available in the databases. And if a researcher searches for the article in those databases, it will not be found. However, as noted above, the article can still be found in HeinOnline. Because an errata notice

database and amending the table of contents), without providing notice to readers, do a disservice to the integrity of their publications.

## Correcting Better

### Instructive Analogies

¶51 Publications in all subject areas face problems of noting and publishing corrections. Three disciplines that offer instructive analogies are briefly discussed below, followed by some possible solutions for linking different article versions and informing readers about revisions to and withdrawal of articles.

### Primary Sources of Law

¶52 Legal researchers are taught how important it is to make sure that the primary materials they read and cite are current and still valid. Many tools help lawyers update and validate primary materials, including citators, pocket parts and, in the digital age, frequent database updates accompanied by detailed information about when each source was last updated. So researchers may be surprised to learn that problems caused by post-publication corrections affect even primary legal sources. As Richard Lazarus describes in a lengthy piece published in the *Harvard Law Review*, the same problems that I found in law journal publishing plague corrections to U.S. Supreme Court opinions (although the Court does warn researchers about this possibility).<sup>91</sup> Supreme Court opinions are published first as slip opinions, then as preliminary prints, and finally in the *U.S. Reports*. As part of that process, the Court reserves the right to correct its opinions before final publication in the *U.S. Reports* and also to issue corrections later if warranted.<sup>92</sup>

¶53 Lazarus's article describes the history of opinion revision by the Court, providing examples of opinions that were changed after initial publication, and suggesting ways for the Court to improve the transparency of its practices: "Although the Court has long revised its opinions and disclosed the fact that it does so, the Court has done little to make clear what changes have been made in individual cases. Instead, the Court deliberately makes discovery difficult notwithstanding the public nature of the revisions."<sup>93</sup> Most of Lazarus's examples concern changes made between the issuance of the initial slip opinion and publication in the bound *U.S. Reports*, a period that has now grown to almost five years; however, he gives some examples of language that has been changed decades, and even close to a century, later.<sup>94</sup>

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was placed in the print version, *Errata*, *supra* note 67, the removal of the article does not seem to have been intended to be surreptitious. For a discussion of "stealth retractions" in science journals, see Jaime A. Teixeira da Silva, *Silent or Stealth Retractions, the Dangerous Voices of the Unknown, Deleted Literature*, 32 PUBL'G RSCH. Q. 44 (2016).

91. Lazarus, *supra* note 3, at 540.

92. *See id.* at 543, 555.

93. *Id.* at 546.

94. *See id.* at 574 (noting an errata sheet from 2010 correcting a 1933 opinion and one from 1980 correcting an 1888 opinion). The Court does "warn" researchers that the opinion is not final until it is published in the *U.S. Reports* but, particularly if opinions are online, how will researchers know which version they are using? "Change sheets" are sent to Westlaw and LexisNexis, but are they sent to other legal database vendors (e.g., Bloomberg BNA, Wolters Kluwer, FastCase, Casemaker)? To Google Scholar? (The question of where Google Scholar gets its court opinions is an interesting one since the answer does not appear to be publicly available. One attorney speculates on Quora that they are

¶54 Lazarus then discusses the ways that corrections are made to federal statutes and regulations, resulting in much greater transparency.<sup>95</sup> Differing versions of Supreme Court opinions certainly have a greater impact on the law and legal researchers than multiple versions of law review articles,<sup>96</sup> but one of Lazarus's suggestions for improvement could be adopted by law journals: providing "public notice of any revisions made, just as Congress does in revising its legislation and federal agencies do in correcting errors in regulations."<sup>97</sup>

### *Commercially Published Scholarly Journals*

¶55 One reason for a lack of standardized practice for post-publication corrections in law journals is the way that most academic law journals in the United States are published, with student editors who are replaced every year and very flexible publishing, copyright, and distribution policies. At the other end of the spectrum, commercially published scholarly journals, particularly in the sciences and medicine, have standardized policies and practices for making corrections and guidelines that encourage or require them to conform to these practices.

¶56 Errors in scientific studies, whether deliberate or unintended, are frequent,<sup>98</sup> and the results of relying on flawed studies can be serious. In response, medical and scientific journals have developed ways to alert researchers to problems. Examining publication practices for journal articles in these fields provides a glimpse into a world where retractions and corrections are common, and there is an accepted method for publishing and publicizing them.

¶57 The policies and practices of the National Library of Medicine (NLM) provide a good example. NLM, through its databases PubMed Central and MEDLINE, is the main aggregator of medical journals. NLM publishes a fact sheet titled *Errata, Retractions, and Other Linked Citations in PubMed*, defining different types of publication errors and how they are handled in the PubMed database.<sup>99</sup> For example:

Errata may be published to correct or add text or information that appears anywhere within an earlier published article. Errata must be labeled and published in citable form; that is, the erratum must appear on a numbered page in an issue of the journal that published the original article. For online journals or online-only content, the erratum must be readily discernable in the table of contents of a subsequent issue and must be associated with identifiable pagination or elocation.

...

NLM links the citation for the erratum notice to the citation for the referent article, and

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supplied by Thomson Reuters. Dana H. Schultz, *Answer to "Where Does Google Scholar Get Its Case Law (Full-Text Court Opinions) From?"* QUORA (Sept. 24, 2015), <https://www.quora.com/Where-does-Google-Scholar-get-its-case-law-full-text-court-opinions-from> [<https://perma.cc/C6NW-EMT2>]).

95. Lazarus, *supra* note 3, at 612–17.

96. The discussion of lower court opinions decided in reliance on later-corrected language in U.S. Supreme Court opinions is particularly troubling. *See, e.g., id.* at 602–03.

97. *Id.* at 620.

98. *See, e.g.,* Christopher Wanjek, *Take that Back: The Top Scientific Retractions of 2019*, LIVE SCIENCE (Dec. 31, 2019), <https://www.livescience.com/top-retracted-science-studies-2019.html> [<https://perma.cc/VM26-AVV7>]; Michael Roston, *Retracted Scientific Studies: A Growing List*, N.Y. TIMES (May 29, 2015), <https://www.nytimes.com/interactive/2015/05/28/science/retractions-scientific-studies.html> [<https://perma.cc/F9LS-XFZF>].

99. *Errata, Retractions, and Other Linked Citations in PubMed*, U.S. NAT'L LIBR. OF MED., <https://www.nlm.nih.gov/bsd/policy/errata.html> [<https://perma.cc/7VH4-V8HK>].

the citation for the erratum notice is automatically indexed with the Publication Type Published Erratum [PT]. The citation for the erratum notice contains the phrase “Erratum for: [article title],” and the citation for the referent article contains the phrase “Erratum in: [article title].”<sup>100</sup>

NLM requires the journals it includes in its databases to follow the publishing practices outlined in two different documents, each of which contains sections on error correction and article retraction.<sup>101</sup> Publishers that do not comply with these practices face removal of their journals from the NLM, including PubMed Central and MEDLINE.<sup>102</sup> Practices from the ICMJE (International Committee of Medical Journal Editors) contain sections covering corrections and retractions, which include “post[ing] a new article version with details of the changes from the original version and the date(s) on which the changes were made,” archiving all previous versions, and noting on older versions that newer versions exist.<sup>103</sup>

¶58 In addition to the requirements of the NLM, there is an independent watchdog website, *Retraction Watch*, which keeps track of retractions in scientific articles.<sup>104</sup> *Retraction Watch* is funded by the Center for Scientific Integrity, a nonprofit with a mission “to promote transparency and integrity in science and scientific publishing, and to disseminate best practices and increase efficiency in science.”<sup>105</sup>

### Journalism

¶59 Journalism has faced two challenges related to post-publication corrections—one continuing from the print era, and one that was created when most journalism became digital. Newspapers have always published errata, or “corrections.” For example, the *New York Times* publishes a list of corrections in its print edition every day, in the first section of the paper, indicating the page where the error was originally published. Corrections include the original erroneous information, along with the corrected information, for example: “ARTS—An article about Susan Sontag’s ‘Duet for Cannibals’ misspelled the given name of an actor. He is Gosta Ekman, not Gost Ekman.”<sup>106</sup> The *Times* also publishes these corrections on its website.<sup>107</sup>

¶60 Newspapers also have strong online presences, where articles are published quickly and often change frequently. Rapid changes in online news stories have

100. *Id.*

101. See ICMJE, *Recommendations for the Conduct, Reporting, Editing, and Publication of Scholarly Work in Medical Journals* (Dec. 2018), <http://www.icmje.org/icmje-recommendations.pdf> [<https://perma.cc/96QF-YHVE>]; *Principles of Transparency and Best Practice in Scholarly Publishing*, DOAJ: DIR. OPEN ACCESS JOURNALS (Jan. 2018), <https://doaj.org/bestpractice> [<https://perma.cc/6KJX-5SS9>]; see also *Policies*, PUBMED CENT., NCBI, <https://www.ncbi.nlm.nih.gov/pmc/about/guidelines/> [<https://perma.cc/LLV3-CVPG>].

102. *Policies*, *supra* note 101.

103. ICMJE, *supra* note 101, at 8.

104. RETRACTION WATCH, <https://retractionwatch.com/> [<https://perma.cc/HV6X-MC26>].

105. *The Center for Scientific Integrity*, RETRACTION WATCH, <https://retractionwatch.com/the-center-for-scientific-integrity/> [<https://perma.cc/7GSH-XHPD>].

106. *Corrections*, N.Y. TIMES, Nov. 27, 2019, at A21.

107. See Rogene Jacqueline, *We Stand Corrected: How the Times Handles Errors*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/reader-center/corrections-how-the-times-handles-errors.html> [<https://perma.cc/467V-A6UD>]; *Corrections*, N.Y. TIMES, <https://www.nytimes.com/section/corrections> [<https://perma.cc/W9P8-43TE>].

created another, more recent, concern—stories that change, or even disappear, replaced by a later version or a related story from another angle, as events develop.<sup>108</sup> A website that helped readers track changes to stories in the *New York Times* and several other major news sites was *NewsDiffs*.<sup>109</sup> The site listed articles that had changed, and showed the different versions with the changes marked. *NewsDiffs* was highlighted in an article by the public editor of the *Times*, who lamented that the paper was not doing this on its own and preserving the information in an archive.<sup>110</sup> The site now appears defunct, with no current content, and a Twitter feed last updated in August 2017.<sup>111</sup> *Diffengine* is a more recent program developed to provide the same type of tracking for news stories,<sup>112</sup> and is available through Github.<sup>113</sup> A number of Twitter sites use *diffengine* to track changes in news sites.<sup>114</sup>

¶61 Journalists value transparency, so it is not surprising that news organizations have developed systems to document and preserve the changes made to their articles. As can be seen from the public editor's comments,<sup>115</sup> though, some failings in their tracking and preservation of information are being supplemented by outside organizations, and it may take time before news organizations routinize preservation of the correction and updating process in a digital environment.

### Systems for Tracking Changes to Journal Articles

¶62 As noted above, most scientific journals are published by commercial publishers with much greater resources than the typical student-edited and law school-funded law journal. Thus, it might seem that the formalized systems are not necessary or practical for law journals. On the other hand, the nonsystem in place now is clearly not satisfactory, and it is worth considering other possible solutions before recommending best practices.

#### *Journal Versioning*

¶63 One possible solution would be for law journals to adopt a journal versioning system.<sup>116</sup> Standards for version labeling exist in the scientific literature. NISO (National Information Standards Organization) issued a set of best practices on

108. Arthur S. Brisbane, *On NYTimes.com, Now You See It, Now You Don't*, N.Y. TIMES, June 26, 2011, at SR10.

109. NEWSDIFFS, <http://newsdiffs.org/> [<https://perma.cc/5992-73R4>].

110. Arthur S. Brisbane, *Insider's View of Changes, From Outside*, N.Y. TIMES, July 1, 2012, at SR9.

111. *NewsDiffs*, TWITTER, <https://twitter.com/newsdiffs> [<https://perma.cc/DSZ5-NDRM>].

112. See Ed Summers, *Tracking Changes with diffengine*, INKDROID (Jan. 13, 2017), <https://inkdroid.org/2017/01/13/diffengine/> [<https://perma.cc/BZJ7-LM2G>].

113. GitHub is a platform for hosting software code, both open source and proprietary. See GITHUB, <https://github.com/> [<https://perma.cc/FN54-CAB4>].

114. Summers, *supra* note 112. A list of Twitter accounts using *diffengine* (some of which have been deleted by Twitter, perhaps because of copyright concerns) are on the *diffengine* GitHub page, <https://github.com/DocNow/diffengine> [<https://perma.cc/E86H-HVHR>].

115. Brisbane, *supra* note 108.

116. This possibility was discussed briefly in a 2012 article in *Law Library Journal*, but the authors concluded that existing systems were too complicated for student-edited law journals and suggested instead that librarians consider versioning issues when working with faculty and student-edited journals. Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 387–91, 2012 LAW LIBR. J. 28, ¶¶ 13–26. The article focuses more on draft versioning than on post-publication corrections, although these were mentioned. See *id.* at 390, ¶ 22.

Journal Article Versioning (JAV) in 2008.<sup>117</sup> The Technical Working Group recommended seven terms and definitions for journal article versions that ranged from “author’s original”<sup>118</sup> to “version of record,”<sup>119</sup> “corrected version of record,”<sup>120</sup> and “enhanced version of record.”<sup>121</sup> The working group did not address the question of retractions in the standards.

¶64 If journals adopt a versioning system, they label each version so that users will know which type of version they have (e.g., “corrected” or “original”). However, by itself this would not provide much of a solution. A reader who finds an “original” version would not know whether a “corrected” or “enhanced” version also existed. Some sort of system to link these versions together is needed.

### *Linked Versions (Crossmark and Digital Object Identifiers)*

¶65 Automated linking for corrections and retractions is available and is used by a number of commercial publishers. This is generally done using Crossmark, a linking system developed by Crossref. Started in 1999, Crossref is a nonprofit organization created by a group of scholarly and scientific publishers to link references in journals using Digital Object Identifiers or DOIs.<sup>122</sup> DOIs are numerical strings assigned by publishers to journal articles, and they ensure that if an article’s location on the web moves, the article can still be found by using the DOI.<sup>123</sup> DOIs are inexpensive but not free. They are available from a number of different registration agencies,<sup>124</sup> one of which is Crossref.<sup>125</sup>

¶66 Crossref developed Crossmark to “give[] readers quick and easy access to the current status of an item of content. With one click, you can see if content has been updated, corrected or retracted and access valuable additional metadata provided by the publisher.”<sup>126</sup> Publishers agree to embed the Crossmark logo in their articles, and clicking on the logo informs readers whether they are reading the latest version of an article; it also links to any corrections, retractions, additional data,

117. NISO/ALPSP JAV TECH. WORKING GRP., JOURNAL ARTICLE VERSIONS (JAV) (Apr. 2008), <http://www.niso.org/publications/rp/RP-8-2008.pdf> [<https://perma.cc/CV7P-LT3Z>].

118. The version “considered by the author to be of sufficient quality to be submitted for formal peer review by a second party. The author accepts full responsibility for the article.” *Id.* at 1.

119. “A fixed version of a journal article that has been made available by any organization that acts as a publisher by formally and exclusively declaring the article ‘published.’” *Id.* at 3.

120. “A version . . . in which errors in the VoR [version of record] have been corrected. The errors may be author errors, publisher errors, or other processing errors.” *Id.* at 4.

121. “A version of the Version of Record . . . that has been updated or enhanced by the provision of supplementary material.” *Id.*

122. See *Board and Governance*, CROSSREF, <https://www.crossref.org/board-and-governance/> [<https://perma.cc/2YXC-88ND>]; Press Release, Reference Linking Service to Aid Scientists Conducting Online Research, CROSSREF (Nov. 16, 1999), <https://www.crossref.org/news/1999-11-16-reference-linking-service-to-aid-scientists-conducting-online-research/> [<https://perma.cc/9WSL-P4UN>].

123. See Benjamin J. Keele, *A Primer on Digital Object Identifiers for Law Librarians*, 20 TRENDS L. LIBR. MGMT. & TECH. 35, 36 (2010).

124. See *DOI Registration Agencies*, DOI, [https://www.doi.org/registration\\_agencies.html](https://www.doi.org/registration_agencies.html) [<https://perma.cc/HMN7-6TJ9>].

125. See *Content Registration Guide*, CROSSREF, <https://www.crossref.org/get-started/content-registration/> [<https://perma.cc/8TMJ-JY2M>].

126. *Crossmark*, CROSSREF, <https://www.crossref.org/services/crossmark/> [<https://perma.cc/4WCJ-2292>].

and so on.<sup>127</sup> Crossref is used by many commercial publishers.<sup>128</sup> Its disadvantage is the cost. Membership in Crossref costs several hundred dollars per year, and the journal is also charged each time that Crossmark is embedded in an article.<sup>129</sup>

### *Citation Rules*

¶67 *The Bluebook*, which is followed by almost all student-edited law journals for citation format, does not address the question of post-publication corrections.<sup>130</sup> The *Chicago Manual of Style* gives this instruction about publishing errata:

Journals periodically publish errata, which, in print issues, may appear in the front or the back matter. Electronic journals should provide two-way links from errata to the articles that contain the errors; in other words, the articles themselves should be updated to link to or otherwise indicate the relevant errata. The entries in the table of contents for the original articles should also contain links to the errata. Small errors in online articles that are corrected after the original publication date (e.g., broken images and typographical errors) are best accompanied by a note indicating the nature of the changes and when they were made.<sup>131</sup>

The widely used APA style manual also has a format for citing corrected articles.<sup>132</sup>

¶68 While the *Bluebook* editors could make the problem more visible by suggesting ways to cite to revised or retracted articles, the main issue with post-publication corrections is not one of citation practices but of publication practices. However, the *Bluebook* does require checking of the validity of cases cited,<sup>133</sup> a citation to the exact version of a statute relied upon,<sup>134</sup> and an indication if the statute has been invalidated, repealed, or amended.<sup>135</sup> The *Bluebook* also requires citations to the specific edition of a book,<sup>136</sup> and citations to webpages require specific date information.<sup>137</sup> A rule requiring that citations include the version of a cited article might be one way to encourage journals to include such versioning information. Perhaps this rule could be implemented in conjunction with the idea of a version of record, discussed below regarding phase I improvements to journal practices.

127. *Id.*

128. At the time of writing, Crossref had more than 17,000 members. *Become a Member*, CROSSREF, <https://www.crossref.org/membership/> [<https://perma.cc/D6W2-XBJF>].

129. *Crossmark Fees*, CROSSREF, <https://www.crossref.org/fees/#crossmark-fees> [<https://perma.cc/UHB3-54D8>].

130. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (21st ed. 2020) [hereinafter THE BLUEBOOK].

131. CHICAGO MANUAL OF STYLE ONLINE, 17th ed., Rule 1.90, <https://www.chicagomanualofstyle.org/book/ed17/part1/ch01/psec090.html> [<https://perma.cc/TY45-XVNG>]. BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE (4th ed. 2018), does not mention errata or post-publication corrections; however, it is a manual for writers rather than for publishers.

132. See Chelsea Lee, *How to Cite a Corrected Journal Article*, APA STYLE BLOG (Mar. 15, 2017), <https://blog.apastyle.org/apastyle/2017/03/how-to-cite-a-corrected-journal-article.html> [<https://perma.cc/H8QX-BJXX>].

133. Rule 10.7 requires citations to include the subsequent history of cases, as well as explanatory parentheticals if anything affects the weight of a case's authority. THE BLUEBOOK, *supra* note 130, at 109–10.

134. Rule 12.3.2 requires citation to the year of the print code, including a citation to the supplement if relevant. *Id.* at 125. Rule 12.5 requires citation to “the currency of the database provided by the database itself” if an electronic source is used for a statute citation. *Id.* at 127.

135. *Id.* at 128–29 (Rule 12.7).

136. *Id.* at 150 (Rule 15.4).

137. *Id.* at 180 (Rule 18.2.2(c)).

## Use of These Solutions by Law Reviews

¶69 Any of the suggested or existing solutions described in this section could be used by law reviews, but implementing them in the decentralized arena of student-edited law reviews would be a daunting task. Most would require monetary investment, something that schools are unlikely to do in a time of law school budget cutbacks, particularly for law journals whose publication is already subsidized by law schools.<sup>138</sup>

¶70 Despite this, law journals should not simply give up and continue to make ad hoc decisions about corrections. There are changes that law reviews can make individually, and even the possibility of low- or no-cost systems that could be adopted generally and would improve the integrity of law journal publication practices.

## Recommended Policies and Practices

### Commitment to Transparency and Consistency

¶71 Technical solutions might provide the means for legal scholarship to address questions of consistency in post-publication corrections. Unless corrected versions indicate what has been corrected, however, there is still no guarantee of transparency. It is unrealistic to expect readers to compare each version of an article to determine what changes have been made. Rather, to ensure transparency, corrections should either be described in detail or clearly marked on the revised version. And to avoid accusations of whitewashing the record, corrected versions should be dated—readers should know when the corrections were made so they can determine whether they were made in response to outside events, such as a nomination to the bench, a campaign for political office, an application for a new academic position, or a tenure review.<sup>139</sup>

### Phase I: Improvements to Individual Journal Practices

#### *Policies*

¶72 Creating policies and procedures for post-publication changes would be a relatively easy first step for law journals to take. Even if some decisions are discretionary, the policy should indicate who is the final decision maker. Journals might find it helpful to create a policy for each type of error listed in the preceding typology and outline a solution based on the type of error in conjunction with its magnitude and the reason for correction. For example, a small typographical error, whether made by the author or the journal, might be corrected in all online versions, the revision noted in a starred footnote, and the correction marked by underlining or a different font. Journals could publish annual notes of revisions in the first issue of the next volume. Journals should also have a policy against making expedient corrections, and authors should be made aware of these policies when signing the publication agreement; it can then be brought to their attention later if necessary. For retractions, journals could publish a note about any retractions in an annual update with a citation (hopefully allowing citators such as *Shepard's* or KeyCite to list it), as well as watermarking

138. See Friedman, *supra* note 1, at 1322.

139. The requirements described in Rule 1.90 of the CHICAGO MANUAL OF STYLE, *supra* note 131, provide a useful starting point.

the original article online as “Retracted,” at least on their own websites. Transparency concerns argue against pulling articles without public acknowledgment.

¶73 Journals should include some information about their correction and retraction policies in their publication agreements—for example, they could include a paragraph stating how decisions about corrected versions are made, the process of notation for corrected copies, and what will happen if a retraction is necessary. Or, to simplify matters, they might simply state in the agreement that the author agrees to the policy, with a link to the policy on their website.

### *Practices*

¶74 One way to solve the consistency problem of multiple versions of an article would be for law journals to adopt a version of record.<sup>140</sup> Each journal could choose a version (if available, perhaps the version in its institutional repository) and designate that as the version of record by noting this in the information about the journal on its website. That would be the version that researchers could check for the latest, presumably most correct, version of the article.

¶75 To make things even easier for researchers, journals could include text about the version of record in a preliminary footnote to each article. For example, it could contain language to this effect: “Any revisions or changes to this article can be found in the Version of Record on the journal’s website/institutional repository.” While a journal could also send the updated version to various databases if it wanted to, all versions would refer back to the version of record for possible changes. The version of record would indicate when it was last updated if changes were made after publication. This, however, does not solve the problem of transparency, which would still depend on the journal clearly indicating what was changed.

¶76 Internally, journals should maintain a list of the databases that publish their articles in case they need to send them corrected versions. Journals should also request that the author update any versions under the author’s control, such as those on SSRN or in the digital repository of the author’s law school.<sup>141</sup>

¶77 The journal should also create a checklist to follow whenever it is confronted with a request for post-publication corrections. The list should refer to the policy, but also could refer to previous instances of post-publication corrections and details of how these were handled. The more information that a journal has, the more likely it is to consider all the consequences of making post-publication corrections, and the more information about its policies and practices it can provide to the person requesting the corrections.

## Phase II: Coordinated Action

### *Could Legal Journal Databases Provide a Solution?*

¶78 The major online databases of legal journals (HeinOnline, Lexis+, and WestlawEdge) currently have a policy of following instructions they receive from journal editors or law school administrators, but nothing more.<sup>142</sup> Perhaps the data-

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140. See NISO/ALPSP JAV TECH. WORKING GRP, *supra* note 117, at 3, for an accepted definition of the term.

141. Many law schools include faculty-authored articles published in law journals from other law schools in their institutional repositories.

142. See sources cited *supra* notes 19 & 20.

bases could be convinced to make changes, although they do not have the motivation or type of funding that a database like PubMed, which is part of the National Library of Medicine, has to ensure that it provides the current status of journal articles.

¶79 Another limitation of relying on these databases for a solution is that HeinOnline, Lexis+, and WestlawEdge are not the only databases that carry law journal articles. The “loose” nature of law journal publishing, with noncommercial publishers, open access repositories, and few restrictions on dissemination, means that online versions of articles can be found on other sites: for example, law school institutional repositories, JSTOR, EBSCO databases, SSRN, LawArXiv, and journal websites. Not everyone has access to the major legal databases—many readers likely find articles on open access sites. Thus, even a system developed in conjunction with these databases would not solve the problem; it might even exacerbate it by lulling authors or journal editors into thinking that the issue had been taken care of.

### *Coordinated Solutions Among Law Journals*

¶80 A solution like the one used by the NLM and PubMed requires coordination across a field of literature. This is made easier when journals are published by large commercial publishers, as is the case for most science and medical journals. Law reviews present almost the polar opposite situation—they are published by hundreds of law schools, edited by students who are in their positions for only one or two years. Even minor attempts at coordination are not often successful. For example, the National Conference of Law Reviews held annual conferences but suffered the same problems as law reviews, which are captive to the quality of their annually changing staffs.<sup>143</sup> The National Conference of Law Reviews asked two law professors, Michael Closen and Robert Jarvis, to draft a model code of ethics in 1992.<sup>144</sup> The model code was approved by the Conference, but no updates have been made to it since, and it does not consider questions about article corrections after publication.<sup>145</sup> There is no information available on the Conference website about which law reviews, if any, have adopted the ethics code.

¶81 Nonetheless, there is some precedent for journals working together or voluntarily agreeing to make changes caused by technology. Consider, for example, the Harvard Library Innovation Lab’s development of Perma.cc to fight the problem of link rot (web links that no longer function).<sup>146</sup> Perma allows authors or journals to preserve a webpage or document as it was the day they looked at it and provides web links to those preserved documents. The use of Perma links was slowly rolled out to law journals. The use of Perma or another reliable Internet

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143. The website of the Conference, <http://www.nclrlaw.com/index.php>, has disappeared and is up for sale by HugeDomains.com. No information later than 2017 is available about the organization, so it seems to be defunct. See, e.g., *National Conference of Law Reviews: Recap*, SCHOLASTICA (Apr. 10, 2017), <https://blog.scholasticahq.com/post/national-conference-of-law-reviews-2017-recap/> [<https://perma.cc/TY4B-EH7T>].

144. See Michael L. Closen & Robert M. Jarvis, *The National Conference of Law Reviews Model Code of Ethics: Final Text and Comments*, 75 MARQ. L. REV. 510 (1992).

145. *Id.*

146. *Project: Perma.cc*, LIBR. INNOVATION LAB, <https://lil.harvard.edu/projects/perma-cc/> [<https://perma.cc/47LW-C4ZR>].

archiving site is now recommended for use by the *Bluebook*,<sup>147</sup> and Perma citations are being used by the Law Library of Congress<sup>148</sup> as well as many law reviews.<sup>149</sup>

¶82 If the Harvard Innovation Lab or another law library or law school were to develop a method for linking journal articles and their revised versions and indicating whether an article had been updated or retracted (similar to what Crossmark does), it could be adopted by law reviews at low or no cost.<sup>150</sup> And if the *Bluebook* created a rule governing journal corrections it would encourage most law reviews to adopt whatever system is in place.

¶83 There are other agreements among journals that have been influential in the past. For example, in 1998 the Association of American Law Schools (AALS) drafted a model author/journal agreement that permitted authors to retain copyright and gave the journal only a license to publish.<sup>151</sup> Over the years, more and more law journals have adopted this type of agreement, until now it is the norm among law school-published journals.<sup>152</sup>

¶84 In the case of post-publication corrections, journals, their faculty advisors, and law school administrators should understand how the lack of consistency and transparency harms the integrity of both their individual journals and of legal scholarship as a whole. This could encourage them to work together, or at least to follow the lead of law schools that decide to occupy the forefront of adopting policies and practices to address the problem.

## Conclusion

¶85 In 2003, Emily Poworoznek published a study of how article corrections were identified and linked in online physical science journals.<sup>153</sup> Her study looked at whether online journals contained links both to and from corrections to the article in that journal. As in my brief case studies of law journal articles, Poworoznek found

147. THE BLUEBOOK, *supra* note 130, at 177 (Rule 18.2.1).

148. Charlotte Stichter, *Law Library of Congress Implements Solution for Link and Reference Rot*, DIGITALGOV (Apr. 13, 2016), <https://digital.gov/2016/04/13/law-library-of-congress-implements-solution-for-link-and-reference-rot/> [<https://perma.cc/VX97-6SZX>].

149. See *About Perma.cc*, PERMA.CC, <https://perma.cc/about#perma-partners> [<https://perma.cc/NF38-9KYF>] (listing the law libraries and journals that are partners in the Perma project).

150. A system similar to this was posited by Eugene Volokh, along with other suggestions for alerting readers to errors in law journal articles, whether they were contained in corrected versions or in responses and critiques by others. See Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors> [<https://perma.cc/BZ6T-FHSN>].

151. AALS Special Comm., *Model Author/Journal Agreement* (1998), archived at <http://www.webcitation.org/67X0Z3Jsc> [<https://perma.cc/H8P7-YX2K>]. The original document location, <http://www.aals.org/deansmemos/98-24.html>, has returned a “page not found” error since 2014, according to the Internet Archive link at <https://web.archive.org/web/20141120231802/http://www.aals.org/80/deansmemos/98-24.html> [<https://perma.cc/K7GG-QM2Y>].

152. See Benjamin J. Keele, *Copyright Provisions in Law Journal Publication Agreements*, 102 LAW LIBR. J. 269, 274–75, 2010 LAW LIBR. J. 15, ¶¶ 16–18 (reporting the results of examining author agreements from 78 law reviews). With the advent of institutional repositories at many law schools, the number is likely even higher now.

153. Emily L. Poworoznek, *Linking of Errata: Current Practices in Online Physical Sciences Journals*, 54 J. AM. SOC’Y INFO. SCI. & TECH. 1153 (2003).

inconsistencies in whether links were present and how they were labeled.<sup>154</sup> She concluded: “The disparities among journals are confusing and suggest that a standard phrase and accepted location for these links would be helpful to both readers and those implementing full-text linking from bibliographic databases.”<sup>155</sup> With the National Library of Medicine and PubMed systems in place today, as well as the NISO standard on journal versioning,<sup>156</sup> an update of Poworoznek’s study would likely find different, and better, results. This provides hope that by developing a system, and convincing law journals to use it, law journals might also be able to improve the transparency and consistency of post-publication corrections.

¶86 As publishers of legal scholarship, law journals must be committed to maintaining the integrity of that scholarship, and this includes using reliable methods to ensure that readers can rely on the articles they are reading. Student editors cannot be expected to think of all the possible repercussions involved each time they receive an author’s request to make a minor change to an article after publication or a university’s demand that the article be pulled from the online databases. Even in the easiest of cases, they cannot be relied on to know which databases contain their articles so that they send the corrected version to each of them, and we cannot know in any case how reliable each online vendor is in following through on requested corrections.

¶87 The invisibility of post-publication corrections to law journal articles is a threat to their scholarly integrity, one that digital publishing has exacerbated. This article proposes some solutions, but it is up to law journals to implement what works for them, probably through a process of trial and error. What is most important is that journals proactively consider the issue rather than merely reacting to each situation as it arises, and then to adopt a policy that is communicated to authors. While a perfect system is perhaps out of reach, implementing policies at the individual journal level and working toward coordinated solutions can provide a way for journals to ensure they maintain their scholarly integrity.

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154. For example, some journals linked to errata using terms such as “Forward references,” “Referred to by,” and “See also,” which do not clearly indicate that they refer to corrections rather than to related materials. *Id.* at 1158.

155. *Id.*

156. NISO/ALPSP JAV TECH. WORKING GRP, *supra* note 117.

## To Cite or Not to Cite: Is That Still a Question?\*

Deborah L. Heller\*\*

*Some states still restrict the citation of unpublished opinions, and the rules among the federal circuits vary slightly as well. This article looks at the history of case publication, the controversy over unpublished opinions, and the current rules related to the citation of unpublished cases.*

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### Introduction

¶1 The question of whether to cite an unpublished<sup>1</sup> opinion still lingers, despite changes brought by the near-universal use of electronic databases and search engines such as Google Scholar. Today’s law students often do not understand the concept of “unpublished” opinions or the rules against their being cited, both of which date to the print era. One might expect that the rules against citing unpublished opinions would have been eradicated years ago since, practically speaking, all cases are “published” since they are easily retrievable on legal research plat-

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\*\* Acting Director of the Law Library, Elisabeth Haub School of Law at Pace University, White Plains, New York. Thank you to all the staff at the Haub Law Library, and especially to Vicky Gannon for your editing assistance.

1. The terms “unpublished” and “unreported” are often used interchangeably to express this concept. This article uses the term “unpublished” to represent the concept.

forms. However, this expectation has not been met in every jurisdiction.<sup>2</sup> As with most issues of law and procedure in the United States, the rules differ depending on jurisdiction. This means that an attorney must be familiar with the rules of any state in which he or she practices.

¶2 This article first explores the history of the publication process for cases, beginning with the Year Books in England and nominative reports in the early United States, through the National Reporter System begun by the West Company, and up to the age of computer-assisted legal research. Next, it traces the evolution of the unpublished case through the 1970s, leading to the fight to change the Federal Rules of Appellate Procedure to allow citation to unpublished opinions. Finally, it discusses the current rules on citation to unpublished cases as well as the publication designation process throughout the United States.

## History of Case Publication

### English Case Reports

¶3 Reports of cases in English date back to the Year Books prepared in England from 1292 to 1535.<sup>3</sup> The Year Books record the law of the Middle Ages, from the time of Edward I to Richard III, and then into the reign of the Tudor kings Henry VII and Henry VIII, when the last was published in 1536.<sup>4</sup> The publication of the volumes began as a continuous enterprise, but eventually became intermittent.<sup>5</sup> Rumors swirled about the origins of the Year Books for years, with some believing that the volumes were compiled by official reporters paid by the king.<sup>6</sup> After careful study of the manuscripts, it became clear that the Year Books were based on notes taken by lawyers who were present in the court.<sup>7</sup>

¶4 Following the Year Books were reports of the 16th, 17th, and 18th centuries, which are collections of cases.<sup>8</sup> These reports are similar to the Year Books in that they appear to have been compiled for the reporter's personal use and contain a variety of material, from eulogies to deceased lawyers to arguments by attorneys and judges alike.<sup>9</sup> These reports differ from Year Books in that they clearly show the change from oral pleadings to written pleadings, thus allowing the relation of better defined issues and decisions.<sup>10</sup> Plowden, Coke, and Saunders compiled some of the famous reports of this era.<sup>11</sup> The volumes took on the name of the individual reporter, thus leading to the age of the nominative reporter, individually compiled by a member of the bar through his own notes, notes from other lawyers, or even the notes of judges.<sup>12</sup>

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2. See *infra* ¶¶28–29 and apps. A & B.

3. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 17 (1987).

4. W.S. HOLDSWORTH, *SOURCES AND LITERATURE OF ENGLISH LAW* 78 (1925).

5. *Id.*

6. *Id.* at 80.

7. *Id.* at 80–81.

8. *Id.* at 89.

9. *Id.* at 90–91.

10. *Id.* at 91.

11. *Id.* at 93.

12. Berring, *supra* note 3, at 17.

### Early American Reports

¶5 In the early days of the American bar, lawyers committed important decisions to memory and depended on treatises by some of the great English jurists, such as Blackstone and Coke.<sup>13</sup> Published law reports were not necessary in colonial America given the relatively few judicial decisions issued during that period;<sup>14</sup> however, colonial printers did publish pamphlets with proceedings from some of the more newsworthy trials.<sup>15</sup> Judges of the 18th century primarily provided oral rather than written justification for their judgments, thus leading to the compilation of personal notebooks to record the holdings in cases an attorney participated in or witnessed.<sup>16</sup> Later attorneys cited to these handwritten notes by “vouching the record.”<sup>17</sup> In most early reports of local decisions, reporters wrote down only the judges’ opinions and then added a summary of facts and arguments of counsel.<sup>18</sup>

¶6 The nominative reporters transferred from England to America and began to become more popular after the Revolutionary War.<sup>19</sup> Early reporters published their works without any official state encouragement and thus relied on volume sales to compensate for their efforts.<sup>20</sup> Massachusetts appointed an official court reporter of the Supreme Judicial Court in 1804.<sup>21</sup> The salary for the reporter was set at \$1000 annually, along with profits from the reports, to be paid from a fund comprised of the monies paid by attorneys to practice in the state.<sup>22</sup> However, the act did have a term of three years from passage.<sup>23</sup> The only qualification required of the reporter was that he be “some suitable person, learned in the law.”<sup>24</sup> The reporter was required to “obtain true and authentic reports of the decisions already made, or that may be hereafter made . . . .”<sup>25</sup> New York State authorized the appointment of a reporter to the Supreme Court of Judicature to report cases of impeachments, corrections of errors, or other cases deemed important.<sup>26</sup> The reporter received a salary of \$850 per year paid on a quarterly basis.<sup>27</sup> Additionally, the reporter had to pay for and deliver one copy of the published report to each of the courts of common pleas.<sup>28</sup> The New York act also included a term limit, but this time of five

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13. Marla Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1207–08 (2003).

14. *Id.* at 1207.

15. Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 52 (1981) (noting the publication of pamphlets on the treason trial of Nicholas Bayard in New York and “A Brief and True Narrative of Some Remarkable Passages Relating to sundry Persons afflicted by Witchcraft, at Salem Village which happened from the Nineteenth of March to the Fifth of April 1692” relating the events of the infamous Salem witch trials).

16. Charles J. Steigler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 LOY. L. REV. 535, 537 (2013).

17. *Id.*

18. Surrency, *supra* note 15, at 48.

19. Berring, *supra* note 3, at 19.

20. Surrency, *supra* note 15, at 53.

21. 1804 Mass. Acts 449.

22. *Id.* at 450.

23. *Id.*

24. *Id.*

25. *Id.*

26. 1804 N.Y. Laws 462.

27. *Id.*

28. *Id.*

years.<sup>29</sup> Several other states followed and began passing legislation to appoint an official reporter.<sup>30</sup> Other states during the same time period had case reports compiled by individuals without any legislative requirement dictating the publication of court decisions.<sup>31</sup> By the end of the 19th century, all reporters were paid a salary for their work, and the printed reports, which some states had required the reporter to pay for, were now published at the expense of the states.<sup>32</sup>

¶7 Decisions of the U.S. Supreme Court have been reported regularly from its infancy.<sup>33</sup> However, the first legal requirement for a reporter did not appear until 1817.<sup>34</sup> The legislation provided that the court appoint a person to report its decisions at an annual salary of \$1000, provided the reporter print and publish the decisions within six months of their issue and, at his own expense, deliver 80 copies to the Secretary of State.<sup>35</sup> The Secretary of State distributed these copies to the long list of officials and departments named in the Act, with any remaining copies going to the Library of Congress.<sup>36</sup> The act was limited to a term of three years.<sup>37</sup> The Supreme Court appointed Henry Wheaton as its first official reporter in 1817, although Wheaton had published reports of the court going back to 1816.<sup>38</sup>

¶8 Henry Wheaton is famous not only for being the first official Supreme Court Reporter; he also brought an action regarding copyright of case reporters that made its way to the Supreme Court itself.<sup>39</sup> In 1828, Wheaton accused Richard Peters of infringing Wheaton's copyright by publishing Supreme Court reports that included condensed versions of the decisions Wheaton originally reported.<sup>40</sup> The litigation lasted until the Supreme Court issued an opinion in 1834.<sup>41</sup> Justice McLean delivered the opinion of the Court and noted at the end that "[i]t may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that

29. *Id.*

30. See, e.g., Del. Laws 188–89 (1837) (assigning the associate judge of the Superior Court in Kent County as the reporter of decisions of the Superior Court, Court of Oyer and Terminer, and Court of Errors and Appeals, and providing an increased salary for this role); 1820 Me. Laws 18–19 (assigning the duty to appoint a reporter of decisions of the Supreme Judicial Court to the governor with the advice of the council at a salary of \$600 annually); 1806 N.J. Laws 688–89 (authorizing the appointment of a person skilled in New Jersey law to compile the cases of the Supreme Court and provide to the state printer for printing); 1818 N.C. Sess. Laws 8 (providing for the judges of the Supreme Court to appoint a reporter of decisions for the court at an annual salary of \$500); 1823 Vt. Acts & Resolves 9 (authorizing the governor, with the advice of the council, to appoint a person learned in the law to report the decisions of the Supreme Court of Judicature at the annual salary of \$400, along with profits from the publication of the reports); 1819 Va. Acts 16 (authorizing the Court of Appeals to appoint a proper person to report the decisions of the court on or before January 1, 1821, and annually thereafter).

31. *American Reports and Reporters*, 22 AM. JURIST & L. MAG. 108, 126 (1839) [hereinafter *American Reports*].

32. Surrency, *supra* note 15, at 60.

33. *American Reports*, *supra* note 31, at 110.

34. Act of Mar. 3, 1817, ch. 63, 3 Stat. 376.

35. *Id.*

36. *Id.*

37. *Id.*

38. Surrency, *supra* note 15, at 56.

39. Thomas A. Woxland, *Forever Associated with the Practice of Law: The Early Years of the West Publishing Company*, 5 LEGAL REFERENCE SERVS. Q. 115, 121 (1985).

40. *Id.*

41. *Wheaton v. Peters*, 33 U.S. 591 (1834).

the judges thereof cannot confer on any reporter any such right.”<sup>42</sup> Following the decision in *Wheaton*, many states decided to retain themselves the copyright to the court reports.<sup>43</sup>

### John West and the Birth of the National Reporter System

¶9 John West began his career as a traveling salesman with the D.D. Merrill Book store in St. Paul, Minnesota, in 1870.<sup>44</sup> Merrill primarily sold office supplies and equipment, but he also acted as a distributor of legal publications from the eastern United States.<sup>45</sup> West worked for Merrill for two years before using to his advantage the knowledge that customers waited long periods to receive court reports and practice books. He established himself as the first full-time law book salesman in Minnesota.<sup>46</sup> He worked as John B. West, Publisher and Bookseller, from 1872 until 1876, when he convinced his brother Horatio to help him start a weekly legal newsletter called the *Syllabi*.<sup>47</sup> The *Syllabi* contained information on various issues adjudicated by the Minnesota courts.<sup>48</sup> The publication soon became popular, and six months after it began its name changed to the *North Western Reporter*.<sup>49</sup> In 1879, the *North Western Reporter* began a new series in which it included the full text of current decisions from Iowa, Michigan, Minnesota, Nebraska, Wisconsin, and the Dakota Territory.<sup>50</sup> Over the next few years, West began publishing the *Federal Reporter* and the *Supreme Court Reporter*. In 1882, the business incorporated, and the West Publishing Company was born.<sup>51</sup>

¶10 John West did not invent the idea of regional court reporting. Around the same time, A.L. Bancroft and Company published the *West Coast Reporter*, and William Gould, Jr. and Company of Albany, New York, published the *Eastern Reporter*.<sup>52</sup> However, West did make a move to provide nationwide coverage of reporters by announcing the prospective publication of four new regional reporters in 1885.<sup>53</sup> In 1886 and 1887, West purchased the *West Coast Reporter* and *Eastern Reporter* respectively.<sup>54</sup> West’s nationwide coverage put other publishers at a disadvantage; and by 1888, West Publishing Company won the court reporting publishing war when many rivals discontinued their publications.<sup>55</sup>

¶11 Fast-forward nearly a century and the legal publishing world changed once again when Lexis introduced the first computer-assisted legal research system in April 1973.<sup>56</sup> Lexis was competing with West’s National Reporter System, and so the inclusion of unpublished cases in the system could be viewed as a marketing advan-

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42. *Id.* at 668.

43. Woxland, *supra* note 39, at 121.

44. *Id.* at 115.

45. *Id.*

46. *Id.*

47. *Id.* at 115–16.

48. *Id.* at 116.

49. *Id.*

50. *Id.*

51. *Id.*

52. Surrency, *supra* note 15, at 62.

53. Woxland, *supra* note 39, at 116.

54. Surrency, *supra* note 15, at 62.

55. Woxland, *supra* note 39, at 116.

56. William R. Mills, *The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age*, 53 N.Y.L. SCH. L. REV. 917, 923 (2008).

tage.<sup>57</sup> The system featured full-text database searching, which could serve as an alternative to West's digest system for finding case law.<sup>58</sup> Two years later, West Publishing Company introduced Westlaw.<sup>59</sup> Westlaw did not initially include the cases but allowed searching only of West headnotes.<sup>60</sup> In 1978, Westlaw added the cases and permitted full-text searching of the opinions.<sup>61</sup> Soon after, Westlaw began loading cases excluded from the print National Reporter System volumes.<sup>62</sup>

## The Evolution of the Unpublished Case

### The Seeds of the Idea

¶12 Declining to publish some court cases is not new. More than 350 years ago, Sir Francis Bacon, then Lord Chancellor, suggested to King James I that case reporters omit cases “merely of iteration and repetition.”<sup>63</sup> Justice Story complained about the number of law reports back in 1831.<sup>64</sup> The American Bar Association (ABA) appointed a standing committee in 1894 to study and report on how to stop the proliferation of law books.<sup>65</sup> The ABA appointed another committee in 1935 to report on the law book issue, and that committee issued a report in 1940.<sup>66</sup> In 1964, the Judicial Conference of the United States resolved that the courts of appeals should publish only “opinions which are of general precedential value.”<sup>67</sup> In 1971, the Federal Judicial Center issued an annual report that noted “widespread consensus that too many opinions are being printed or published or otherwise disseminated.”<sup>68</sup> The Judicial Conference, in 1972, instructed the various courts of appeals to develop their own plans for selective publication of judicial decisions.<sup>69</sup> Every court of appeals adopted a publication plan by 1974 and began implementing it over the years that followed.<sup>70</sup>

¶13 In 1973, the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice issued its report on standards for publication of judicial opinions.<sup>71</sup> The report recommended certain standards for the publication of opinions;<sup>72</sup> they should be short and deal mainly with the facts as they relate to the law, be written especially for the parties involved, but “need not be polished.”<sup>73</sup>

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 924.

62. *Id.*

63. Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 543, 545 (1997).

64. Hon. John J. O'Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13, 14 (1949).

65. *Id.*

66. *Id.*

67. Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 708 (2006).

68. *Id.*

69. *Id.* at 709.

70. *Id.*

71. ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973) [hereinafter STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS].

72. *Id.* at 4.

73. *Id.* at 5.

In contrast, published opinions should involve cases with broader importance and thus be written with care and attention.<sup>74</sup> The report named various problems with unlimited publication, including the jurist's burden of writing opinions, the lawyer's burden of searching endlessly for factual analysis, the publisher's burden of balancing reasonable prices with capacity to publish, and the innovator's burden of creating and expanding law-finding devices.<sup>75</sup> The report advised the highest court in a jurisdiction to promulgate rules for the standard for publication.<sup>76</sup> Furthermore, it urged the repeal of statutes that mandate publication of all appellate opinions, opting instead to advocate for publication of opinions only if a majority of the judges participating in the decision agreed that the standards for publication were satisfied.<sup>77</sup> The report outlined four standards for publication: (1) the opinion sets a new rule of law or modifies an existing rule; (2) the opinion involves a legal issue of continuing public interest; (3) the opinion criticizes existing law; or (4) the opinion resolves an apparent conflict.<sup>78</sup> The committee debated three alternatives for citation of unpublished decisions: (1) unpublished cases have precedential value and can be cited; (2) unpublished cases have no precedential value; or (3) unpublished cases may not be cited to support statements of law, and precedential value was not discussed at all.<sup>79</sup> The committee suggested applying the third option.<sup>80</sup>

¶14 In 1974 and 1975, the Commission on Revision of the Federal Court Appellate System conducted an inquiry into the work of the federal courts of appeals.<sup>81</sup> Senator Roman Hruska chaired the Commission, which included members of Congress, judges, teachers, and lawyers.<sup>82</sup> The Commission held hearings in 1974 and 1975 and issued its final report in June 1975.<sup>83</sup> The Hruska Report spanned more than 170 pages and included recommendations such as establishing a national court of appeals and expansion of the judiciary through congressional appointment of more appellate judges to properly handle the mounting caseloads in the circuits.<sup>84</sup> As part of the report, the Commission surveyed the opinions of attorneys in three circuits (Second, Fifth, and Sixth).<sup>85</sup> The rate of return from each circuit exceeded 60 percent.<sup>86</sup> More than three-fourths of the attorneys questioned agreed that it was important for courts to issue a memorandum opinion, at a minimum, so that courts avoid the appearance of acting arbitrarily.<sup>87</sup> However, attorneys did not insist on either publication or a formal opinion.<sup>88</sup> "Majorities in each circuit were of the view

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74. *Id.*

75. *Id.* at 6–8.

76. *Id.* at 9.

77. *Id.* at 9–10.

78. *Id.* at 15–17.

79. *Id.* at 20.

80. *Id.*

81. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1172 (1978).

82. *Id.*

83. *Id.*

84. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE vii, ix (1975) [hereinafter HRUSKA REPORT].

85. *Id.* at 42.

86. *Id.*

87. *Id.* at 49.

88. *Id.*

that in many cases it is not necessary to issue a written opinion for publication.”<sup>89</sup> In terms of written opinions, the report recommended “that in every case there be some record, however brief and whatever the form, of the reasoning which underlies the decision.”<sup>90</sup> The report further recommended the use of memoranda, brief per curiam opinions, and other alternatives when appropriate, and strongly encouraged selective publication.<sup>91</sup> The report discussed some of the issues with selective publication, including access to opinions and citation of unpublished opinions, but noted that the Judicial Conference was the appropriate organization to solve such issues or make recommendations.<sup>92</sup>

¶15 The growing caseload of the federal circuit courts is provided as one of the main reasons advanced for choosing to designate some opinions as unpublished. In 1964, at the same time that the Judicial Conference was suggesting that only precedential decisions be published, 78 judges disposed of 5700 cases in the courts of appeals.<sup>93</sup> In 1972, when the courts were instructed to develop their own selective publication plans, 97 judges disposed of 13,828 cases.<sup>94</sup> By 1977, although the number of judges remained at 97, they now issued dispositions in 17,784 cases.<sup>95</sup> Along with the rationale of case overload is the corollary that issuing formal published opinions is time consuming for judges and their clerks.<sup>96</sup> According to Judge Boyce F. Martin, Jr., “we use unpublished opinions in order to get through our docket.”<sup>97</sup> Judge Martin goes on to estimate that he and his clerks spend about half as much time on an average unpublished opinion as they do on a published opinion since the opinions are generally shorter, involve straightforward points of law, and take less research time.<sup>98</sup>

¶16 The “threat to a cohesive body of law” by publishing all decisions is another reason provided for selective publication.<sup>99</sup> The fear is that an ever-larger body of case law will make it harder and more time consuming to find that needle in a haystack among cases; thus, the main principles of law will be lost among the chaff.<sup>100</sup> As a corollary to this idea, the creation of more published law would make legal research more expensive because libraries would need to purchase more and more case reporters.<sup>101</sup> And the increase in case reporters would necessitate more shelving and storage capacity, which also proves costly.<sup>102</sup> However, many libraries now rely on electronic databases for case research, so the expense caused by expanded storage space is not quite the same now as it might have been 40 years ago.

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89. *Id.*

90. *Id.* at 50.

91. *Id.* at 51.

92. *Id.* at 51–52.

93. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATIVE OFFICE OF THE U.S. COURTS 164 (1977).

94. *Id.*

95. *Id.*

96. Reynolds & Richman, *supra* note 81, at 1183.

97. Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189 (1999).

98. *Id.* at 190.

99. STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 71, at 6.

100. Reynolds & Richman, *supra* note 81, at 1184.

101. *Id.*

102. *Id.*

¶17 Initially, attorneys and members of the public could procure an unpublished opinion by going to the clerk's office in the courthouse and requesting a copy of the decision.<sup>103</sup> However, as the use of computer-assisted legal research grew, more and more unpublished opinions became available through these platforms.<sup>104</sup> In 2001, West launched a new case reporter called the *Federal Appendix*.<sup>105</sup> The *Federal Appendix* followed the same formatting as the other case reporters in the National Reporter System, including headnotes and Key Numbers.<sup>106</sup> It differed from the others in that it published *only* previously unpublished circuit court opinions.<sup>107</sup> The policy of West was to include every unpublished case that it received from the various circuits and to exclude only those cases that were so informal that they could not produce a synopsis and at least one headnote.<sup>108</sup> Finally, the E-Government Act of 2002 required that federal courts post all written opinions, even those designated as unpublished, on their own websites.<sup>109</sup>

¶18 The question of how to handle unpublished opinions for citation purposes goes hand in hand with the publication decision. Two arguments dominate the citation debate.<sup>110</sup> First, allowing citation would frustrate the purpose of limited publication.<sup>111</sup> If unpublished opinions can be cited, judges might need to do more than merely apply the facts to the law for the purpose of the parties involved and instead provide a greater explanation as they do in published opinions, thus taking more judicial time.<sup>112</sup> Second, permitting citation might unfairly advantage some (better resourced) litigants over others.<sup>113</sup> Since some large law firms have more money and access to resources that index unpublished opinions, their clients could presumably have an advantage over clients of small firms or pro se litigants.<sup>114</sup>

### *Anastasoff*

¶19 Since the late 1970s, all of the federal circuits maintained their own rules for publication of opinions.<sup>115</sup> Only the U.S. Court of Appeals for the District of Columbia Circuit discontinued the practice of labeling some opinions nonprecedential by allowing all opinions after January 1, 2002, to be cited as precedent, whether published or unpublished.<sup>116</sup> The no-citation debate took center stage after the Eighth Circuit Court of Appeals issued its decision in *Anastasoff v. United States*.<sup>117</sup> Anastasoff filed a request for a refund of taxes due on April 15, 1993, but it was not received by the IRS until April 16, 1996, and so the IRS denied the claim on the

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103. Gant, *supra* note 67, at 709.

104. *Id.*

105. William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429, 444 (2002).

106. *Id.*

107. *Id.*

108. *Id.*

109. E-Government Act of 2002, Pub L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913.

110. Reynolds & Richman, *supra* note 81, at 1185.

111. *Id.*

112. *See id.* at 1186.

113. *Id.* at 1185.

114. *Id.* at 1187.

115. Gant, *supra* note 67, at 710.

116. *Id.*

117. 223 F.3d 898 (8th Cir. 2000).

ground that it was not timely filed within the three-year refund window.<sup>118</sup> The three-judge panel hearing the case noted that the circuit had rejected a similar legal argument, about a request mailed before the deadline but received after, made in an unpublished opinion of the court back in 1992.<sup>119</sup> Anastasoff argued that *Christie* did not bind the court since it was unpublished and therefore not precedent under the circuit rules.<sup>120</sup> The three-judge panel concluded that

8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional . . . . Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.<sup>121</sup>

¶20 At the same time the Eighth Circuit issued its opinion in *Anastasoff*, the Second Circuit reached an opposite conclusion about the timeliness of the demand for refund.<sup>122</sup> Due to the Second Circuit decision, Anastasoff requested rehearing en banc.<sup>123</sup> On receipt of the petition, the government informed the court that it would pay Anastasoff the money she requested and asked for a dismissal of the rehearing as moot.<sup>124</sup> The Eighth Circuit agreed that the case was now moot and decided to vacate its previous judgment in the case.<sup>125</sup> The court also noted that “the constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.”<sup>126</sup>

¶21 In 2001, the Ninth Circuit, in an opinion authored by Judge Kozinski, weighed in on the constitutionality of court rules prohibiting citation to unpublished opinions.<sup>127</sup> In that case, the court ordered counsel to show cause why he should not receive a sanction for citing an unpublished opinion in his brief in contravention of Circuit Court Rule 36-3.<sup>128</sup> Ultimately, the court discharged the order to show cause finding that “*Anastasoff* may have cast doubt on our rule’s constitutional validity.”<sup>129</sup> However, Judge Kozinski provided a virulent attack on the decision in *Anastasoff* that no-citation rules are unconstitutional:

Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. On the contrary, we believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit. We agree with *Anastasoff* that we—and all courts—must follow the law. But we do not think this means we must also make binding law every time we issue a merits decision. The common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the

118. *Id.* at 899.

119. *Id.* (citing *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992)).

120. *Id.*

121. *Id.* at 900, 905.

122. *Weisbart v. U.S. Dep’t of Treasury*, 222 F.3d 93, 96–97 (2d Cir. 2000).

123. Appellant’s Petition for Rehearing En Banc at 1, *Anastasoff v. United States*, 235 F.3d 1054 (2000) (No. 99-3917), 2000 WL 34468102, at \*1.

124. Appellee’s Response to Appellant’s Petition for Rehearing En Banc at 3–4, *Anastasoff v. United States*, 235 F.3d 1054 (2000) (No. 99-3917), 2000 WL 34017024, at \*3–4.

125. *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000).

126. *Id.*

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

128. *Id.* at 1158.

129. *Id.* at 1180.

judicial function is separating the cases that should be precedent from those that should not. Without clearer guidance than that offered in *Anastasoff*, we see no constitutional basis for abdicating this important aspect of our judicial responsibility.<sup>130</sup>

### The Move to Federal Rule of Appellate Procedure 32.1

¶22 With *Anastasoff* and *Hart*, the debate over unpublished opinions in general and citation of unpublished opinions began anew.<sup>131</sup> On January 16, 2001, then Solicitor General Seth P. Waxman sent a letter to Judge Will Garwood, Chair of the Appellate Rules Committee, suggesting the introduction of a new rule 32.1 to the Federal Rules of Appellate Procedure allowing citation of unpublished opinions in all federal courts of appeals.<sup>132</sup> The Appellate Rules Committee had the topic of citation to unpublished opinions on its study agenda from 1991 until 1997.<sup>133</sup> In his May 1998 report to the Standing Committee on Rules of Practice and Procedure, Judge Garwood noted that he had reached out to chief judges on all the circuits and heard back from almost all, as well as other circuit judges, and “[t]he judges were virtually unanimous—and, on the whole, quite emphatic—that the Committee should not propose rules addressing *any* of these topics”<sup>134</sup> (meaning unpublished opinions and citation to the same). At its April 2001 meeting, the Appellate Rules Committee discussed the proposal floated by Solicitor General Waxman and agreed to postpone any further discussion to some later meeting.<sup>135</sup>

¶23 At the April 2002 meeting of the Appellate Rules Committee, chaired by then-Judge Samuel A. Alito of the Third Circuit, he reported he had again surveyed chief judges on unpublished opinion citation and received mixed responses.<sup>136</sup> The Committee debated whether to suggest a national rule.<sup>137</sup> Supporters of allowing citation to unpublished opinions noted that some district courts and state courts allow citation for persuasive purposes, no-citation rules raise civil liberties concerns, and courts could still issue unpublished decisions.<sup>138</sup> Those who did not support allowing citation noted that some circuit judges could view it as the first step in eliminating popular nonprecedential opinions, caseloads do not allow writing a published opinion in each case, the opinions in unpublished cases have almost no value to anyone other than the instant parties, and it would create too much case law.<sup>139</sup> The Committee voted six to three to approve the Justice Department proposal from Solicitor General Waxman, but changed unpublished to nonpreceden-

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130. *Id.*

131. *Gant*, *supra* note 67, at 717–18.

132. *Id.* at 720–21.

133. *Id.* at 719–20.

134. JUDGE WILL GARWOOD, COMMITTEE ON RULES OF APPELLATE PROCEDURE MAY 1998 REPORT 2–3 (May 12, 1998), [http://www.uscourts.gov/sites/default/files/fr\\_import/AP5-1998.pdf](http://www.uscourts.gov/sites/default/files/fr_import/AP5-1998.pdf) [<https://perma.cc/8JEQ-ZVHE>].

135. MINUTES OF THE APRIL 11, 2001, MEETING OF THE ADVISORY COMMITTEE ON RULES OF APPELLATE PROCEDURE 64–65 (Apr. 11, 2001), [https://www.uscourts.gov/sites/default/files/fr\\_import/app0401.pdf](https://www.uscourts.gov/sites/default/files/fr_import/app0401.pdf) [<https://perma.cc/9JYX-Q336>].

136. MINUTES OF THE APRIL 22, 2002, MEETING OF THE ADVISORY COMMITTEE ON RULES OF APPELLATE PROCEDURE 23 (Apr. 22, 2002), [https://www.uscourts.gov/sites/default/files/fr\\_import/app0402.pdf](https://www.uscourts.gov/sites/default/files/fr_import/app0402.pdf) [<https://perma.cc/M5UX-N8PU>].

137. *Id.* at 24–27.

138. *Id.* at 24.

139. *Id.* at 25.

tial decisions and changed subdivision (b) of the rule, eliminating the requirement for parties to serve copies of nonprecedential opinions they cite.<sup>140</sup>

¶24 At the November 2002 meeting, the Appellate Rules Committee discussed three versions of proposed Rule 32.1<sup>141</sup> Alternative A was the most permissive, allowing a court of appeals to designate an opinion as nonprecedential and allowing citation to nonprecedential opinions without any restriction.<sup>142</sup> Alternative B did not address whether courts should issue nonprecedential opinions, but only mentioned that nonprecedential opinions may be cited to without restriction.<sup>143</sup> Alternative C was the most restrictive, allowing citation to nonprecedential opinions “only if no precedential opinion of the forum court adequately addresses that issue.”<sup>144</sup> The Committee rejected Alternative A by consensus after a brief discussion.<sup>145</sup> After much deliberation the Committee approved by a vote of seven to one (with one abstention) Alternative B with some changes to be discussed at the spring 2003 meeting.<sup>146</sup>

¶25 At the May 2003 meeting, the Appellate Rules Committee approved the redrafted Rule 32.1 by a vote of seven to one (with one abstention) with a slight modification.<sup>147</sup> The approved Rule 32.1 read:

Rule 32.1 Citation of Judicial Dispositions

Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent” or the like, unless that prohibition is generally imposed upon the citation of all sources.

Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.<sup>148</sup>

The one approved change to subsection (a) was to make it clear that no restriction can be imposed on the citation of unpublished judicial opinions unless the restriction is also imposed on the citation of published judicial opinions. Judge Alito, as the chair of the Committee, wrote a memorandum to the Standing Committee, proposing the new Rule 32.1.<sup>149</sup> The last part of subsection (a) was changed to read “unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.”<sup>150</sup> The proposed Rule

140. *Id.* at 26–27.

141. MINUTES OF THE NOVEMBER 18, 2002, MEETING OF THE ADVISORY COMMITTEE ON RULES OF APPELLATE PROCEDURE 22–39 (Nov. 18, 2002), [https://www.uscourts.gov/sites/default/files/fr\\_import/app1102.pdf](https://www.uscourts.gov/sites/default/files/fr_import/app1102.pdf) [<https://perma.cc/XW2M-94RK>].

142. *Id.* at 22.

143. *Id.* at 28.

144. *Id.* at 32.

145. *Id.* at 35.

146. *Id.* at 39.

147. MINUTES OF THE MAY 15, 2003, MEETING OF THE ADVISORY COMMITTEE ON RULES OF APPELLATE PROCEDURE 11–17 (May 15, 2003), [https://www.uscourts.gov/sites/default/files/fr\\_import/app0503.pdf](https://www.uscourts.gov/sites/default/files/fr_import/app0503.pdf) [<https://perma.cc/93PA-C6F8>].

148. *Id.* at 11.

149. JUDGE SAMUEL A. ALITO, JR., REPORT OF ADVISORY COMMITTEE ON APPELLATE RULES 32–39 (May 22, 2003), [https://www.uscourts.gov/sites/default/files/fr\\_import/AP5-2003.pdf](https://www.uscourts.gov/sites/default/files/fr_import/AP5-2003.pdf) [<https://perma.cc/5KCD-F785>].

150. *Id.* at 32.

32.1 received more than 500 comments, making it the second most commented upon rule in federal rulemaking up to that time and the most commented upon proposed appellate rule.<sup>151</sup> The Appellate Rules Committee also held hearings on proposed Rule 32.1.<sup>152</sup> On April 14, 2004, the Appellate Rules Committee discussed proposed Rule 32.1 yet again. Then–Judge John G. Roberts, Jr., of the D.C. Circuit reported on his appearance at the Standing Committee’s meeting in January, since he attended in place of Judge Alito.<sup>153</sup> Judge Roberts “stressed that the rule and accompanying Committee Note were drafted to take no position on the issue of whether it is lawful for a court to refuse to give binding precedential effect to one of its opinions.”<sup>154</sup> The Committee voted six to one (with one person missing) to approve Rule 32.1.<sup>155</sup> At its June 2004 meeting, the Standing Committee on Rules of Practice and Procedure considered Rule 32.1 and decided to return it to the advisory committee and recommend an empirical study about the practical experience of circuits that adopted rules allowing citation of unpublished opinions.<sup>156</sup>

¶26 The Federal Judicial Center (FJC) conducted such a study and issued its final report on December 21, 2005.<sup>157</sup> The study included a survey of judges and attorneys, and a review of case files.<sup>158</sup> Judges in circuits that permitted citation to unpublished opinions did not think that the number of unpublished opinions, length of unpublished opinions, or time to draft unpublished opinions would change if the rules on citing unpublished opinions changed.<sup>159</sup> Judges in circuits with recently relaxed rules reported some increase in citation to unpublished opinions, but no impact on their work.<sup>160</sup> The federal appellate attorneys generally expressed support for a rule permitting citation to unpublished opinions.<sup>161</sup> According to the 650 cases reviewed as part of the study, about one-third included published opinions, and most of the unpublished opinions were under 500 words, which makes them of limited citation value.<sup>162</sup> The Appellate Rules Committee discussed the FJC preliminary report and approved Rule 32.1 by a vote of seven to two.<sup>163</sup> The Standing Committee finally approved, without objection, the new rule

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151. Gant, *supra* note 67, at 723. Individual comments can be viewed at <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-comments?committee=40&year%5Bvalue%5D%5Byear%5D=2003> [<https://perma.cc/9L9L-VMXQ>].

152. TRANSCRIPT OF HEARING BEFORE ADVISORY COMMITTEE ON APPELLATE RULES (Apr. 13, 2004), [www.nonpublication.com/aphearing.htm](http://www.nonpublication.com/aphearing.htm) [<https://perma.cc/8D9L-7CPP>].

153. MINUTES OF THE APRIL 13–14, 2004, MEETING OF THE ADVISORY COMMITTEE ON RULES OF APPELLATE PROCEDURE 1–2 (Apr. 13–14, 2004), [https://www.uscourts.gov/sites/default/files/fr\\_import/app0404.pdf](https://www.uscourts.gov/sites/default/files/fr_import/app0404.pdf) [<https://perma.cc/G9Q9-TDVV>].

154. *Id.* at 2.

155. *Id.* at 9.

156. MINUTES OF THE JUNE 17–18 COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 8–11 (June 17–18, 2004), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST06-2004-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST06-2004-min.pdf) [<https://perma.cc/F5YF-6T3G>].

157. ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS (2005), <https://www.fjc.gov/sites/default/files/2012/Citatio3.pdf> [<https://perma.cc/6VDD-L3XN>].

158. *See id.*

159. *Id.* at 6.

160. *Id.*

161. *Id.* at 17.

162. *Id.* at 22.

163. MINUTES OF THE APRIL 18, 2005, MEETING OF THE ADVISORY COMMITTEE ON RULES OF APPELLATE PROCEDURE 2–18 (Apr. 18, 2005), [https://www.uscourts.gov/sites/default/files/fr\\_import](https://www.uscourts.gov/sites/default/files/fr_import)

by voice vote at its June 2005 meeting.<sup>164</sup> At its meeting in September 2005, the Judicial Conference approved Rule 32.1, but added that it would apply only to judicial dispositions issued on or after January 1, 2007, and transmitted the rule to the Supreme Court with the recommendation that it be adopted.<sup>165</sup> The Supreme Court approved the new Rule 32.1 to take effect on December 1, 2006.<sup>166</sup>

¶27 The one question unanswered by the adoption of Rule 32.1 is the precedential value of any unpublished opinion.<sup>167</sup> The Committee Notes to Rule 32.1 specifically state, “Rule 32.1 addresses only the *citation* of judicial dispositions that have been *designated* as ‘unpublished’ or ‘non-precedential’—whether or not those dispositions have been published in some way or are precedential in some sense.”<sup>168</sup> The consensus is that, at most, unpublished opinions would have persuasive value.<sup>169</sup>

## The Current Rules on Publication and Citation to Unpublished Decisions

### Federal Circuits

¶28 All federal courts must at least follow Federal Rule of Appellate Procedure 32.1.<sup>170</sup> However, just as before, each circuit can also adopt local rules that govern the publication of decisions in the circuit, as well as the citation to unpublished decisions.<sup>171</sup> Some circuits are more permissive than Rule 32.1 and allow for citation of opinions regardless of publication date.<sup>172</sup> Others may have a different opening date of publication than 2007. Some essentially follow the Federal Rules of Appellate Procedure.<sup>173</sup> Attorneys must check the local circuit rules to know what

/AP04-2005-min.pdf [https://perma.cc/R4QC-WDXA] [hereinafter MINUTES APRIL18, 2005].

164. MINUTES OF THE JUNE 15–16 COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 10 (June 15–16, 2004), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST06-2005-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST06-2005-min.pdf) [https://perma.cc/7ZHK-TSFS].

165. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 36–37 (2005), <https://www.uscourts.gov/sites/default/files/2005-09.pdf> [https://perma.cc/RH7K-A3T5].

166. Order Amending Federal Rules of Appellate Procedure (Apr. 12, 2006), <https://www.supremecourt.gov/orders/courtorders/frap06p.pdf> [https://perma.cc/VP33-DCB8].

167. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 68–71 (2013).

168. MINUTES APRIL 18, 2005, *supra* note 163, at 3 (emphasis in original).

169. RICHMAN & REYNOLDS, *supra* note 167, at 69–70 (citing David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. APP. PRAC. & PROCESS 19, 45–46 (2010); Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 923 (2008); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 497 (2003)).

170. FED. R. APP. P. 32.1:

- (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
  - (i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and
  - (ii) issued on or after January 1, 2007.
- (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

171. See app. A, *infra*.

172. *Id.*

173. *Id.*

the court in their jurisdiction allows. The circuits also have different local rules for publication.<sup>174</sup> Some provide a laundry list of criteria to consider before making a publication decision.<sup>175</sup> Others barely mention the publication process.<sup>176</sup> Some circuits even provide the policy behind publication decisions.<sup>177</sup> The table in appendix A lays out the current rules regarding citation of unpublished opinions as well as publication rules in the federal circuits.

### States/Territories

¶29 The states have differing rules regarding whether a party can cite an unpublished case for anything other than the usually accepted reasons of *res judicata*, claim preclusion, or law of the case. Some states still do not allow citation to unpublished cases, while other states allow citation to an unpublished case after a definitive date. Some states require a party citing an unpublished opinion to provide a copy to opposing counsel, while others do not. For the most part, unpublished opinions do not carry the same precedential power as published decisions but, again, the rules vary among the states. It is important to note that as late as 2019, some states were still changing the rules about citation to unpublished opinions, so researchers should still check this every so often. The table in appendix B lays out the current rules about citation to unpublished opinions and publication rules among the 50 states, the District of Columbia, and U.S. territories.

### Conclusion

¶30 The case publication landscape has changed over the centuries, moving from personal annotations of trials to collected regional reporters to online access through court websites and databases. U.S. case law has proliferated exponentially, and in response the limited publication and limited citation movement was born. But does limiting case publication still make sense now that print sources are used infrequently, databases are increasingly more sophisticated, and searching for cases is easier? Legal professionals should regularly ask this question as they evaluate whether older rules for publishing cases remain useful. Since the major reason for limited citation—fairness—is a lesser concern in the digital landscape, courts should allow citation to all cases to ensure that litigants may use existing decisions openly and freely.

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

**Appendix A: Federal Circuit Court Citation/Publication Rules**

CIRCUIT	RULE/STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	PROVISION OF COPIES REQUIRED	PUBLICATION RULES
First	<p>1ST CIR. R. 32.1.o (citation)</p> <p>1ST CIR. R. 36.o(b) (publication)</p> <p>1ST CIR. R. 36.o(c) (precedent)</p>	<p>Citation allowed regardless of date for dispositions of the circuit.</p> <p>FED. R. APP. P. 32.1 and rules of the other courts govern citation for dispositions of other courts, but may always cite for res judicata, collateral estoppel, law of the case, double jeopardy, abuse of writ, or similar doctrine.</p>	<p>Persuasive value unless for res judicata, collateral estoppel, law of the case, double jeopardy, abuse of writ, or similar doctrines.</p> <p>However, a panel decision to issue an unpublished opinion means the panel sees no precedential value.</p>	N/A	<p>Policy of the court is that opinions be published and available for citation.</p> <p>However, policy overcome when opinion does not state new rule of law, modify an established rule, apply an established rule to novel facts, or provide a significant guide to future parties.</p> <p>Publication will occur if there is a dissent or more than one opinion, unless all participating judges decide against publication. Any party or interested person may apply for good cause shown to the court for publication of an unpublished opinion.</p>
Second	<p>2D CIR. R. 32.1.1 (citation)</p>	<p>Parties may cite summary orders issued on or after 1/1/2007. Parties may not cite summary orders issued before 1/1/2007 except in a subsequent stage of the case in which the summary order has been entered, in a related case, or for estoppel or res judicata; or when a party cites the order as subsequent history for another opinion it appropriately cites.</p>	<p>Summary orders do not have precedential effect.</p>	<p>A party citing a summary order must serve a copy on any party not represented by counsel.</p>	N/A

CIRCUIT	RULE/STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	PROVISION OF COPIES REQUIRED	PUBLICATION RULES
Third	3D CIR. I.O.P. 5.2–5.3 (publication)  3D CIR. I.O.P. 5.7 (citation)  3D CIR. I.O.P. 6.2 (publication)	The court traditionally does not cite to its nonprecedential opinions as authority.	Nonprecedential opinions are not binding.	As per FED. R. APP. P. 32.1, a party must provide a copy when it is not available in a publicly accessible electronic database.	Unless otherwise provided, an opinion that appears to have value only to the trial court or parties receives the designation “not precedential” and is posted on the court’s website.  Judges may use a judgment order when the district court based its judgment on findings of fact not clearly erroneous; sufficient evidence supports a jury verdict; substantial evidence on the record as a whole supports a decision or order of an administrative agency; no error of law appears; the district court did not abuse discretion; or the court has no jurisdiction.
Fourth	4TH CIR. R. 32.1 (citation)  4TH CIR. R. 36(a) (publication)  4TH CIR. R. 36(b) (request for publication)	Disfavors citation of unpublished opinions issued before 1/1/2007 except for res judicata, estoppel, or law of the case. Allows citation if a party believes the cited case has precedential value for a material issue in its case and no published opinion would serve as well.	N/A	As per FED. R. APP. P. 32.1, a party must provide a copy when it is not available in a publicly accessible electronic database.	Will publish disposition if it establishes, alters, modifies, clarifies, or explains a rule of law in the circuit; involves a legal issue of continuing public interest; criticizes existing law; contains a nonduplicative historical review of a law; or resolves a conflict between panels of the court or creates a conflict with another circuit.  To qualify for publication, parties must fully brief and present cases at oral argument.  Additionally, all members of the court must acknowledge in writing receipt of the proposed opinion.  Counsel may move for publication of an unpublished opinion, citing reasons for the motion.

CIRCUIT	RULE/STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	PROVISION OF COPIES REQUIRED	PUBLICATION RULES
Fifth	<p>5TH CIR. R. 47.5.3–47.5.4 (citation)</p> <p>5TH CIR. R. 47.5.1–47.5.2 (publication)</p>	<p>Parties may cite unpublished opinions issued before 1/1/1996 according to the rules in FED. R. APP. P. 32.1.</p> <p>Allow citation after that date for res judicata, collateral estoppel, or law of the case, and in instances allowed by FED. R. APP. P. 32.1.</p>	<p>Unpublished opinions before 1/1/1996 are precedent. Decisions after that date are precedent only for res judicata, collateral estoppel, or law of the case.</p>	<p>If the disposition is not available in an electronic database, the party citing it must provide a copy.</p>	<p>An opinion is published if it establishes, alters, or modifies a rule of law, or calls attention to an overlooked law; applies significantly different facts to an established rule; explains, criticizes, or reviews the history of existing case law or enacted law; creates or resolves a conflict of authority; discusses a factual or legal issue of significant public interest; has been reviewed previously and its merits addressed by a Supreme Court opinion.</p> <p>May also publish an opinion if it includes a concurring/dissenting opinion, reverses decision below, or affirms on different grounds.</p> <p>Will publish an opinion unless each member of the panel determines its publication is neither required nor justified under the criteria. Any judge of the court or any party can request that the panel reconsider its decision not to publish, and it will be published if the panel determines it meets one or more of the criteria or should be published for any other good reason.</p>
Sixth	<p>6TH CIR. R. 32.1(a) (citation)</p> <p>6TH CIR. I.O.P. 32.1(b) (publication)</p>	<p>Permitted to cite any unpublished opinion, order, judgment, or other written disposition.</p>	<p>N/A</p>	<p>Yes, if not in a publicly accessible database.</p>	<p>Consider if it establishes a new rule, modifies an existing rule, or applies an established rule to novel facts; creates or resolves a conflict of authority; discusses an issue of continuing public interest; includes concurring or dissenting opinions; reverses the decision below unless the reversal was due to an intervening change in law or fact or reversal is to remand without comment; addresses a published lower court or agency decision; or has been reviewed by the U.S. Supreme Court.</p> <p>Any panel member can request publication, and the court may publish on motion.</p>

CIRCUIT	RULE/STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	PROVISION OF COPIES REQUIRED	PUBLICATION RULES
Seventh	7TH CIR. R. 32.1 (publication and citation)	May not cite an order of the court issued before 1/1/2007 except to support a claim of preclusion or to establish the law of the case from an earlier appeal in the same proceeding.  May cite unpublished opinions in accordance with FED. R. APP. P. 32.1.	Not treated as precedent.	As per FED. R. APP. P. 32.1, a party must provide a copy when it is not available in a publicly accessible electronic database.	The court may dispose of an appeal by an opinion or order.  Opinions are published, and orders are not published.  Any person may request by motion to reissue an order as an opinion.
Eighth	8TH CIR. R. 32.1A (citation)  8TH CIR. R. 47B (publication)	Allows citation for opinions issued before 1/1/2007 in cases of res judicata, collateral estoppel, or law of the case. Also allows citation when the party believes the cited case has precedential value on a material issue in its case and no published precedent would serve as well.	Unpublished opinions are not precedent.	Must provide a copy if the opinion is not available in a publicly accessible electronic database.	A judgment or order may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and one of the following exists: a judgment of the district court is based on findings of fact not clearly erroneous; evidence in support of a jury verdict is not insufficient; order of an administrative agency is supported by substantial evidence on the record as a whole; or no apparent error of law.

CIRCUIT	RULE/STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	PROVISION OF COPIES REQUIRED	PUBLICATION RULES
Ninth	<p>9TH CIR. R. 36-3 (citation)</p> <p>9TH CIR. R. 36-2 (publication)</p> <p>9TH CIR. R. 36-4 (request for publication)</p> <p>9TH CIR. R. 36-5 (orders for publication)</p>	<p>Allows citation to unpublished dispositions or orders of the court before 1/1/2007 in a request to publish or a petition for panel rehearing or rehearing en banc. Also allows citation to demonstrate a conflict among opinions, dispositions, or orders.</p> <p>Also permitted under the doctrine of law of the case, issue preclusion, claim preclusion, for factual purposes such as showing double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or a related case.</p>	Unpublished dispositions and orders of the court are not precedent except when relevant to law of the case, claim preclusion, or issue preclusion.	N/A	<p>Will designate a written disposition an opinion and publish if it establishes, alters, modifies, or clarifies a rule of federal law; calls attention to a generally overlooked rule of law; criticizes existing law; involves a legal or factual dispute of unique interest or substantial public importance; is a disposition in a case where the lower court or administrative agency published an opinion, unless publication is not necessary to clarify the disposition; follows a reversal or remand by the Supreme Court; or there is a separate concurring or dissenting expression and the author wants publication.</p> <p>May request publication of an unpublished disposition by a letter addressed to the clerk and providing the reasons for publication within 60 days of the issuance of the disposition.</p> <p>A majority of judges may specially designate an order for publication.</p>
Tenth	<p>10TH CIR. R. 32.1 (citation)</p> <p>10TH CIR. R. 36.1-36.2 (publication)</p>	May cite unpublished opinions both before and after 1/1/2007.	Persuasive value.	Yes, if not available in a publicly accessible electronic database.	Dispositions without opinion do not require application of new points of law that would make the decision valuable precedent. The court normally publishes opinions when the opinion of the district court, administrative agency, or tax court was also published.

CIRCUIT	RULE/STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	PROVISION OF COPIES REQUIRED	PUBLICATION RULES	
Eleventh	11TH CIR. R. 36-2 (publication and citation)	May cite unpublished opinions as persuasive authority.	Persuasive authority. The court will not give the unpublished opinion of another circuit more weight than the decision is to be given in that circuit under its own rules.	Must provide a copy if the text is not available on the Internet.	An opinion shall be unpublished unless a majority of the panel decides to publish it.	
	11TH CIR. R. 36-3 (publishing unpublished opinions)	The court generally does not cite to its unpublished opinions. However, the court may cite to them where they are specifically relevant to determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist; to establish law of the case; or to establish procedural history or facts of the case.			At any time before the mandate has issued, the panel can on its own motion or motion by a party vote unanimously to order publication of a previously unpublished opinion.	
	11TH CIR. I.O.P. 5 (publication)					
	11TH CIR. I.O.P. 6 (precedential weight)					The policy of the court is to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions.
	11TH CIR. I.O.P. 7 (citation by the court)					
Federal	FED. CIR. R. 32.1(b) (publication)	Parties are not prohibited or restricted from citing nonprecedential dispositions issued after 1/1/2007. Parties may also cite nonprecedential dispositions issued before that date for reasons of claim preclusion, issue preclusion, judicial estoppel, law of the case, etc.	The court will not give its own nonprecedential disposition the effect of binding precedent. The court will not consider nonprecedential dispositions of another court binding precedent of that court unless the rules of the court provide for such.	As per FED. R. APP. P. 32.1, a party must provide a copy when it is not available in a publicly accessible electronic database.	Nonprecedential orders do not add significantly to the body of law.	
	FED. CIR. R. 32.1(c) (citation)				Any person may request and provide reasons to reissue an opinion as precedential within 60 days after its issuance as nonprecedential.	
	FED. CIR. R. 32.1(d) (precedential value)				The court may enter judgment of affirmance without opinion when it determines that an opinion would have no precedential value and any of the following circumstances exist: the judgment, decision, or order of the trial court is based on findings not clearly erroneous; evidence supporting the jury's verdict is sufficient; record supports summary judgment, directed verdict, or judgment on the pleadings; decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing review; or a judgment or decision was entered without an error of law.	
	FED. CIR. R. 32.1(e) (request for precedential status)					
	FED. CIR. R. 36 (publication)				The court may look to a nonprecedential disposition for guidance or persuasive reasoning.	

CIRCUIT	RULE/STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	PROVISION OF COPIES REQUIRED	PUBLICATION RULES
D.C.	<p>D.C. CIR. R. 32.1(b) (citation)</p> <p>D.C. CIR. R. 36(c) (publication)</p> <p>D.C. CIR. R. 36(f)</p>	<p>Parties may cite unpublished dispositions of the D.C. Cir. published on or after 1/1/2002.</p> <p>Parties cannot cite dispositions before this date.</p> <p>Parties may cite unpublished dispositions from other courts of appeals and district courts before 1/1/2007 when binding for res judicata or law of the case, or if the preclusive effect of the disposition is relevant. Otherwise, parties may only cite unpublished decisions of other courts of appeals entered before 1/1/2007 under circumstances and for the purposes permitted by the issuing court, and parties may not cite unpublished dispositions of district courts entered before that date. Parties may cite unpublished dispositions of other federal courts entered after 1/1/2007 in accordance with FED. R. APP. P. 32.1.</p>	N/A	Must provide a copy of each unpublished disposition not available in a publicly accessible electronic database.	<p>It is the policy of the court to publish opinions and explanatory memoranda that have general public interest.</p> <p>An opinion, memorandum, or other statement explaining the court’s action will be published if it meets one or more of the following criteria: it is a case of first impression of a substantial issue it resolves; it alters, modifies, or significantly clarifies a previously announced rule of law; it calls attention to an existing rule of law that has been generally overlooked; it criticizes or questions existing law; it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit; it reverses a published agency or district court decision, or affirms a decision of the district court on different grounds; or it warrants publication in light of other factors giving it general public interest.</p> <p>Any person may move, within 30 days after judgment or 30 days from petition for rehearing, to request publication of an unpublished opinion.</p> <p>However, such motions are not favored and are granted only for compelling reasons.</p>

## Appendix B: State/Territorial Citation/Publication Rules

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Alabama	ALA. R. APP. P. 53 (Sup. Ct. and Ct. Civ. App.)  ALA. R. APP. P. 54 (Ct. Crim. App.)	Only for doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar.	No precedential value.	N/A	<p>The Supreme Court or Court of Civil Appeals can affirm a judgment/order of the trial court without a written opinion if the court determines the opinion would not serve significant precedential purpose and at least one of the following exists: the judgment/order is based on findings of fact not clearly, plainly, or palpably erroneous; the evidence adequately supports the jury verdict; in a nonjury case in which the judge does not make specific findings of fact, the evidence would support the findings that would have been necessary to support the order/judgment; the order of an administrative agency is sufficiently supported by the record; the appeal is from summary judgment, judgment on the pleadings, or judgment on a directed verdict, and the judgment is supported by the record; or the court, after review of the record and party contentions, concludes judgment or order was entered without error of law.</p> <p>Such “no-opinion” cases are not published in the official reports but are collected in a periodic “Table of Decisions Without Published Opinions” that is published in the official reports.</p> <p>However, a special opinion written by a judge or justice dissenting or concurring with the outcome will be published.</p> <p>The Court of Criminal Appeals may also affirm a judgment/order without opinion if the case has no precedential purpose. Special opinions of this court will also be published.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Alaska	ALASKA R. APP. P. 214	Not encouraged for reasons other than res judicata, estoppel, or law of the case; but allowed if party believes the unpublished opinion has persuasive value for a material issue in its case and no published opinion would serve as well.	Persuasive value at most.	Yes, if the unpublished opinion is not available in a publicly accessible electronic database.	The court may decide an appeal by summary order and without formal written opinion and parties can request such.  Exception is that in criminal cases, the summary order must contain a statement of the issues considered by the appellate court.
Arizona	ARIZ. R. APP. P. 28 (publication)  ARIZ. R. SUP. CT. 111 (citation and precedent)	May cite memorandum decisions only for purposes of claim preclusion, issue preclusion, or law of the case; to assist the court in deciding whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review; or for persuasive value if issued after 1/1/15, no opinion adequately addresses the issue before the court, and the citation is not to a depublished opinion.	Not precedent, but can be cited for persuasive value if issued on or after 1/1/15 and not a depublished opinion.	Provide either a copy or hyperlink to a free copy of the decision.	An appellate court's decision of an appeal must be in writing but can be by opinion, memorandum decision, decision order, or order. A memorandum decision is not intended for publication. An appellate court will issue an opinion if a majority of the judges deciding determine the court's disposition does one or more of the following: establishes, alters, modifies, or clarifies a rule of law; calls attention to a generally overlooked rule of law; criticizes existing law; or involves a legal or factual issue of unique interest or substantial public import.  Any disposition including a separate concurrence or dissent must be by opinion.  Partial portions of decisions may be issued as an opinion.  Appellate courts will consider a motion for publication of a memorandum decision as a motion for reconsideration under ARIZ. R. APP. P. 22.
Arkansas	ARK. SUP. CT. & CT. APP. R. 5-2	Cannot cite unpublished decisions of the Court of Appeals or Supreme Court issued before 7/1/2009 except for res judicata, collateral estoppel, or law of the case. Every opinion of the Supreme Court and Court of Appeals issued after 7/1/2009 may be cited.	Unpublished cases have no precedential value. Every Supreme Court or Court of Appeals opinion issued after 7/1/2009 is precedent.	N/A	Supreme Court and Court of Appeals shall file every opinion with the clerk, and the reporter of decisions shall post every opinion on the Arkansas judiciary's website. All opinions after 2/14/2009 shall be included on the website.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
California	<p>CAL. R. Ct. 8.1115 (citation)</p> <p>CAL. R. Ct. 8.1105 (publication)</p>	<p>Can cite only for res judicata, law of the case, or collateral estoppel; or when relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.</p>	N/A	<p>Must provide copy on request of the court or a party.</p>	<p>All opinions of the Supreme Court are published in the Official Reports.</p> <p>Court of Appeal or Superior Appellate Division opinions are published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final.</p> <p>Court of Appeal or Superior Appellate Division opinions should be certified for publication if the opinion establishes a new rule of law; applies an existing rule of law to significantly different facts in published opinions; modifies, explains, or criticizes an existing rule of law and provides reasons for such; advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule; addresses or creates an apparent conflict; involves a legal issue of continuing public interest; makes a significant contribution to legal literature by reviewing development of common law rule or legislative history; invokes a previously overlooked rule of law or reaffirms a principle not recently applied in a reported decision; or includes a separate concurring or dissenting opinion and the publication of all would significantly contribute to the development of law.</p> <p>The workload of the court or potential embarrassment of litigants, lawyers, judges, or others should not impact the publication decision.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Colorado	COLO. APP. R. 35	Shall not cite orders of affirmance without an opinion issued by the Supreme Court or Court of Appeals except for law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar.	An order of affirmance issued by the Supreme Court or Court of Appeals without an opinion has no precedential value.	N/A	No Court of Appeals opinion shall be designated for publication unless it satisfies one or more of the following: establishes a new rule of law, alters or modifies an existing rule of law, or applies an established rule to novel facts; involves a legal issue of continuing public interest; majority opinion, dissent, or special concurrence directs attention to the shortcomings of existing common law or inadequacies in statutes; or resolves an apparent conflict of authority.
Connecticut	Sec. 67-9 repealed as to appeals filed on or after 7/1/2013	N/A	N/A	N/A	N/A
Delaware	DEL. SUP. CT. I.O.P. XIII (publication)  DEL. SUP. CT. R. 14 (citation)	Although there is no statement about citing to unreported opinions, there is mention of the style of citation to be used for such in R. 14(g)(ii).	N/A	N/A	The Supreme Court indicates to the clerk all opinions and case-dispositive orders that are designated for publication.
District of Columbia	D.C. Ct. APP. R. 28 (citation)  D.C. Ct. APP. R. 36 (publication)	May not cite unless relevant under law of the case, res judicata, or collateral estoppel; in a criminal proceeding involving the same defendant; or in a disciplinary case involving the same respondent.	N/A	N/A	An opinion may be either published or unpublished. A party or interested person may request an unpublished opinion be published by filing a motion within 30 days after issuance. The court may sua sponte publish any previously issued unpublished opinion.
Florida	FLA. R. APP. P. 9.800	May cite to a slip opinion if case not published.	N/A	N/A	N/A

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Georgia	GA. SUP. CT. R. 59  GA. CT. APP. R. 36	N/A	No preceden- tial value.	N/A	Supreme Court can issue an affirmance without opinion in any civil case when the evidence supports the judg- ment; no harmful error of law, properly raised and requiring reversal appears; or judgment of court below adequately explains the decision and an opinion would have no prec- edential value.  Court of Appeals can affirm a case without opinion if evidence supports judgment; no reversible error of law and an opinion would have no precedential value; judgment below adequately explains decision; or issues controlled adversely to appellant for reasons and authority given in the appellee's brief.
Hawaii	Hi. R. APP. P. 35	Can cite memorandum opinion or unpub- lished dispositional order filed before 7/1/2008 only for law of the case, res judi- cata, or in a criminal action or proceeding involving the same respondent.  Dispositions after 7/1/2008 may be cited.	Opinions issued after 7/1/2008 are not precedent but may be cited for per- suasive value.	Append a copy to the brief or mem- orandum.	Memorandum opinions are not published.  Dispositional orders may be published only on order of the appellate court.
Idaho	IDAHO SUP. CT. OPERATING R. 15	If an opinion is unpub- lished, it may not be cited as authority or precedent.	No preceden- tial value.	N/A	At or after the oral conference following the presentation of oral argument or submis- sion to the court on briefs, the court may unanimously decide not to publish the final opinion.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Illinois	ILL. SUP. CT. R. 23	May cite written orders and summary orders only to support contentions of double jeopardy, res judicata, collateral estoppel, or law of the case.	No precedential value. <sup>178</sup>	Provide a copy to other counsel and the court.	<p>Appellate court opinions are issued when a majority of the panel determines the decision establishes a new rule of law or modifies, explains, or criticizes an existing rule and/or the decision resolves, creates, or avoids conflict of authority within the appellate court.</p> <p>Written orders may be used for cases that do not qualify for an opinion. A summary order may be used when a unanimous panel decides that any one or more of 8 conditions are met: appellate court lacks jurisdiction; disposition is clearly controlled by case precedent, statute, or rules of court; appeal is moot; issues involve only application of well-settled rules to recurring facts; opinion or conclusion of trial court adequately explains decision; no error of law on the record; trial court/agency did not abuse discretion; or record does not show the trier of fact ruled against the weight of the evidence.</p> <p>If an appeal is disposed of by order, any party may move to have the order published as an opinion within 21 days of the entry of the order and provide reasons why it satisfies the criteria for disposition as an opinion.</p>

178. [Ed. note: While this article was in press, the Illinois Supreme Court issued an amendment to R. 23 allowing citation for persuasive purposes, effective Jan. 1, 2021. See Committee Comment, Ill. Sup. Ct. R. 23 (Jan. 1, 2021), [http://www.illinoiscourts.gov/SupremeCourt/Rules/Art\\_I/arti.htm#Rule23](http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_I/arti.htm#Rule23) [<https://perma.cc/2ENL-RX5W>].]

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Indiana	IND. R. APP. P. 65	A memorandum decision may be cited only for res judicata, collateral estoppel, or law of the case unless later designated for publication.	Not precedent unless later designated for publication.	N/A	<p>All Supreme Court opinions shall be published and citable.</p> <p>Court of Appeals opinions shall be published and citable if the case establishes, modifies, or clarifies a rule of law; criticizes existing law; or involves a legal or factual issue of unique interest or substantial public importance.</p> <p>A judge who dissents from a memorandum decision may designate the dissent for publication if it meets one of the above criteria.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Iowa	<p>IOWA CT. R. 6.904 (citation)</p> <p>IOWA CT. R. 21.22 (publication)</p> <p>IOWA CT. R. 6.1203 (publication)</p> <p>IOWA CODE § 602.4106 (2019) (Supreme Court publication)</p> <p>IOWA CODE § 602.5111 (2019) (Court of Appeals publication)</p>	<p>An unpublished opinion or decision of a court or agency may be cited if it can be readily accessed electronically. The party needs to include an electronic citation indicating where the opinion can be readily found online.</p>	<p>Do not constitute controlling legal authority.</p>	<p>N/A</p>	<p>All opinions of the Supreme Court, other than per curiam opinions, shall be published. A list of per curiam opinions shall be published quarterly in the <i>North Western Reporter</i>, except for those the court specially orders to be regularly published.</p> <p>The Court of Appeals, by a majority of its members en banc, shall decide which opinions shall be published.</p> <p>An opinion may be published only after it is final. If further review is granted, the opinion shall not be published unless directed by the Supreme Court.</p> <p>A judgment or order may be affirmed without an opinion if the Appellate Court decides the questions are not of sufficient importance to justify an opinion, an opinion would have no precedential value, and if a judgment of the district court is correct; the evidence in support of the jury verdict is sufficient; the order of an administrative agency is supported by substantial evidence; or no error of law appears.</p> <p>If the Supreme Court/Court of Appeals decides that a decision is not of sufficient general importance to be published, it will be designated as such and not included in the reports. No case is reported without an order of the full bench.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Kansas	KAN. SUP. CT. R. 7.04  KAN. STAT. ANN. § 60-2106 (West 2008)	Memorandum opinion may be cited only if it has persuasive value for a material issue not addressed in a published opinion of a Kansas appellate court and it would assist the court in disposition of the issue.	Not binding precedent except for res judicata, law of the case, and collateral estoppel.  Otherwise nonbinding precedent.	Must be attached to any document, pleading, or brief in which it is cited.	An opinion will be issued as a formal opinion if a majority of the panel decides that it establishes a new rule of law or modifies an existing rule; involves an issue of continuing public interest; criticizes existing law; applies an established rule to a factual situation different from existing opinions in the state; resolves a conflict of authority; or is a significant and nonduplicative contribution to legal literature by reviewing the history of law or describing legislative history.  Memorandum opinions will be published only if they contain a separate concurring or dissenting opinion and the author requests publication or the Supreme Court orders publication.  A party or other interested person may file a motion in the Supreme Court asking for an opinion of the Supreme Court or Court of Appeals to be published. The motion must state the grounds for publication, include the opinion, and comply with KAN. SUP. CT. R. 5.01.
Kentucky	Ky. R. CIV. P. 76.28	Unpublished Kentucky appellate decisions after 1/1/2003 may be cited if no published opinion would adequately address the issue.	Not binding precedent.	Provide a copy to the court and all parties.	The court designates whether an opinion is published or not published.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Louisiana	<p>LA. CODE CIV. P. art. 2168 (citation)</p> <p>LA. CTS. APP. UNIF. R. 2-16 (publication)</p>	<p>Unpublished opinions of the Supreme Court and courts of appeals are posted on the websites of the courts.</p> <p>Opinions that are posted may be cited as authority.</p>	N/A	N/A	<p>A formal opinion of a court of appeal shall be published unless a majority of the panel decides otherwise. A memorandum opinion or a summary disposition of a court of appeal shall not be published unless the majority of the panel decides otherwise.</p> <p>A case may be disposed of by formal opinion when at least one of the following criteria is met: establishes a new rule of law or alters/modifies an existing rule; involves a legal issue of continuing public interest; criticizes or explains existing law; applies an established rule of law to a significantly different factual situation from that in published decisions; resolves an apparent conflict; or constitutes a significant and non-duplicative contribution to legal literature through a historical review of law, review of legislative history, or review of conflicting decisions.</p> <p>The panel shall reconsider its decision not to publish at the request of the trial judge or a party as long as the reasons are made in writing within the delays for rehearing following the rendering of the opinion.</p>
Maine	<p>ME. R. APP. P. 12 (citation)</p> <p>ME. STAT. tit. 4, § 702 (2018) (publication)</p>	N/A	A memorandum of decision does not establish precedent.	N/A	<p>The reporter of decisions reports cases more or less at large according to his or her judgment of their importance and acts in accordance with instructions or advice given by the Chief Justice of the Supreme Judicial Court.</p> <p>A memorandum of decision will not be published as an opinion of the court in the <i>Maine Reporter</i>.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Maryland	<p>Md. R. 1-104 (citation)</p> <p>Md. R. 8-605.1 (publication)</p> <p>Md. R. 8-113 (publication)</p>	<p>An unreported opinion of the Court of Appeals or Court of Special Appeals may be cited before either court for any purpose other than precedent within the rule of stare decisis or as persuasive authority. In other courts, unreported decisions of either court may be cited only when relevant under law of the case, res judicata, or collateral estoppel; in a criminal action or related proceeding involving the same defendant; or in a disciplinary action involving the same respondent.</p>	Persuasive authority.	A copy must be attached to the pleading, brief, or paper in which it is cited.	<p>The Court of Special Appeals reports only those opinions of substantial interest as precedents. The court can on its own or at the request of a party or nonparty designate for reporting something previously designated as unreported before the mandate is due to be issued.</p> <p>All opinions of the Court of Appeals shall be filed with the clerk, who shall deliver a copy of each to be reported to the state reporter for inclusion in the state reports.</p>
Massachusetts	<p>MASS. GEN. LAWS ch. 211A, § 9 (2019) (publication) (App. Ct.)</p> <p>MASS. GEN. LAWS ch. 221, § 64 (2019) (publication) (Sup. J. Ct.)</p> <p>MASS. APP. PRAC. R. 1:28 (citation)</p>	<p>A party can cite to an order of the Appeals Court in which the court determined that no substantial question of law is presented or that some clear error of law has been committed that injuriously affected the substantial rights of an appellant and affirmed, modified, or reversed the action of the court below.</p> <p>Only such orders issued after 2/26/2008 may be cited.</p> <p>The party must cite the case title, a citation to the Appeals Court Reports where issuance of the order is noted, and a notation that the order was issued pursuant to Rule 1:28.</p>	N/A	The full text of the order should be included as an addendum to the brief or other filing.	<p>Opinions and rescripts of the Appeals Court shall be published by the reporter of decisions.</p> <p>The reporter of the Supreme Judicial Court has the discretion to report cases more or less at large according to their relative importance and not to unnecessarily increase the size or number of volumes of reports.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Michigan	MICH. CT. R. 7.215	Unpublished opinions should not be cited for propositions of law when there is published authority. If a party cites an unpublished opinion, the party must explain the reason for citation and how it is relevant to the issues presented.	Unpublished opinions are not precedentially binding under the rule of stare decisis.	Must provide a copy to the court and opposing parties with the brief or other paper in which the citation appears.	<p>An opinion must be published if it establishes a new rule of law; is a matter of first impression of a constitution, statute, regulation, ordinance, or court rule; alters, modifies, or reverses existing rule of law; reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a reported decision since 11/1/1990; involves an issue of significant public interest; criticizes existing law; resolves a conflict among unpublished Court of Appeals opinions brought to the attention of the court; or decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch is invalid.</p> <p>Any party may request publication of an opinion not designated for publication by filing with the clerk 4 copies of a letter stating why the opinion should be published and mailing a copy to each party to the appeal not joining in the request and to the clerk of the Supreme Court.</p> <p>The request must be filed within 21 days of the release of the opinion or 21 days within denial of a timely motion for rehearing.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Minnesota	MINN. STAT. § 480A.08 (2018)	Unpublished opinions of the Court of Appeals must not be cited unless the party citing provides a full and correct copy to other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial; or a full and correct copy is attached to the brief where cited.	Unpublished opinions of the Court of Appeals are not precedential.	Must provide 48 hours before use in trial or hearing or append to a brief.	Court of Appeals publishes only decisions that establish a new rule of law; overrule a previous decision not reviewed by the Supreme Court; provide important procedural guidelines in interpreting statutes or administrative rules; involve a significant legal issue; or would significantly aid in the administration of justice.
Mississippi	Miss. R. APP. P. 35-A (Sup. Ct.)  Miss. R. APP. P. 35-B (Ct. App.)	Cannot cite Supreme Court opinions in cases decided before 11/1/1998 except for continuing or related litigation.  Cannot cite Court of Appeals opinions not designated for publication except in continuing or related litigation.	Per curiam decisions have no precedential value.	N/A	Supreme Court shall publish all written opinions; however, per curiam decisions may affirm an action of a trial court without a formal opinion.  Court of Appeals shall publish all opinions; however, per curiam decisions can affirm the action of the trial court without a formal opinion.  A per curiam affirmance may be issued with the concurrence of all participating justices that the opinion would have no precedential value and one or more of the following criteria exist: the court concurs in the facts as found or as found by necessary implication by the trial court; material evidence supports the jury verdict; or there is no reversible error of law.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Missouri	Mo. SUP. Ct. R. 84.16	Memorandum decisions and written orders may not be cited in any court.	N/A	N/A	<p>All cases decided by the Supreme Court and Court of Appeals shall be in writing. If all judges agree to affirm and believe the opinion would have no precedential value, disposition may be by memorandum decision or written order.</p> <p>The factors used to determine whether to issue a memorandum decision or written order include that the judgment of the trial court reviewable under Rule 84.13(d) is supported by substantial evidence and not against the weight of evidence; judgment of trial court in a proceeding under Rule 24.035/29.15 is based on findings of fact not clearly erroneous; evidence in support of jury verdict is not insufficient; order of administrative agency is supported by competent and substantial evidence on the record; or that no error of law appears.</p>
Montana	MONT. SUP. Ct. I.O.R. § 1	Memorandum opinion is not citable as binding precedent, but can be cited for res judicata, law of the case, collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same person.	Not binding precedent.	N/A	If an appeal to the Supreme Court presents no constitutional issues or issues of first impression, establishes no new precedent, does not modify existing precedent, or presents a question controlled by settled law or clear application of standards of review, the court can classify the appeal as one for a memorandum opinion. A memorandum opinion shall be reported to LexisNexis Group and to the <i>Pacific Reporter</i> along with the case number in the quarterly table of memorandum opinions.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Nebraska	NEB. CT. R. APP. P. § 2-102  NEB. REV. STAT. § 24-1104 (2016)	Opinions of the Court of Appeals not designated as “For Permanent Publication” may be cited only when such case is related by identity of the parties or cause of action to the case before the court.	N/A	N/A	Memorandum opinion shall not be published unless ordered by the Court of Appeals. The Court of Appeals should consider certain factors when deciding to publish: whether the decision creates a new rule of law; applies an established rule of law to a significantly different factual situation than in previous published opinions; resolves or identifies a conflict between prior decisions of the Court of Appeals; provides a contribution to legal literature by collecting case law or reciting legislative history; or involves a case of substantial and continuing public interest.
Nevada	NEV. R. APP. P. 36	May cite an unpublished opinion issued by the Supreme Court on or after 1/1/2016.  Unpublished dispositions of the Court of Appeals may not be cited in any Nevada court for any purpose except to establish issue or claim preclusion or law of the case.	Persuasive value, if any.	Must cite an electronic database if available, as well as docket number and date filed in the Supreme Court.  Must serve a copy on any unrepresented party.	The Supreme Court or Court of Appeals will decide a case by published opinion if it presents an issue of first impression; alters, modifies, or significantly clarifies a rule of law of either court; or involves an issue of public importance that has application beyond the parties.
New Hampshire	N.H. SUP. CT. R. 20 (citation)  N.H. SUP. CT. R. 25 (publication and citation)  N.H. REV. STAT. ANN. § 505:7 (2010) (publication)	Cases disposed of through summary disposition shall not be cited as authority.  Nonprecedential orders may be cited as long as identified as such. The nonprecedential orders are controlling with respect to issues of claim preclusion, law of the case, and similar issues involving the same parties or facts of the case in which the order was issued.  Nonprecedential orders must identify the court, docket number, and date.	Controlling for claim preclusion, law of the case, etc.  No precedential value for other reasons.	All citations to nonprecedential orders shall identify the court, docket number, and date.	Reporter publishes report of case in which court provides an opinion.  The Supreme Court may issue an order of summary affirmance when no substantial question of law is presented and the court does not disagree with the result below; the case includes the decision of the trial court, which identifies and discusses the issues presented and the court does not disagree; the case includes the decision of the administrative agency, no substantial question of law is presented, and the court does not find the decision unjust or unreasonable; or other just cause exists for summary affirmance.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
New Jersey	<p>N.J. R. Ct. 1:36-2 (publication)</p> <p>N.J. R. Ct. 1:36-3 (citation)</p>	<p>Can only cite appellate opinions not approved for publication that have been reported in an authorized administrative law reporter or to the extent required by res judicata, collateral estoppel, the single controversy doctrine, or other similar principle of law.</p>	<p>No unpublished opinion shall constitute precedent or be binding on any court.</p>	<p>Must serve a copy of the opinion and all contrary unpublished opinions known to counsel on the court and all other parties.</p>	<p>All opinions of the Supreme Court shall be published unless otherwise directed by the court.</p> <p>Opinions of the Appellate Division shall be published only by direction of the panel issuing the opinion.</p> <p>The Chief Justice shall appoint a committee on opinions to review formal written opinions submitted for publication by a trial judge. The committee shall not review a trial court opinion until the time for appeal from the final judgment has expired, except in extraordinary circumstances.</p> <p>If no appeal is taken, the committee determines whether to approve publication. If an appeal is taken, the Appellate Division will determine whether the opinion should be published when it decides the appeal.</p> <p>Opinions will be published when they involve a substantial question under the U.S. or N.J. Constitutions; determine a new and important question of law; change, reverse, seriously question, or criticize the soundness of an established principle of law; determine a substantial question on which the only case law in the state is from before 9/15/1948; are based on a matter of practice and procedure not previously authoritatively determined; are of continuing public interest and importance; resolve an apparent conflict of authority; or otherwise merit publication, constitute a significant and nonduplicative contribution to legal literature by providing an historical review of the law, describe legislative history, or contain a collection of cases that should be a substantial aid to the bench and bar.</p> <p>Any person may request publication of an opinion by letter to the committee on opinions explaining the reasons for the request.</p>

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New Mexico	N.M. R. APP. P. 12-405	Nonprecedential dispositions may be cited for any persuasive value and under the doctrines of law of the case, claim preclusion, and issue preclusion.  Any citation to a nonprecedential disposition from any jurisdiction must indicate in a parenthetical that the disposition is nonprecedential or unpublished.	Persuasive value.	Must provide a copy if it is unavailable in a publicly accessible electronic database.	Cases may be disposed of by nonprecedential order, decision, or memorandum opinion if the issues presented were previously decided by the Supreme Court or Court of Appeals; presence or absence of substantial evidence disposes of the issue; issues are answered by statute or rules of the court; asserted error is not prejudicial to complainant; or issues presented are manifestly without merit.
New York	N.Y. JUD. LAW § 431 (McKinney 2018) (pub- lication)	There is no published rule in New York State regarding the citation of unreported cases.	N/A	Some judges have specific practice rules that require copies of unreported cases that are not available on Westlaw, Lexis, or NYSCEF, or that are reported in the NYLJ but otherwise not available. See N.Y. COM. DIV. N.Y. CTY. R. MASLEY, pt. 48.	The law reporting bureau shall report every cause in the Court of Appeals and appellate divisions of the Supreme Court unless otherwise directed by the deciding court.  The bureau may also report any cause determined in any other court that the state reporter, with approval by the Court of Appeals, considers worthy of reporting because of usefulness as a precedent or importance to matter of public interest.
North Carolina	N.C. R. APP. P. 30	Citation of unpublished opinions in trial and appellate divisions is disfavored except to establish claim preclusion, issue preclusion, or law of the case. If a party believes that an unpublished opinion has precedential value to a material issue in its case and no published opinion would serve as well, citation is permitted as long as a copy is served on the court and other parties.	Unpublished decisions are not controlling legal authority.  Persuasive value at best.	Provide a copy to the court and serve it on other parties.	The Court of Appeals is not required to publish an opinion in every case, and if the panel determines that an opinion involves no new legal principles and would have no value as precedent, the panel may direct that no opinion be published.  Counsel of record and pro se parties of record may move for publication of an unpublished opinion, citing reasons based on N.C. R. APP. P. 30(e) (1) and serving a copy on all other counsel and pro se parties of record within 10 days of the filing of the opinion.

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North Dakota	N.D. SUP. CT. ADMIN. R. 27	N/A	N/A	N/A	<p>An opinion of the Court of Appeals may be published only when it satisfies one of the following: establishes a new rule of law or alters/modifies an existing rule; involves a legal issue of continuing public interest; criticizes or explains existing law; applies an established rule to new facts different from previously published opinions of the state; resolves an apparent conflict; or constitutes a significant and nonduplicative contribution to legal literature.</p> <p>An opinion may be published only if one of the three judges participating determines that one of the standards is met.</p> <p>The published opinion must include concurrences and dissents.</p>
Ohio	OHIO SUP. CT. R. REP. OP. 3.4 (citation)  OHIO REV. CODE. ANN. § 2503.42 (LexisNexis 2016) (pub- lication)	All opinions of the courts of appeals issued after 5/1/2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether it was published.	Legal authority if issued after 5/1/2002.	N/A	The Supreme Court shall report each of its decisions that determines or modifies an unsettled or new and important question of law, or gives construction to a statute of ambiguous import. The decisions shall be as short as is practicable. The court shall also report other decisions that it deems of public interest and importance.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Oklahoma	OKLA. STAT. tit. 20, § 30.5 (2011) (Ct. Civ. App.)  OKLA. STAT. tit. 20, § 60.4 (2011) (Emergency App. Div.)  OKLA. STAT. tit. 12, R. 1.200 (2011)	No opinion of the Court of Civil Appeals shall be cited as precedent unless it has been approved by a majority of the justices of the Supreme Court for publication in the official reporter.  No opinion of the Emergency Appellate Division shall be cited unless approved by the Court of Criminal Appeals for publication in the official reporter.  May cite an unpublished opinion of the Supreme Court or Court of Civil Appeals only for res judicata, collateral estoppel, or law of the case.	Unpublished Court of Civil Appeals opinions are not binding.  Unpublished opinions are deemed without value as precedent.  An opinion designated for publication in O.B.J. is not considered precedent.	N/A	A majority of the justices of the Supreme Court must decide which cases of the Court of Civil Appeals to publish in the official reporter.  Those cases that apply settled precedent and do not settle new questions of law will not be released for publication in the official reporter. An affirmative vote of at least two members of the division responsible can be used to decide to publish an opinion.  Opinions of the Court of Emergency Appellate Division must be approved by the Court of Criminal Appeals for publication in the official reporter.  An opinion of the Supreme Court and the Court of Civil Appeals shall be prepared in memorandum form unless it establishes a new rule of law or alters/modifies an existing one; involves a legal issue of continuing public interest; criticizes or explains existing law; applies an established rule of law to a factual situation significantly different from that in published opinions of the courts in the state; resolves an apparent conflict; or constitutes a significant and nonduplicative contribution to legal literature through a historical review of law or a description of legislative history. A memorandum opinion shall not be published unless it is ordered published. An opinion shall be published only if a majority of justices participating in the decision find one of the standards is met.
Oregon	OR. R. APP. P. 5.20	Cases affirmed without opinion by the Court of Appeals should not be cited as authority.	N/A	N/A	N/A

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Pennsylvania	<p>PA. R. APP. P. 126</p> <p>PA. I.O.P. SUPER. CT. § 65.37 (as amended by PA. ORDER C.O. 0026)</p>	<p>Nonprecedential opinions that are unpublished memorandum decisions of the Superior Court filed after 5/1/2019 or unreported memorandum opinions of the Commonwealth Court filed after 1/15/2008 may be cited for persuasive value.</p> <p>Single judge opinions other than those reported in an election law matter after 10/1/2013 may be cited for persuasive value and not as binding precedent.</p> <p>Any disposition can be cited if relevant to law of the case, res judicata, or collateral estoppel; or if relevant to a criminal action or proceeding because it recites issues raised and reasons for decisions affecting the same defendant in a prior action or proceeding.</p> <p>An unpublished memorandum decision filed before 5/2/2019 shall not be relied on or cited by a court or a party except for law of the case, res judicata, collateral estoppel, or relevance to a criminal action or proceeding because it recites issues raised and reasons for decisions affecting the same defendant in a prior action or proceeding.</p>	Persuasive value.	<p>Party should direct the court to the specific part of the authority. If the authority is not readily available, it should be attached as an appendix to the filing.</p> <p>If citing an unpublished memorandum filed before 5/2/2019, a copy must be provided to the court and other party.</p>	After an unpublished memorandum decision has been filed, the panel may sua sponte, or by motion of any party to the appeal, or request by trial judge, convert it to a published opinion. The panel has the sole discretion to publish.
Rhode Island	R.I. SUP. CT. ART. I, R. 16	Unpublished orders will not be cited by the court or counsel.	No precedential effect.	N/A	N/A

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
South Carolina	S.C. APP. Cr. R. 268 (citation)  S.C. APP. Cr. R. 220 (publica- tion)	Memorandum opin- ions and unpublished orders should not be cited except in proceedings in which they are directly involved.	No preceden- tial value.	N/A	Memorandum opinions shall not be published in the offi- cial reports. The Supreme Court may file a memorandum opinion when it unanimously determines that a published opinion would have no preced- ential value and one or more of the following condi- tions are met and are dispo- sitive of the issues submitted to the court: a judgment of the trial court is based on findings of facts that are or are not clearly erroneous; the evidence to support a jury verdict is not insufficient; the order of an administrative agency is or is not supported by the level of evidence pre- scribed by the statute or law permitting judicial review; or no error of law appears.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
South Dakota	S.D. CODIFIED LAWS § 15-26A-87.1 (2016)	Memorandum opinions or orders of the Supreme Court shall not be cited or relied on as authority except for law of the case, res judicata, collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same person.	Memorandum opinions and orders of the Supreme Court are not authority.	N/A	<p>Supreme Court may enter an order or memorandum opinion affirming the judgment or order of the trial court for the reason that it is manifest on the face of the briefs and the record that the appeal is without merit because issues are clearly controlled by settled state law or federal law binding on the state; issues are factual and there is sufficient evidence to support the jury verdict or findings of fact below; or the issues are of judicial discretion and there was clearly no abuse of discretion.</p> <p>This can be unanimous or on a majority vote as long as all justices participating agree summary disposition may be made.</p> <p>The Supreme Court may also enter an order or a memorandum opinion reversing the judgment or order of the trial court for the reason that it is manifest on the face of the briefs and record that the order or judgment is clearly erroneous for one or more of the following reasons: summary judgment was erroneous because a genuine issue of material fact exists; judgment or order was clearly contrary to settled state law or federal law binding on the states; or the issue is one of judicial discretion and there clearly was an abuse of discretion. This may be done unanimously or on a majority vote as long as all the justices participating agree summary disposition may be made.</p> <p>A list of such memorandum opinions and orders shall be published quarterly in the <i>North Western Reporter</i>.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Tennessee	<p>TENN. SUP. Ct. R. 4 (publication and citation)</p> <p>TENN. CT. APP. R. 12 (citation)</p>	<p>An opinion designated as “Not for Citation” shall not be cited by any judge in any trial or appellate decision, or by any litigant, except when the opinion is the basis for a claim of res judicata, collateral estoppel, law of the case, or to establish a split authority, or when relevant to a criminal, postconviction, or habeas corpus action involving the same defendant.</p> <p>Citation of unpublished opinions is allowed in the Court of Appeals.</p>	<p>Opinion of intermediate court whose application for permission to appeal is denied by the Supreme Court with a “Not for Citation” designation has no precedential value.</p> <p>An unpublished opinion is considered controlling authority between the parties to the case when relevant under res judicata, law of the case, collateral estoppel, or in a criminal, post-conviction, or habeas corpus action involving the same defendant.</p>	<p>A copy is not required if it is available from an Internet-based electronic database and the citation includes both appropriate citation to the database and whether an appeal has been filed or permission to appeal denied.</p> <p>A copy must be provided within 5 days of a written request for a copy or if not available in an Internet-based database.</p>	<p>Unless explicitly designated “Not for Publication,” all opinions of the Supreme Court shall be published in the official reporter.</p> <p>Opinions of the Special Workers’ Compensation Appeals Panels shall not be published unless publication is ordered by a majority of the Supreme Court.</p> <p>An intermediate appellate court opinion may be published if permission to appeal is filed and denied and the opinion meets one or more of the following criteria: establishes a new rule of law, alters or modifies an existing rule of law, or applies an existing rule to facts not in a published opinion; involves a legal issue of continuing public interest; criticizes, along with reasons, an existing rule of law; resolves an apparent conflict of authority; updates, clarifies, or distinguishes a principle of law; or makes a significant contribution to legal literature by reviewing the development of a common law rule or legislative/judicial history of a provision of a constitution, statute, or other written law.</p>

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Texas	<p>TEX. R. APP. P. 47.7 (citation)</p> <p>TEX. R. APP. P. 47.2 (publication)</p> <p>TEX. R. APP. P. 47.4 (publication)</p> <p>TEX. R. APP. P. 47.6 (publication)</p> <p>TEX. R. APP. P. 77.2-77.3 (publication and citation)</p>	<p>Opinions and memorandum opinions in criminal cases not designated for publication by the courts of appeals may be cited with the notation "Not Designated for Publication."</p> <p>Opinions and memorandum opinions in civil cases designated "Do Not Publish" by the courts of appeals before 1/1/2003 may be cited with the notation "Not Designated for Publication."</p>	No precedential value.	N/A	<p>Each opinion of the court must be designated an opinion or a memorandum opinion. A majority of the justices who participated in the case must make the determination.</p> <p>An opinion may not be designated a memorandum opinion if the author of a concurrence or dissent opposes it. An opinion must be designated a memorandum opinion unless it establishes a new rule of law, alters/modifies an existing rule of law, or applies an existing rule to novel facts that are likely to recur in the future; involves issues of constitutional law or other legal issues important to Texas jurisprudence; criticizes existing law; or resolves an apparent conflict.</p> <p>An en banc court may change a panel designation of an opinion.</p>
Utah	<p>UTAH R. APP. P. 30 (citation)</p> <p>UTAH R. APP. P. 31 (publication)</p>	<p>Unpublished decisions of the Court of Appeals issued on or after 10/1/1998 may be cited as precedent in all courts of the state.</p> <p>Other unpublished decisions may be cited as long as all parties and the court are supplied with accurate copies when first cited.</p>	Precedent if issued on or after 10/1/1998.	Must provide copy of decisions issued before 10/1/1998.	The court may consider for expedited decision without opinion: appeals involving uncomplicated factual issues based primarily on documents; summary judgments; dismissals for failure to state a claim; dismissals for lack of personal or subject matter jurisdiction; and judgments or orders based on uncomplicated issues of law.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Vermont	Vt. R. APP. P. 28.2 (citation)  Vt. R. APP. P. 33.1 (precedential value)	A party may cite any unpublished judicial opinion, order, judgment, or other written disposition.	An unpublished decision by a three-justice panel may be cited as persuasive authority and is controlling precedent only on issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case.	Must provide a copy of the document with the brief or paper in which it is cited.	N/A
Virginia	VA. R. SUP. CT. 5:1 (citation Sup. Ct.)  VA. R. SUP. CT. 5A:1 (citation Ct. App.)  VA. CODE ANN. § 17.1-413 (2015) (publication) (Ct. App.)  VA. CODE ANN. § 17.1-322 (2015) (publication) (Sup. Ct.)	Permitted to cite unpublished decisions as informative in both the Court of Appeals and Supreme Court.	Informative but not binding.	If not available in a publicly accessible electronic database, a copy must be provided with the brief or paper.	Opinions designated by the Court of Appeals as having precedential value or significance for the law or legal system shall be reported in <i>Court of Appeals Reports</i> . The clerk of the Court of Appeals shall retain in the clerk's office a list and brief summary of the case for all unpublished decisions and opinions of the Court of Appeals.  The judges of the Supreme Court direct the reporter which cases shall be reported.

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Washington	WASH. GEN. R. 14.1	<p>Unpublished opinions of the Court of Appeals filed on or after 3/1/2013 may be cited as nonbinding.</p> <p>Unpublished opinions issued by any court from a jurisdiction other than Washington may be cited if citation is permitted under the law of the jurisdiction.</p> <p>Washington appellate courts should not cite or discuss unpublished opinions in their opinions unless necessary for a reasoned decision.</p>	Nonbinding authority may be accorded persuasive value as deemed appropriate by the court.	Must provide a copy of an opinion from a jurisdiction other than Washington.	N/A
West Virginia	W. VA. R. APP. PROC. 21	Memorandum decisions may be cited in any court or administrative tribunal in the state as long as the citation makes it clear that it is a memorandum decision.	N/A	N/A	<p>The court may issue a memorandum decision affirming the decision of the lower tribunal when the court finds no substantial question of law and does not disagree with the decision below as to the question of law; upon consideration of the standard of review and the record, the court finds no prejudicial error; or there is other just cause for summary affirmance.</p> <p>The court may issue a memorandum decision reversing the lower court decision, but this should be done in limited circumstances.</p> <p>Memorandum decisions are not published in the <i>West Virginia Reports</i>, but are posted on the court's website.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Wisconsin	WIS. STAT. § 809.23 (2019)	<p>An unpublished opinion may not be cited in any court except in support of a claim of claim preclusion, issue preclusion, or law of the case.</p> <p>However, an unpublished opinion issued on or after 7/1/2009 and authored by a three-judge panel or a single judge under § 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion.</p>	Persuasive if authored by a three-judge panel or a single judge under § 752.31(2) and issued on or after 7/1/2009.	Serve a copy with the brief or other paper.	<p>Criteria for publication include whether the opinion creates a new rule of law or modifies, clarifies, or criticizes an existing rule; applies an established rule to a significantly different factual situation than in published opinions; resolves or identifies a conflict; contributes to the legal literature by collecting case law or reciting legislative history; or decides a case of substantial and continuing public interest.</p> <p>Any person at any time may file a request that an opinion not recommended for publication or an unreported opinion be published in the official reports.</p> <p>Cannot be for an opinion by one court of appeals judge under §§ 752.31(2) and (3) or a per curiam opinion on issues other than appellate jurisdiction or procedure. A person may request that a per curiam opinion that does not address issues of appellate jurisdiction or procedure be withdrawn, authored, and recommended for publication within 20 days of the date of opinion. A copy of any request for publication must be served on the parties to the appeal/proceeding.</p>

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Wyoming	Wyo. R. APP. P. 9.06 (publica- tion)  Order Adopting a Public Domain or Neutral- Format Citation (Wyo. Aug. 19, 2005) (citation)	Per curiam opinions are not to be cited as precedent.	N/A	N/A	The Supreme Court can unanimously vote to enter an abbreviated opinion affirming or reversing the judgment or order of the district court for the reason that it is clear that affirmance or reversal is required because the issues are clearly controlled by settled state law or federal law binding on the state; issues are factual and there is clearly sufficient evidence to support the jury verdict or findings of fact below; sum- mary judgment was errone- ously granted because there is a genuine issue of material fact; or issues are ones of judicial discretion and there clearly was or was not abuse of discretion.  Abbreviated opinions shall be published.
American Samoa	N/A	There are currently no published rules regarding citing unpublished cases.	N/A	N/A	N/A
Guam	GUAM R. APP. P. 27	Opinions that are not published shall not be cited in any other action or proceed- ing except when it establishes law of the pending case, res judicata, collat- eral estoppel, or in a criminal action or pro- ceeding involving the same respondent.	N/A	N/A	Opinions of the Supreme Court shall be published unless designated otherwise.  Memorandum opinions shall not be published.
Northern Mariana Islands	N. MAR. I. SUP. CT. R. 32.1	Although highly dis- favored, parties may cite dispositions from any jurisdiction that are designated as unpublished as long as its unpublished status is noted clearly in the citation.	N/A	If an opin- ion is not available in a publicly accessible database, a copy must be filed and served with the brief or paper in which it is cited.	N/A

STATE/ TERRITORY	RULE/ STATUTE	IS CITATION ALLOWED?	PRECEDENTIAL VALUE	COPIES REQUIRED	PUBLICATION RULES
Puerto Rico	R. SUP. CT. P.R. 44 <sup>179</sup>	Inappropriate to cite as authority or precedent a decision of the Supreme Court that has not been issued through an opinion or that has not been published by the Bar Association or the court itself.	N/A	N/A	All decisions of the court that have opinions will be sent by the secretary to the compiler and publicist of jurisprudence, the Bar Association, and any bona fide entity that requests them.  The judgments that are issued will not be sent for publication without an opinion.
U.S. Virgin Islands	V.I. SUP. CT. I.O.P.R. 5:3  V.I. SUP. CT. I.O.P.R. 5:7	An unpublished judicial opinion, order, judgment, or other written disposition of this court may be cited regardless of the date of issuance.  The citation of dispositions of other courts is governed by the rules of the issuing court.  Unpublished or non-precedential dispositions may always be cited to establish a fact about the case before the court or when the binding preclusive effect of the opinion is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of writ, or other similar doctrine.	Unpublished opinions, etc., have persuasive value but no binding precedent.	If a party cites a judicial opinion, order, judgment, or other written disposition not available in a publicly accessible electronic database, a copy must be served with the brief or paper in which it is cited.	An opinion that the majority of the panel decides has value only to the trial court or the parties is not published.  Unless an opinion states that it is not for publication on its face, it shall be for publication.



## Keeping Up with New Legal Titles\*

Compiled by Susan Azyndar\*\* and Susan David deMaine\*\*\*

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Aviram, Hadar. *Yesterday's Monsters: The Manson Family Cases and the Illusion of Parole*. Oakland: University of California Press, 2020. 296p. \$29.95 (paperback).

*Reviewed by Kathleen Lynch\**

¶1 The Manson Family murders are among America's most infamous crimes. Just reading the title of this book, a thought likely passes through a few minds: "Another Charles Manson crime book? How many of these books need to be published before people get tired of the topic?" This is not your typical Charles Manson crime procedural, however. While Hadar Aviram does discuss the Manson crimes, she does so in a context that allows readers to understand who the subjects of the book are. In so doing, she looks carefully at the California parole system or, as she puts it, the *illusion* of parole.

¶2 Why, out of the thousands of people in the California correctional system, did Aviram decide to use the Manson Family members to discuss this topic? In 1971, Manson and his followers were convicted of first-degree murder and sentenced to death. Their sentences were commuted to life with the possibility of parole after the California Supreme Court's 1972 ruling that the California death penalty was unconstitutional. Manson Family members have now been in prison for close to 50 years. During this time, society has changed how it views criminals like these, and these changes are reflected in the law. Victims' rights laws such as Megan's Law<sup>1</sup>

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1. CAL. PENAL CODE § 290.46 (West 2014). Megan's Laws are those laws requiring registry of certain sex crime offenders.

and Marsy's Law<sup>2</sup> have affected the parole prospects of the Manson Family as well as many other life prisoners. For Aviram, not only have the Manson Family members experienced (and, to some extent, caused) changes in the parole system due to their long tenure in prison, but they also have been the subject of many publications and thus are less likely to be damaged in their parole potential by another. Aviram discusses the impact of a 2001 book about Leslie Van Houten,<sup>3</sup> one of Manson's followers. After the book was published, the parole board relied on material in the book in denying Van Houten parole. Aviram reasoned that if she were to use another person to illustrate the illusion of parole, it was entirely possible this person's chance of parole might be negatively impacted, just as Van Houten's was.

¶3 The layout of Aviram's book is fairly streamlined. The book starts with a description of California's parole system and the nature of Board of Parole hearings. Aviram walks the reader through the process of how an inmate serving life in prison with the possibility of parole could actually earn parole. Needless to say, the process is complicated, but Aviram makes a good attempt to explain the system to someone with little knowledge of how the parole system in California works.

¶4 Aviram then moves into a discussion of the influence the Manson Family cases have had on California's criminal justice system. Aviram writes about the "Trifecta of Extreme Punishment"—the death penalty, life without the possibility of parole, and life with the possibility of parole (p.12). She explains why this trifecta is really all the same punishment: life without the possibility of parole. Since few people sentenced to death are actually executed, and those serving life with the possibility of parole do not get paroled, all convicts with these sentences are actually serving life without the possibility of parole.

¶5 Aviram investigates multiple parole hearings from different time periods and for different people, finding that the focus of the hearings has changed over time. Early hearings for Family members allowed discussion of the facts and other ways of viewing the actions of the perpetrators. Later hearings did not allow factual discussions and moved away from considerations of behavior while in prison, focusing almost exclusively on whether the convicted person had the appropriate level of "insight" into their responsibility for the crime (p.104). At the same time, later hearings allowed statements from prosecutors and victims' relatives. These measures effectively establish the terrible past actions as the only consideration, pushing aside evidence of rehabilitation or low risk of future criminality.

¶6 One of the many hearings investigated by Aviram was Susan Atkins's 2009 parole hearing, which illustrates some of the problems Aviram sees in the California parole system. Susan Atkins was bedridden, suffering from a brain tumor, at the time of her 2009 parole hearing. After Atkins was wheeled into the room, the parole board began discussing how the crimes Atkins committed in 1971 could lead to dangerous behavior in the future. During the parole hearing, Atkins is only barely able to recite Psalm 23. At the end of the hearing, the board denied parole because she posed an "unreasonable risk" (p.204). Aviram suggests that the parole board has moved the goalposts. Are these Manson Family members only being denied parole because of who they are? Possibly. It is hard to gauge without comparing their expe-

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2. Victims' Bill of Rights Act of 2008, CAL. CONST. art. I § 28; CAL. PENAL CODE §§ 3041.5, 3043 (West 2011).

3. KARLENE FAITH, *THE LONG PRISON JOURNEY OF LESLIE VAN HOUTEN: LIFE BEYOND THE CULT* (2001).

riences to those of others. Such a comparison would be fraught, though; if something were published about another potential parolee as the result of a study, the parole board may hear of it, and be influenced by it when considering that person's parole petition—the Leslie Van Houten problem.

¶7 Aviram wants the reader to understand the issues with the current California parole system. While discussing the book with a member of the California Department of Corrections and Rehabilitation (CDCR), the CDCR employee discusses how they measure the “sincerity” of a potential parolee—through “body language and nonverbal cues” rather than something more evidence-based, like the effects of prison rehabilitation programs on inmates (pp.219–20). Even though criminal justice reforms were passed in California in 2008, there has been little reform in how the parole system works.

¶8 *Yesterday's Monsters* is an interesting read, especially for those with an interest in the Manson Family murders, the California parole system, or criminal justice more generally. It is one of those books that will make you question how fair our criminal justice system truly is. I recommend it for academic law libraries in particular. Undergraduate libraries serving criminal justice departments will also find this book to be a worthwhile purchase.

Deo, Meera E., Mindie Lazarus-Black, and Elizabeth Mertz, eds. *Power, Legal Education, and Law School Cultures*. New York: Routledge, 2020. 302p. \$140.

*Reviewed by Jamie J. Baker\**

¶9 In *Power, Legal Education, and Law School Cultures*, the authors and editors make a bold effort to bring awareness to issues surrounding the meritocracy myth in legal education. The diverse content interrogates this myth through various perspectives, including the hierarchies of power and cultural norms that shape and maintain inequities in legal education. Ultimately, the authors and editors provide a new lens from which to view the structural inequities in both legal education and legal practice, in hope of moving the conversation toward reform.

¶10 As stated in the introduction, “[e]ach of the sections in the book highlights different aspects of inchoate power in legal education” (p.3). The overall goal of the book is to showcase the power dynamics at work across all sectors of legal education and training. In doing so, the book is well organized into three corresponding parts. Part 1 highlights the law school curriculum and modes of instruction that result in an academic culture with an unequal power structure. Part 2 focuses on class and market considerations in legal education. Part 3 uncovers the processes and images in legal education that perpetuate unequal hierarchies.

¶11 Part 1, “Legal Pedagogies in Context(s),” provides clear examples of the ways in which legal pedagogy upholds unequal power structures. The three chapters in part 1 pull from an international and comparative perspective to assess the power struggles inherent in legal education. By reviewing lessons from Canadian and French legal education and training, part 1 sheds light on the consequences of elite pedagogical models as perpetuating unequal power dynamics, particularly as it pertains to incorporating practice into teaching. Part 1 also includes an impor-

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\* © Jamie J. Baker, 2020. Associate Dean and Director of the Law Library; Professor of Law, Texas Tech University School of Law, Lubbock, Texas.

tant discussion on the imperial nature of teaching international lawyers how to think, speak, and act like U.S. lawyers.

¶12 Moving beyond law school curriculum, part 2, “Class and Market in Legal Education,” examines the systems of law school recruitment, financing, and debt, as these systems create and maintain inequities in race, class, and social status among law students and lawyers. Here again, the book uses examples from the French perspective to review how law student socialization transitions into power positions in government. Other issues represented in part 2 include affordability, cost, and access to legal education by reviewing historical and structural barriers, as well as the problematic nature of viewing legal education in market terms.

¶13 Finally, part 3, “Invisible Processes and Images in Legal Education,” brings to light the academic culture in American legal education that silently perpetuates unequal hierarchies. This section reviews firsthand interviews with international J.D. students that show how language and culture affect participation, identity, and belonging. The section goes on to discuss the marginalization of Black people who aspire to be lawyers, as well as the intersectionality of raceXgender bias in legal academia. Part 3 concludes by providing empirical research uncovering the continued problem of marginalization for people of color and white women within the U.S. legal academy.

¶14 Through comprehensive and diverse perspectives, *Power, Legal Education, and Law School Cultures* meets its goal of showcasing the power dynamics at work across all sectors of legal education and training. With much of the scholarship in this area focused solely on the U.S. system of legal education, a unique aspect of this book is that it touches on the elitist and exclusive consequences of legal education worldwide as a barrier to entry and career success.

¶15 The book provides a thoughtful discussion of the systemic issues perpetuating unequal hierarchies in the legal academy and beyond. As more law schools look to increase diversity and inclusivity training, *Power, Legal Education, and Law School Cultures* makes a wonderful choice for faculty reading and discussion groups. Law students would also benefit from understanding the issues related to entry and participation in the greater legal sector. To that end, readers should take note of the comprehensive citations provided at the end of each chapter as further reading on the topic. Recommended for all academic law libraries.

Geyh, Charles Gardner. *Who Is to Judge?* New York: Oxford University Press, 2019. 196p. \$29.95.

*Reviewed by Stewart A. Caton\**

¶16 Written by judicial selection scholar Charles Gardner Geyh of Indiana University Maurer School of Law, *Who Is to Judge?* provides an approachable discussion of the seemingly binary debate over selecting American judges through an appointment process versus an election. In this work, Geyh reviews the arguments associated with each approach and demonstrates how those arguments are often overstated and thwart consensus between the two camps. However, he acknowledges that it is impossible to achieve true consensus because electoral accountability will always be in tension with judicial independence. Instead of arguing which side is

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best, he suggests that we should embrace the different choices because flexibility provides judicial selection alternatives “in changing times, changing circumstances, and changing legal cultures in different jurisdictions” (p.21).

¶17 *Who Is to Judge?* is presented in seven chapters followed by endnotes and an index. Geyh opens with an overview of the centuries-long debate in the form of a back-and-forth tennis match in which each side presents its arguments and counterarguments for judicial elections versus appointments. He continues by reminding readers why the topic of judicial selection is important and provides a roadmap for the remainder of the book.

¶18 Geyh offers a succinct history of judicial selection in the United States, beginning with Sir Edward Coke’s battle for judicial independence and the colonies’ displeasure with judicial selection moving from colonial legislatures to the king. Geyh continues by discussing the Jacksonian populism that gave rise to partisan-elected judiciaries, and he notes the advent of nonpartisan elections as a means to check the power of party bosses. The history concludes with the rise of merit selection systems in which judges are selected by an executive from a list of acceptable candidates compiled by a group of experts and citizens. In such a system, reappointments or retention elections are common. While there were occasions during this historical review when I was left wanting more detail, Geyh provides endnotes pointing to additional materials.

¶19 Geyh breaks down the appointment/election debate into five initial selection processes used by states: gubernatorial appointment, commission-assisted gubernatorial appointment (merit selection), legislative appointment, partisan election, and nonpartisan election. Further, each state may have different processes for high, intermediate, and trial courts. Fortunately, he includes a useful table that shows the selection methods states use for each state’s levels of courts. Understanding these distinct processes could easily become overwhelming, but Geyh ensures readers understand which system he is discussing throughout the book.

¶20 Geyh surveys the current, and sometimes contentious, state of politics in judicial selection. His discussion includes the shift in Southern politics, discretionary review for supreme courts, “wars” on drugs and crime impacting judicial races, and pro-business tort reform interests. However, he observes that identifying national trends is problematic because of the variation between and within states and even from election to election.

¶21 Geyh also takes the interesting approach of constructing briefs from both sides, arguing their positions on the role of judges and the merits and demerits of elective and appointive systems. The briefs are well supported, contain thought-provoking illustrations, and provide a starting point for anyone wanting to develop an understanding of the debate. However, it is worth knowing, as Geyh acknowledges, that he has often argued for the appointment side of the debate in his scholarship.

¶22 Following the briefs, Geyh addresses how both sides often exaggerate their claims. To do this, Geyh pokes holes in the arguments each side makes and notes when an argument is overstated or not supported by data. In some instances, he reviews specific questions from studies to illustrate why arguments are flawed or misleading. Geyh notes that political science scholars and legal scholars have different perspectives—legal scholars often view the debate from a litigant’s perspective and will value an independent judge, while political scholars view the debate

from a voter's perspective, thereby valuing elected judges. Also, he mentions how psychological factors such as cognitive dissonance and assimilation bias can account for rigid adherence to one side of the debate.

¶23 In the end, Geyh attempts to reconcile both camps by discussing ways in which to make elected judiciaries more independent and appointed judiciaries more accountable. While Geyh admittedly prefers the appointment method as the default, he admits that, as illustrated in this work, it is not always ideal for a given jurisdiction. Interestingly, Geyh proposes what he calls a "qualified election" model for instances in which a state may want to modify its current system to something that attempts to bring the two systems closer together (p.140).

¶24 *Who Is to Judge?* is a great addition to any library, especially academic law and political science libraries. It will be a highly valuable resource for those wanting to know more about judicial selection. In addition to text from an expert on the topic, ample endnotes guide readers to additional sources.

Henry, Jo, Joe Eshleman, and Richard Moniz. *Cultivating Civility: Practical Ways to Improve a Dysfunctional Library*. Chicago: ALA Editions, 2020. 216p. \$59.99.

*Reviewed by Kaylan Ellis\**

¶25 *Cultivating Civility: Practical Ways to Improve a Dysfunctional Library* is the much-anticipated follow-up to the authors' 2018 title, *The Dysfunctional Library: Challenges and Solutions to Workplace Relationships*, reviewed in *Law Library Journal*, vol. 110:3. *The Dysfunctional Library* did an excellent job identifying the root causes of dysfunction in libraries of all sizes and settings, namely incivility and poor communication, but it left readers clamoring for additional actions they could take to address those issues.

¶26 As the full title implies, *Cultivating Civility* attempts to provide more concrete, practical suggestions for avoiding or remedying dysfunctional situations within libraries. Each chapter includes lengthy citations to case studies, articles, and surveys reiterating the prevalence and impact of various dysfunctions. Unlike the previous book, most chapters in *Cultivating Civility* include a brief case study written by another librarian to illustrate potential solutions, and every chapter concludes with a list of discussion questions to guide further self-reflection and inquiry.

¶27 In another upgrade from *The Dysfunctional Library*, this book is divided into four parts, allowing readers to focus on the areas most relevant to their situation. Part 1 covers functional individuals, emphasizing the importance of self-awareness, effective conflict-management and communication skills, and wellness. Part 2 focuses on functional teams, including considerations for successful team formation and facilitating efficient communication. Functional leaders are addressed in part 3, with many elements from part 1 reframed from the leader's perspective, along with additional coverage related to collaboration and resistance to change. Part 4 looks at the functional organization as a whole, and includes suggestions for developing healthy organizational structures, building trust, and reinforcing positive behaviors through trainings on bias, diversity, empathy, and other relevant topics.

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¶28 Like its predecessor, this new title grounds its claims in organizational psychology, communication theory, and leadership principles, but with somewhat less emphasis on the unique aspects of the library environment than occurred in *The Dysfunctional Library*. Though there are indeed many practical tips and solutions presented in this new volume, at times they feel haphazardly assembled and presented in a manner that can feel overwhelming to the reader, making it difficult to identify a clear strategy. The changes to format in this new title, in particular the insightful discussion questions, are welcome improvements that should help the reader navigate and incorporate the content, but the improved structure is not always enough to overcome the issues of clarity.

¶29 Matters of diversity and inclusion receive more attention in *Cultivating Civility* than in its predecessor, with these issues more fully embedded within topical areas rather than treated as disconnected problems. The negative impact of vocational awe on library workers is also highlighted throughout various chapters. However, virtual conferencing and communication is given less consideration than in *The Dysfunctional Library*, which itself devoted only one (albeit lengthy) paragraph to the subject. The authors certainly should not be faulted for their inability to predict the global shift toward remote work necessitated by the COVID-19 pandemic, but web conferencing and virtual business communication platforms have only increased in popularity in recent years, so the scant coverage of these topics is frustrating. Readers will need to devote their own time and energy to translating the communication and workplace relationship concepts from *Cultivating Civility* to a primarily remote working environment.

¶30 Library workers eager to discover more ways to alleviate interpersonal and organizational communication problems within their libraries may identify more answers in *Cultivating Civility* and may find the structural changes helpful in locating relevant discussions. However, if money or time is in short supply and one is forced to choose only one title, the authors' 2018 publication, *The Dysfunctional Library: Challenges and Solutions to Workplace Relationships*, is likely the more accessible tool, with more digestible insights and useful springboards, despite its deficits in the number of specific solutions. Purchasing both books is recommended for a complete investigation of the causes of, and solutions to, library dysfunction, but skip *Cultivating Civility* if a more concise and applicable treatment of the issues is desired.

Hershkoff, Helen, and Stephen Loffredo. *Getting By: Economic Rights and Legal Protections for People with Low Income*. New York: Oxford University Press, 2019. 944p. \$125.

*Reviewed by Lei Zhang\**

¶31 The United States' social safety net, despite its limitations, is vital in helping low-income residents "get by." This social safety net has taken on even more importance in the wake of COVID-19, when millions of people have lost jobs and livelihoods. Helen Hershkoff and Stephen Loffredo's *Getting By* is a valuable reference

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work that helps raise awareness of the various federal and state services that comprise the social safety net.

¶32 *Getting By* is structured in a question-and-answer format. The book's 10 chapters are divided among issues regarding types of public economic assistance, categories of legal rights, and issues that blend the two. Four of the chapters primarily cover public economic assistance, describing programs for cash assistance, food, healthcare, and housing. Four chapters discuss a category of legal rights: consumer rights, rights to public spaces, access to justice, and voting rights. Two chapters, one on worker protections and benefits and the other on education, present more hybrid approaches because they spend considerable time on not only public benefits (e.g., unemployment insurance or Pell Grants), but also general rights (e.g., employment safeguards under the Fair Labor Standards Act or the right to a free and public education).

¶33 Hershkoff and Loffredo's coverage is quite comprehensive. In their discussion of public economic assistance programs, for example, not only do they highlight prominent benefits, like the Supplemental Nutrition Assistance Program (SNAP, or "food stamps") and the Housing Choice Voucher Program (also referred to as Section 8 vouchers), but they also touch on more obscure programs like the Senior Farmers' Market Nutrition Program (helping low-income seniors buy fresh food at farmers' markets) and the Individual Development Accounts and Family Self-Sufficiency Program (helping low-income families purchase homes). The authors answer general questions, such as whether constitutional or statutory rights are implicated, but the strength of the book lies in the more granular questions dealing with details of the programs, such as how to obtain eligibility and how one might lose it, how benefits are calculated, for how long one can receive the benefits, and so forth. Importantly, most chapters also include questions and answers about immigrant eligibility and the potential effects on immigration status from receiving some of these benefits.

¶34 Because the discussions regarding categories of legal rights do not have governmental benefits to describe, the nature of these questions is slightly different. These chapters describe rights that technically apply to everyone, but the questions focus on aspects of these rights that may disproportionately affect economically vulnerable people. For example, the voting rights chapter mentions the interplay of homelessness and voter registration.

¶35 Hershkoff is a professor at New York University School of Law, and Loffredo is a professor at City University of New York School of Law. In addition to their academic work, both professors have professional experience advocating for the rights of low-income populations, with Hershkoff having been an attorney with the Legal Aid Society of New York and an associate legal director of the American Civil Liberties Union, and Loffredo having practiced with the Legal Aid Society in the South Bronx. They also collaborated previously, coauthoring the 1997 book *The Rights of the Poor*, to which *Getting By* is a spiritual successor. Not only are Hershkoff and Loffredo experts in this area of law, they are passionate, and their genuine concern is evident. They do not lecture readers about the erosion of the United States' social safety net, but they make it clear where they stand, by peppering their thoughts throughout the book (e.g., "A major policy failure is that Congress has thus far declined to make the [Children's Health Insurance] program permanent or to ensure that it has enough funding to cover all eligible children." (p.365)). The book does not strike an overly

partisan tone, though Hershkoff and Loffredo do occasionally note a lot of the cuts to these social programs have come from Republican-led Congresses.

¶36 *Getting By* does not go into great detail about how to actually apply for these benefits (e.g., what office to go to, what forms to fill out), which makes sense since most of these programs are administered at the state level and the processes vary across states. That said, *Getting By* would be particularly useful for legal aid organizations, law firms advocating for low-income individuals (pro bono or otherwise), public law libraries, law school libraries, and anyone interested in helping or learning more about services for economically disadvantaged people. It is recommended as a worthwhile acquisition.

Hoffer, Peter Charles. *Law and People in Colonial America, Second Edition*. Baltimore: Johns Hopkins University Press, 2019. 232p. \$32.95.

*Reviewed by Frederick W. Dingley\**

¶37 The legal history of the United States did not begin with the Declaration of Independence, Articles of Confederation, or the Constitution. The law that the original 13 states developed as British colonies shaped their jurisprudence as a fledgling independent nation. *Law and People in Colonial America*, by Peter Charles Hoffer, a history professor at the University of Georgia, skillfully examines the law of the British American colonies from their founding until the early years after the Revolution.

¶38 The early part of Hoffer's book focuses on the state of English law when the early colonies were founded and how individual colonies' laws unfolded differently from that single point of origin, with a focus on Virginia, Massachusetts, New York, New Jersey, and Pennsylvania. The remainder of the book takes a more generalized look at the developing law and legal systems of the colonies, from various jurisprudential influences to growing professionalism to how colonists used their legal system to protest increasingly heavy-handed regulation from London. One of the most interesting discussions examines the differences, conflicts, and attempted compromises between the written English, Spanish, and French colonial laws, laden with detailed rules and focusing on both the government's coercive power and individual responsibility, and the orally transmitted law of the Native nations encountered by the colonists, which generally focused on collective responsibility and consent and worked from a flexible set of ground rules.

¶39 This book achieves and surpasses the goals set out for it: to be a useful introduction to legal history that could be included in courses on early America, to show how law and society influence each other, and to show how the realities of colonial life caused American law to diverge from its English origins. Hoffer's lively prose, vivid examples, and clear explanations make it easy for readers to connect cause and effect, whether in the impact law had on society or vice versa. One of Hoffer's more engaging examples is a story about a Massachusetts legislator's vendetta against a business rival that nicely illustrates the dearth of conflict of interest rules for early American public officials. The book also ensures that readers do not restrict their thinking to English influence on American law, due to its substantive discussions of the laws of other European colonial powers and Native nations. For

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\* © Frederick W. Dingley, 2020. Senior Reference Librarian, Wolf Law Library, William & Mary Law School, Williamsburg, Virginia.

readers who are more interested in what the law actually said rather than how it developed, Hoffer provides brief summaries.

¶40 *Law and People in Colonial America* is also a useful research resource, although the features that make it such a good introductory text may be a source of frustration for researchers used to the lengthy footnotes typical of legal scholarship. Hoffer warns early on that describing the law for each colony, as well as general colonial legal trends in detail, would be impossible in a relatively small number of pages, and that he has chosen readability over encyclopedic coverage. In terms of discussing substantive law, readers should consider this book more in the spirit of a nutshell than a comprehensive hornbook. Endnotes in the back of the book replace footnotes, making flipping back and forth necessary, and those endnotes are fairly sparse by legal academic standards. Instead, Hoffer includes a bibliographic essay at the end explaining the sources that he used for each chapter, along with some suggestions for further reading on particular topics. This essay provides readers a wealth of sources for more detailed and extensive research, but it also requires more work on researchers' part than referring to a page cited in a footnote.

¶41 The second edition follows the first in 1992 and a revised edition in 1998. The major change in this edition is a new chapter on slavery in the American colonies. The rest of the book does not seem to have been updated—the bibliographic essay makes two references to “forthcoming” materials that were published more than a decade ago (pp.185, 188), and in a more serious oversight, the first chapter states that the U.K.'s “Parliament remains a court to this day,” even though the Supreme Court of the United Kingdom assumed the House of Lords' judicial role in 2009 (p.7). Overall, though, the resources upon which Hoffer relies remain useful. *Law and People in Colonial America* provides a readable, informative introduction to the origins of the law of the United States, and the addition of material covering one of the country's ugliest chapters—a chapter of “history” that lingers in our present in many ways—makes this edition a worthwhile purchase, even for those who own the previous editions. Recommended for academic law libraries.

Jefferson, Renee K., and Hannah B. Johnson. *Shortlisted: Women in the Shadows of the Supreme Court*. New York: New York University Press, 2020. 304p. \$30.

*Reviewed by Sabrina A. Davis\**

¶42 Reportedly the first book of its kind, *Shortlisted: Women in the Shadows of the Supreme Court* examines the history of women who have been considered as nominees for the U.S. Supreme Court. Although this book is primarily about women generally, the authors do touch upon the importance of including minority women in the judiciary and the women's rights movement multiple times.

¶43 I encourage readers not to skip the introduction to *Shortlisted*, as it describes the authors' impetus for writing the book, offers enlightening statistics, and introduces concepts such as the “leaking pipeline” (p.5) and the Mansfield Rule.<sup>4</sup> Following the introduction, the authors present a brief history of the women's

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4. The “leaking pipeline” refers to the fact that as many women enter the legal profession as men, but do not achieve prominence and leadership roles at the same rate as men. The Mansfield Rule is a diversity practice, suggested for law firms and legal departments, requiring employers to consider diverse candidates for at least 30 percent of their open leadership positions.

rights movement. This overview was helpful for context, and yet it was also a depressing and frustrating reminder that women still fight the same battles today. These battles include gender pay gaps, sexual harassment, and being judged on appearance and “womanly skills” rather than competence.

¶44 On the positive side, the authors also discuss the rise of women in leadership roles in both the judicial and executive branches of government. This discussion includes brief biographies of women who were considered, shortlisted, nominated, and/or confirmed to the U.S. Supreme Court.

¶45 The authors investigate the shortlisting processes for U.S. Supreme Court Justices used by five presidents: Kennedy, Johnson, Nixon, Ford, and Reagan,<sup>5</sup> culminating in the appointment of Justice Sandra Day O’Connor in 1981. The most fascinating (and discouraging) part of the shortlisting process was how some presidents used the American Bar Association (ABA) rating of judicial nominees to exclude women from consideration; they knew the ABA would not give a highly favorable rating to a woman.

¶46 In the second part of *Shortlisted*, the authors explore more deeply some of the themes already raised, including tokenism, the many challenges faced by women during the nomination process, and the impact women have had as judges. Regarding the challenges, the authors explore five particular challenges in detail: (1) feminism/racism, as evidenced in the beliefs held and actions taken (or not taken) by the women profiled in the book, whose views on these issues and the impact their views have had on their judicial decisions vary greatly; (2) appearance/femininity/respectability; (3) professional and intimate relationships; (4) motherhood and competing careers; and (5) age, often a boon for men but a detriment for women (p.143).

¶47 After identifying these challenges, the authors advance eight strategies for women in moving from shortlisted to selected in any position, not just the judiciary. The authors draw these strategies from their own lives as well as their research. The first recommendation is to get a law degree, so this necessarily limits the population of women interested in following these strategies. Other recommendations are more universal, such as creating meaningful opportunities and being aware of self-shortlisting. Seven of the strategies relate to actions women can take individually, and the remaining one is a call for government-funded childcare to support women’s ability to participate in their professions on equal terms.

¶48 *Shortlisted: Women in the Shadows of the Supreme Court* is an easy read and is well researched, with the appendices offering details on the authors’ methodology. It is likely to appeal to those interested in women’s history, feminist scholars, and U.S. Supreme Court scholars, although some readers might take issue with the “liberal” leanings of the book. It is appropriate for all law library collections, especially academic ones, and would also be a valuable addition to undergraduate libraries. Overall, I highly recommend including it on “to read” lists.

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5. The authors note that although President Carter did increase the number of women in the federal judiciary, he never had an opportunity to fill a U.S. Supreme Court vacancy.

Klein, Andrew R., and Jessica L. Klein, *Abetting Batterers: What Police, Prosecutors, and Courts Aren't Doing to Protect America's Women*, Updated Edition. Lanham, Md.: Rowman & Littlefield, 2020. 308p. \$38.

*Reviewed by Genevieve P. Nicholson\**

¶49 America has a domestic violence problem. Old cultural norms held men responsible for their households and made it their right, or duty even, to “discipline” their wives to maintain household order. These norms also placed a high value on marriage and granted privacy to domestic matters to aid the preservation of marriage, with the consequence of shielding domestic violence. Although by the late 1970s legislators across the country had begun to enact laws to address domestic violence, the present-day culture and the criminal justice system still largely fail to protect domestic violence victims and punish abusers.

¶50 *Abetting Batterers: What Police, Prosecutors, and Courts Aren't Doing to Protect America's Women* details the evolution of American laws, policies, and practices regarding domestic violence. While the book provides historical context and addresses victim advocacy and legislative efforts, it focuses primarily on trends in policing, prosecution, and sentencing over the past 30 years. The book is arranged thematically and is meticulously researched. The authors weave statistics and case narratives from multiple jurisdictions into each section to illustrate the real-world effects of various policies and to evaluate their efficacy.

¶51 The chapters on policing, prosecution, and sentencing offer a general analysis of the three phases of the criminal justice system and detailed insight into selected topics specific to each phase. The policing chapter highlights issues associated with strangulation, stalking, dual arrests, and LGBTQ+ victims. The prosecution chapter examines practices related to plea bargains, diversion programs, victimless prosecutions, and bail. The sentencing chapter discusses parity in sentencing, supervision related to probation or parole, and the tendency to treat battering as if it were an addiction or a mental illness. Analysis of each topic centers on how different laws, policies, and practices either make victims safer or put them at greater risk.

¶52 In the last quarter of *Abetting Batterers*, the authors propose areas of change that could most benefit domestic violence victims. They focus on three action items of the highest priority: preventing abusers' access to guns, changing child custody policies to make victim safety, rather than maintaining family unity, the primary goal, and keeping the criminal justice system's attention on domestic violence issues. The book was originally published in 2016, and this updated edition includes a brief afterword that warns how the Trump administration has threatened the progress that has been made on domestic violence prevention. This warning echoes the overarching theme of *Abetting Batterers*—how the attitudes of police officers, prosecutors, and judges toward domestic violence affect cultural norms. If domestic abuse carries a lighter sentence than shoplifting, how can society view it as a “real” crime? If batterers are released on bail, allowed access to guns, sentenced to probation and counseling instead of incarceration, and freely given custodial rights to their children, how can society view them as criminals who pose a danger? For our cultural norms to shift, the authors argue, we need engaged police officers, prosecutors, and judges committed to making (and keeping) domestic violence prevention a priority.

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¶53 I recommend *Abetting Batterers* for anyone studying, working, or with a general interest in fields related to public policy, criminal justice, or victim advocacy. Because the power of the book lies in the cumulative effect of the statistics, narratives, and analysis it provides, it needs to be read linearly in its entirety. It would not work particularly well being excerpted for class lessons, and it would not be a good resource for practicing attorneys who need a quick reference. *Abetting Batterers* presents a thorough, accessible, and enlightening treatment of domestic violence issues in America. It would be an excellent purchase for academic and public law libraries.

Lazarus, Richard J. *The Rule of Five: Making Climate History at the Supreme Court*. Cambridge, Mass.: Belknap Press, 2020. 358p. \$29.95

*Reviewed by Mark W. Podvia\**

¶54 In 2007, the U.S. Supreme Court handed down a 5-4 decision in the case of *Massachusetts v. Environmental Protection Agency*.<sup>6</sup> The case addressed the issue of climate change, specifically the regulation of greenhouse gases under the Clean Air Act. The Court found for the appellants, Massachusetts, along with 11 other states and several cities. It has been called the most important environmental law case ever decided by the Court. Richard J. Lazarus's *The Rule of Five: Making Climate Change History at the Supreme Court* tells the story of this case, one that many environmental groups originally did not support for fear that a loss would be highly detrimental to their cause and a terrible setback for the environmental movement. In the end, theirs was the victory, and the EPA went on to determine that greenhouse gases were indeed pollutants meriting regulation.

¶55 The matter began with the filing of a petition with the EPA in 1999 by a then unknown public interest attorney, Joe Mendelson. He worked for a tiny environmental organization in Washington, D.C., operating on the smallest of budgets. The petition argued that greenhouse gases produced by motor vehicles endangered public health and should be regulated by the EPA. In 2003, after much delay, the EPA finally denied Mendelson's petition.

¶56 Fortunately, after the petition was denied, various environmental organizations, including the Sierra Club, the Environmental Defense Fund, and Earthjustice, along with the attorneys general of 12 states, led by Massachusetts and including New York and Connecticut, filed suit. The case was first heard by the Court of Appeals for the District of Columbia Circuit, perhaps the most influential of the nation's federal appellate courts. Fighting to force the EPA to regulate carbon dioxide as an air pollutant, the petitioners quickly gave themselves a nickname: "The Carbon Dioxide Warriors" (p.1).

¶57 Readers are introduced to these warriors, learn what role they played in the case, and discover how cases proceed through the federal courts. In addition to Mendelson, the litigation team included Jim Milkey of the Massachusetts Attorney General's Office, David Doniger of the Natural Resources Defense Council, Howard Fox from Earthjustice, and David Bookbinder of the Sierra Club. After the D.C.

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6. 549 U.S. 497 (2007).

Circuit found for the EPA, Lisa Heinzerling, a law professor at Georgetown, joined the warrior team. Readers also meet the government lawyers who argued on behalf of the EPA, the judges on the D.C. Circuit who decided the appeal, and the Supreme Court Justices who made the final decision.

¶58 At the D.C. Circuit, the judges found in favor of the EPA in a 2-1 decision, although the two-judge majority did not agree on why the EPA prevailed. After considerable debate among the Carbon Dioxide Warriors, the petitioners filed for, and were granted, a writ of certiorari to the U.S. Supreme Court.<sup>7</sup>

¶59 Lazarus does an excellent job explaining the workings of the Supreme Court, including various traditions, such as the lunch the justices enjoy together on argument days where they discuss everything except the cases they will be hearing. He also explains how it is determined who will draft the Court's opinion; in *Massachusetts v. Environmental Protection Agency*, Justice Stevens, as the senior justice in the majority, reserved the authoring of the majority opinion for himself.

¶60 Attorneys are, of course, human beings with human emotions. Lazarus discusses the challenges this case presented to the lawyers involved and the various conflicts that resulted. Not surprisingly, some of them were no longer on speaking terms by the time the case reached the Supreme Court. Lazarus's treatment of these human conflicts adds considerable interest and tension to the story.

¶61 Lazarus is particularly well qualified to write this book, having represented both the government and environmental law groups in 40 Supreme Court cases, 14 of which he argued. He is also the founding director of the Supreme Court Institute, which assists attorneys as they prepare for oral argument before the high court, and for more than a decade he has co-taught with Chief Justice John Roberts a course on Supreme Court history.

¶62 Libraries—be they law, academic, or public—should have this book on their shelves. *The Rule of Five* would also serve as an excellent book for classes ranging from environmental law to Supreme Court history. This is a book that students will actually want to keep after the class ends. Finally, this book would be an excellent read at the beach, lake, or any other vacation spot—something this reviewer does not often say about law-related books.

Logue, Hugh. *Automating Legal Services: Justice through Technology*. Chicago: American Bar Association, 2019. 210p. \$69.95.

*Reviewed by Sarah A. Pfeiffer\**

¶63 *Automating Legal Services* encourages the legal profession to embrace rather than fear modern technology. The book is organized into five parts: an introduction followed by four sections on various types of technology. The introduction is designed to prime the reader to accept that technology will continue to affect legal practice. The book aims to convince lawyers that technology can be good for business.

¶64 Logue acknowledges that lawyers have mixed feelings about the current trend toward more technology in legal practice, but he asserts that the industry needs what technology can deliver. Consumers are beginning to expect more legal services to be provided online. Courts are bogged down and overrun with cases.

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7. 548 U.S. 903 (2006).

\* © Sarah A. Pfeiffer, 2020. MSLIS Student, University of North Texas, Denton, Texas.

Lawyers complain about the need to drive down fees and want to achieve a better work-life balance. Logue largely contends that a broader adoption of more technology, including self-service automation and artificial intelligence tools, can solve—or at least alleviate—all of these problems.

¶65 Logue attempts to make technology more palatable to lawyers by pointing out various other threats to the legal industry, such as potential market entry by the big accounting firms and the now-common outsourcing of things like document collection and review. Logue uses this dynamic to dovetail into a discussion of how industries other than law have embraced more technology and how it has benefited those industries. While the contrast with other industries is informative, most of the industries discussed, with the exception of healthcare, do not involve ethical obligations akin to those of a lawyer representing a client. Nor do the automated tasks found in other industries typically involve the judgment and analysis required for many legal tasks. Logue does acknowledge this difference and makes the fair argument that automating certain legal tasks will free up lawyers to take on more of the creative and critical-thinking tasks.

¶66 Logue proposes that firms separate more mundane tasks that can be accomplished through self-service resources plus automated document creation from analysis and more complex legal tasks. Logue argues that attracting clients by offering automated tasks at a low fee may result in these same clients using the firm for more complex (and higher-fee) tasks when needed. Logue offers several case studies on low-fee, automated services.

¶67 The subtitle of the book, *Justice through Technology*, implies that the book will directly address how technology can improve access to justice and other public interest services. Logue appears to dedicate part 4 to these issues, but much of the discussion struck me as superficial. Logue offers several case studies that illustrate the justice gap between wealthy and poor in both the United Kingdom and United States as further motivation for the legal industry to fully embrace legal automation, but this coverage is brief. He also highlights how electronic filing and electronic forms have already revolutionized court services and identifies a few technology companies addressing these issues.

¶68 The majority of *Automating Legal Services* focuses on convincing law firm leadership that adopting more technology will not cost them billable hours but instead will enhance their ability to collect fees. This may be the correct approach to get law firms to adopt technology, but Logue does not attempt to convince law firms that they should, or at least could, then use this time to help the underserved or advocate for access to justice. At best, Logue indicates there may be trickle-down benefits if bigger firms force a revolution within the legal industry, but the focus is on adopting technology without cutting profits per partner. Logue includes five case studies, four at traditional large firms offering specialized services and one involving a legal tech startup geared toward large firms and corporate legal departments. It may be interesting to see whether the recent forced adoption of remote working and remote hearings and trials due to the coronavirus pandemic will help Logue's argument that the legal industry should adopt technology with open arms.

¶69 *Automating Legal Service* provides a succinct introduction to current trends in legal technology and identifies some issues that may slow adoption, including resistance from lawyers and regulatory concerns relating to the practice of law and privacy. It also offers reasonable talking points for pitching the idea of transitioning

to more automated services to leadership at a firm. This book is most useful to lawyers and librarians involved on the technology side of a firm's practice. While many of the examples in the book are from outside the United States, the coverage is broad enough to be useful to U.S. practitioners as well. *Automating Legal Services* is of little value to an academic or governmental law librarian, as it fails to offer meaningful solutions, or even critiques, as to how the legal industry can effectively adopt more legal technology to truly provide more access to justice in the United States.

Shaver, Lea. *Ending Book Hunger: Access to Print Across Barriers of Class and Culture*. New Haven, Conn.: Yale University Press, 2019. 224p. \$35.

*Reviewed by Heather J.E. Simmons\**

¶70 Written in a style accessible for the layperson, Lea Shaver's *Ending Book Hunger* explores the complex topic of copyright law through the lens of global children's literacy efforts, focusing on organizations that provide books to young, emerging readers. This book especially targets "publishers, writers, artists, librarians, teachers, philanthropists, policymakers, nonprofit leaders" (p.10).

¶71 Shaver begins with extensive profiles of charities and nonprofit organizations that work to put books into the hands of children around the world. Notable among these is Imagination Library, founded by Dolly Parton. Imagination Library's efforts started in the United States, but it is now expanding its reach to other parts of the world.

¶72 Beyond the threshold issue of funding these programs, the book analyzes two significant problems: logistics and copyright. The logistical problem concerns how to print and deliver books to children in remote areas around the world. The second problem is legal. Even if the books can be distributed at no charge, the underlying content is copyrighted. Shaver attempts to demystify the complexities of U.S., as well as some foreign and international, copyright law, including fair use, permissions, licensing, and creative commons copyright.

¶73 Print books are ideal, but the author suggests that books in digital formats can meet the need more effectively by solving the logistics problem. Many people in developing countries have smartphones, making it easy to download materials for children to read. There is no need for a truck or a yak to navigate treacherous mountain passes to reach remote villages.

¶74 A major focus of the book is the issue of neglected languages. Children learn best by starting to read in their native language as a first step to becoming literate and then transitioning to a second language, yet most books are never translated into the many languages spoken by a relatively few number of people. India provides a good example. India is home to many languages and dialects, but English is an essential skill for those who want to pursue an education. Due to the work involved and limited potential markets, copyright holders gain no profit from translating and publishing children's books in the many regional languages of India. Meanwhile, copyright protections restrict the ability of anyone else, such as a literacy-focused nonprofit organization, from doing so, and children who speak neglected languages go hungry for books.

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¶75 Shaver also proposes that, in the course of translating a book into a neglected language, the text could also be adapted to a variety of reading levels, with very simple words for beginners and greater complexity for further developed readers. The author envisions translating an existing 1500-word story into another language while at the same time creating a 750-word version and a 250-word version. Not only would this technique help a variety of readers in a single language, but it would also create materials useful to teachers in multilingual classrooms where students speak a number of different local languages.

¶76 Getting publishers on board is the single biggest impediment to any of these efforts. Since economies of scale make it impossible to make a profit from producing new works in lesser known, neglected languages, publishers should be open to the concept of translating existing works into these languages and distributing them to the children who need them. The author suggests a formula to solve the problem of reading material in neglected languages. She does the math, based on an extensive review of titles currently available in print and in English, proving that her translation solution is feasible. Her requirements for appropriate early literacy books include an engaging story, beautiful artwork with bright colors, and diverse characters and settings.

¶77 *Ending Book Hunger* contains several user aids at the end of the book. “Organizations Profiled” is a useful resource list of companies whose mission it is to deliver free books to children. It contains the name, website, and a brief description of each, as well as their notable innovations. There is an index, a feature missing from many new books, but it is disappointing. For example, I wanted to find the discussion of the United Nations 2030 goal for children’s education, “[A]ll children should enjoy a quality primary and secondary education leading to effective learning (p.167).” This quotation appears on page 167, but the index listing for United Nations indicates only pages 172–74. The phrase “United Nations” does appear on page 172, but the discussion at that page range is about translation issues. In another example, Moore’s law is discussed in the text but does not appear in the index at all.

¶78 As a law librarian, I found the lack of citations frustrating. The author provides case names and treaty names, but there are no citations to assist retrieval of the full text of these documents. There is a bibliography, but a “Cases, Statutes, and Treaties” citation list would be a helpful addition.

¶79 I write in the summer of 2020 at the peak of the COVID-19 pandemic. These times are perfectly characterized by a recent Forbes headline: “LeVar Burton Reading Live on Twitter is Everything We Need Right Now.”<sup>8</sup> How does this article relate to *Ending Book Hunger*? A towering figure in children’s literacy efforts, Burton ran into copyright issues as he prepared to read children’s books on Twitter, and he tweeted his concern. Well-known author Neil Gaiman stepped up, immediately offering blanket permission. Other authors and publishers soon followed suit, and #LeVarBurton Reads became a reality. Shakespeare is in the public domain, so Patrick Stewart’s daily sonnet reading on Facebook poses no copyright concerns. Copyright laws, intended to make creativity worthwhile, can sometimes stand in the way of what we need as a

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8. Abram Brown, *LeVar Burton Reading Live on Twitter Is Everything We Need Right Now*, FORBES (Apr. 3, 2020), <https://www.forbes.com/sites/abrambrown/2020/04/03/levar-burton-reading-live-on-twitter-is-everything-we-need-right-now/> [<https://perma.cc/7PA3-LJGV>].

society. Shaver's *Ending Book Hunger* explores this conflict and proposes a solution to enhance children's literacy. Recommended for academic law libraries.

Smith, Keith L., and Erin L. Ellis, eds. *Coaching Copyright*. Chicago: ALA Editions, 2020. 188p. \$59.99.

*Reviewed by Eli Edwards\**

¶80 Academic librarians, including law school librarians, deal with copyright questions on a regular basis. Law librarians, in particular, may handle issues involving copyright as they assist faculty with dissemination of scholarly works; license content for classes and independent study; and help law journal editors negotiate copyright concerns in publishing, interlibrary loan, and secondary distribution channels. *Coaching Copyright*, a collection of instructive chapters by a variety of authors, is devoted to helping academic librarians provide engaging and effective assistance in answering copyright questions from students, staff, faculty, and other campus stakeholders.

¶81 *Coaching Copyright* is a lean book at less than 200 pages, but it packs a lot of information into its 10 chapters. In fact, despite the slimness of the volume, trying to read it all at once is not optimal. Readers are better off dipping in and choosing what to focus on, depending on their needs at the moment. The preface by editors Kevin Smith and Erin Ellis explains the concept behind the title—why advising on copyright issues resembles, and should mirror, the role athletic coaching plays in providing direct support for handling specific questions, with a focus on application and implementation. Smith opens the collection with general advice on how to treat copyright inquiries, as well as a framework for analyzing copyright situations. This is one of the longer chapters of the book, in part because Smith gives an overview of American copyright law, touching on the vagaries of musical copyright, the bundle of rights typically encompassed by copyright, licensing, statutory exemptions, fair use, and infringement.

¶82 Jill Beck and editor-author Erin Ellis discuss how to integrate copyright coaching into instructional programs, whether advising students on copyright, plagiarism, and ethics of information use and reuse for classes, turning to copyright librarians on campus to deal with a questionable scholarly publishing situation, or squelching blackletter rules that may be misapplied by users. The theme of instruction carries through other chapters on how to engage various audiences for copyright coaching. Examples discussed include using hooks, storytelling, and even role playing to teach negotiation skills. The authors of these pedagogical tool chapters emphasize balance and nuance without leading people into the abstract/theoretical weeds of copyright law, thus echoing the early messages on coaching.

¶83 *Coaching Copyright* covers coaching specific audiences as well. One chapter discusses working with undergraduate research journal staff, and includes a case study from the University of Illinois at Urbana-Champaign; another discusses how to build “copyright confidence” in instructional designers via formal and informal approaches to reactive and proactive copyright guidance (p.121). In the book's final chapter, a library science professor reviews the efficacy of his Legal Issues in Librarianship course in preparing students to deal with such issues.

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\* © Eli Edwards, 2020. Emerging Technologies Research Librarian, Mabie Law Library, Santa Clara University School of Law, Santa Clara, California.

¶84 Higher-level topics are also considered. For example, how do copyright challenges at a small liberal arts college differ from those at a large research university? It turns out size makes things different but not necessarily less complex. What is the role of a copyright librarian? Copyright librarians can not only provide targeted advice, but also may develop policies and initiatives for departments and schools. In the course of this work, they may work with library directors, deans, university counsel, and others.

¶85 *Coaching Copyright* is not an answer book; it does not give bright-line rules or overall guidance on answering copyright questions. However, it provides plenty of suggestions for working with various audiences that may have copyright concerns in an academic arena. Whether you are a copyright librarian, a scholarly communications librarian, or a librarian in circulation, technical services, or administration who handles copyright queries from various stakeholders, this book provides effective strategies for coaching people in reaching conclusions about copyright. Particularly if you are a new or accidental copyright librarian, this guide is full of good tips on how to interact with your communities, create or expand learning opportunities for copyright education, and build your own expertise on a very thorny subject. Recommended for law school and general academic libraries.

Susskind, Richard. *Online Courts and the Future of Justice*. Oxford: Oxford University Press, 2019. 347p. \$24.95.

*Reviewed by Jennifer L. Behrens\**

¶86 What happens when a legal futurist thinks a bit too far ahead? In his introduction to *Online Courts and the Future of Justice*, Professor Richard Susskind imagines the landscape in 2039, when his baby granddaughter Rosa (to whom the book is dedicated) will be 21 years old. The introductory section makes an impassioned case for the continued development of online courts to improve global access to justice and notes the current skepticism among many lawyers and judges that this scenario will actually come to pass.

¶87 Susskind finished his manuscript on April 28, 2019 (p.xiv). Less than a year later (and just weeks after the book's publication), the coronavirus pandemic accelerated the timeline for many of his predictions. Judiciaries around the world scrambled to develop infrastructure for remote hearings, including the notoriously technology-averse U.S. Supreme Court. While no one could credibly fault Susskind for failing to anticipate an international health crisis, the effects of coronavirus on court operations in 2020 cast a shadow over portions of the book that can be difficult for a reader to disregard. In particular, much of the author's careful attention to outlining and refuting potential counterarguments to his proposals reads as excessive in the current climate. Certainly, one muses, Susskind's hypothetical naysayer *must* be convinced by now of the benefits of online courts when the only other alternative to remote court services during a global contagion would have to be no court services at all?

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\* © Jennifer L. Behrens, 2020. Associate Director for Administration and Scholarship and Senior Lecturing Fellow, J. Michael Goodson Law Library, Duke University Law School, Durham, North Carolina.

¶88 Of course, Susskind aims higher than simply shifting the work of traditional courts and human judges into virtual settings. The current COVID-related adjustments to court services represent what Susskind terms “online judging” (p.6), which is just one of two ways that Susskind characterizes online courts. This approach effectively illustrates the “wheel-change dilemma” (p.112) of which Susskind frequently warns clients: the futility of changing a car’s tire while simultaneously speeding down the interstate. As Susskind notes, attempts to transform current approaches too often lead to “the compromise of committing to technology but simply grafting it onto current ways of working,” rather than the ideal scenario, which is “to build and launch an entirely new vehicle” (p.112). Susskind calls the other approach “extended courts” (p.6): leveraging technology to streamline and automate traditional court services, and also to supplement them with new and improved services, such as automated case evaluation or disposition.

¶89 *Online Courts and the Future of Justice* is arranged in four parts. “Courts and Justice” outlines the general concept of justice and the high-stakes role of courts in its delivery. “Is Court a Service or a Place?” considers how online courts could change, and already have changed, this landscape. “The Case Against” addresses many of the likely objections, including concerns about equitable access, fairness, and transparency. Finally, “The Future” examines the potential contributions of such assorted technologies as virtual and augmented reality, online dispute resolution, and artificial intelligence.

¶90 The book’s organization can feel circular in places, with frequent cross-references to previous and subsequent chapters (sometimes as many as four or five per page). The author seems to assume that this text will be read out of order or in excerpts, and the parenthetical pointers to other chapters can grow distracting on a direct read-through. This arrangement does lend itself well, however, to quick consultations on subtopics of interest; the thorough index will undoubtedly aid the more desultory reader.

¶91 Susskind remains, as he has been for decades, one of the premier writers and speakers on topics of legal technology and the future of law practice. *Online Courts and the Future of Justice* is an accessibly written introduction to key issues that makes it a valuable addition to academic law libraries. However, some readers and libraries may prefer to wait for a paperback or revised edition, which one could reasonably assume might include a new chapter on recent developments and the author’s thoughts on how they have helped—or hindered—progress toward his ultimate vision.



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