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The U.S. Legal System: Common Values, Uncommon Procedures

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The U.S. Legal System

COMMON VALUES, UNCOMMON PROCEDURES*

I. INTRODUCTION

The federal appellate system in the United States has a virus. Commonly known as “non-precedential decisions,”¹ this virus exists in every circuit within the federal court system. Much like a virus that infects the human body, non-precedential decisions have wormed their way into the

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¹ The phrase “non-precedential” has replaced the misnomer “unpublished” when referring to decisions by federal appellate courts that decide only a particular case and do not establish binding precedent. These non-precedential decisions arise from “no-citation rules” that are established on a circuit-by-circuit basis and that forbid, or allow in very limited form, citation in court documents to decisions termed “unpublished.” The term “unpublished” is a misnomer because these decisions are, in fact, published in both electronic and hard copy form. However, though these decisions are available to read, they are generally unavailable for citation purposes and thus are non-precedential.

The fact that non-precedential decisions were actually unpublished in the past is one reason used to justify no-citation rules.

In the past, some have . . . argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of non-precedential opinions on Westlaw and Lexis, on free [I]nternet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MINUTES OF FALL 2002 MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 1, 22-39 (2002) [hereinafter “Advisory Committee Minutes”], available at <http://www.uscourts.gov/rules/Minutes/app1102.pdf>; see also Memorandum from Judge Samuel A. Alito, Jr., Chair of the Advisory Committee on Appellate Rules, to Judge Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure (May 22, 2003), at 27-36 (publishing Proposed Appellate Rule 32.1 for comment) [hereinafter Alito Memorandum], available at <http://www.uscourts.gov/rules/app0803.pdf>.

appellate system through federal circuit courts' no-citation policies and have begun to corrupt the fair and efficient functioning of that system. The shocking effect has been to render approximately eighty percent of all decisions made by federal circuit courts today non-precedential² and, therefore, unavailable for use by parties, advocates, and even judges.³ What this means, essentially, is that decisions made by federal appeals courts are "tickets good for one ride" only.⁴ As one circuit court judge framed it, "[w]e may have decided this question the opposite way yesterday . . . but that does not bind us today, and, what's more, you cannot even tell us what we did yesterday."⁵ The problem of non-precedential decisions is demonstrated by this assertion: courts are not bound, judges are not bound, and nobody knows what will happen tomorrow. More to the point, nobody knows what happened yesterday.

To properly understand the far-reaching consequences of the increase in non-precedential decisions, it is helpful to note the manner in which their wide use has caused the U.S. common law system⁶ to become more like a civil law system.⁷

² ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES 2001, tbl.S-3 (2001) [hereinafter "ADMINISTRATIVE OFFICE"], available at <http://www.uscourts.gov/judbus2001/tables/s03sep01.pdf>; see also Tony Mauro, *Judge Ignites Storm Over Unpublished Opinions*, FULTON COUNTY DAILY REP., Sept. 5, 2000.

³ While judges, practitioners, and legal scholars have debated the constitutionality of such policies, the fact remains that these rules do exist and have formed a body of law that is unaccessible as precedent. For a good discussion of the constitutionality and desirability of non-publication policies, see Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAWYER, June 2000, at 43; Judge Boyce F. Martin, Jr., *Judges on Judging: In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 183 (1999); Joshua R. Mandell, *Trees that Fall in the Forest: The Precedential Effect of Unpublished Opinions*, 34 LOY. L.A. L. REV. 1255 (2001). For the opposite view, see *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000).

For a general overview of current national debates on the subject of the constitutionality and desirability of non-publication policies, as well as discussion on the practical impact of such decisions, see Appellate Practice Section of the Bar Association of San Francisco, *Unpublished Decisions: Caught Between Scylla and Charybdis* (April 24, 2001) (presenting opinions of panelists Judge Alex Kozinski, Professor Stephen R. Barnett and Ms. Andrea Asaro) [hereinafter "*Scylla and Charybdis*"], available at <http://www.nonpublication.com/discussion.pdf>.

⁴ Adam Liptak, *Federal Appeals Court Decisions May Go Public*, N.Y. TIMES, Dec. 25, 2002, at A21. This article provides a useful graph demonstrating the percentage of opinions unpublished in each circuit court for the period from October 1, 2000 through September 30, 2001. *Id.* These percentages range from 60.2% in the Seventh Circuit to 91.5% in the Fourth Circuit and average out to 80.4%. *Id.*

⁵ *Id.* (quoting Judge Richard S. Arnold of the Eighth Circuit).

⁶ For purposes of this Note, the term "U.S. system" will be used to refer to the common law system developed and currently in force in the federal judicial system.

While this analogy has limitations, it allows a clearer elucidation of the problems and risks that may arise due to the operation of frozen precedent within the common law system. As a common law system, the U.S. legal system is based upon the workings of *stare decisis*.⁸ On the other hand, civil law systems rely on extensive and integrated codifications for decision making rather than a system of precedential court decisions.⁹ While both systems have weaknesses, both also have internal correctives, and it is in this regard that analogizing code law and frozen precedent yields its greatest insight. When a common law system begins to bear traits of a civil law system, but lacks the internal correctives of such a system, the opportunity arises for judges to make arbitrary and tangential

The terms "Continental approach" or "civil law system" will be used to refer to the civil law system developed from Roman law and currently in force, in varying degrees, in much of Europe and Latin America. The civil law countries examined in this Note are primarily Germany and France.

⁷ "Civil law systems are legal systems of countries or other territorial units (states or provinces of a federation) with a private law predominately based or influenced by Roman Law (the *ius civile*)." George A. Zaphiriou, *Introduction to Civil Law Systems*, in *INTRODUCTION TO FOREIGN LEGAL SYSTEMS* 47 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994) (footnote omitted). Roscoe Pound elucidated three different ideas of what a civil law system is: (1) "a complete legislative statement of the whole body of the law so as to put it authoritatively in one self-sufficing form;" (2) "republishing in a systematic form of the whole mass of existing law of every kind, and . . . separate codification of statute and [of non-statutory] law, adhering as closely as possible to the language, conceptions, and methods of the old law;" and (3) "to provide so far as possible a complete legislative statement of principles so as to furnish a legislative basis for juristic and judicial development . . . laying down rules sparingly and for the analogies they furnish" ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 96 (2d ed. 1977) (quoting Roscoe Pound, *Sources and Forms of Law*, 22 *NOTRE DAME LAW.* 1, 71-72 (1946)). In essence, a civil law system is represented by extensive codifications set forth by legislatures and elucidated by legal scholars. This system does not rely on *stare decisis* but instead places the emphasis on the analysis of rules for each new factual situation. See discussion *infra* Part II.A.

⁸ 15A AM. JUR. 2D *Common Law* § 1 (2002) (stating that the common law is "inseparably identified with the decisions of the courts"). In general, *stare decisis* is the practice of following the decisions of superior courts as precedential and binding. Alexander Hamilton asserted that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *Rogers v. Tennessee*, 532 U.S. 451, 472 n.2 (2001) (citing *THE FEDERALIST* NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). David J. Luban defends precedent by quoting Anthony Kronman, who stated that "[t]he force of precedent . . . is best understood through 'the traditionalist idea that the past possesses an authority of its own.'" David J. Luban, *Legal Traditionalism*, 43 *STAN. L. REV.* 1035, 1040 (1991) (citing Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1046 (1990)).

⁹ Zaphiriou, *supra* note 7, at 51-52 (giving the four main characteristics of civil law systems as (1) a moralistic and dogmatic approach to legal reasoning; (2) "[e]xtensive and integrated codifications"; (3) the lack of *stare decisis*; and (4) different procedures in criminal and civil trials).

decisions that will ultimately degrade the function, efficiency, faith in, and fundamental fairness of the U.S. legal system.

To substantiate the assertions above, Part II of this Note compares some general features of the civil law and common law systems, including origins, approaches to legal reasoning, and the training, education, and selection of judges. Part III demonstrates the code analogy discussed above, namely that increasing numbers of non-precedential decisions have shifted the common law system into a system that bears the traits of a code system. Part IV emphasizes the effects of this process by highlighting the loss of internal correctives within the methodology of legal reasoning. Part V discusses the corruption¹⁰ of the U.S. legal system and Part VI recommends ways to increase internal mechanisms for protection against unfairness and inefficiency, including a discussion of Proposed Appellate Rule 32.1.¹¹

II. THE CIVIL LAW AND THE COMMON LAW LEGAL SYSTEMS

A. *Civil Law*

The goal of the civil law system, or Continental approach, is to "state in a general, orderly, integrated, and complete way the rules of private law needed to regulate private relations."¹² Thus, the civil law is primarily recognizable to those outside of its system by its extensive and integrated codifications. However, it can also be differentiated from the U.S. system by the preeminence of legal scholars and the insertion of a comprehensive and fundamental moral system at the inception of modern codification.¹³

These elements of a civil law system arose from the manner of its origination. While the U.S. system developed on the British Isles, the Continental approach sprung from ancient Roman law as discovered and interpreted by medieval

¹⁰ The term "corruption" is used in the sense of corrosion, and is meant to indicate the increase of uncertain variables within the judicial system.

¹¹ ADVISORY COMMITTEE MINUTES, *supra* note 1, at 22-39 (proposing and approving Appellate Rule 32.1 in principle on November 18, 2002, pending approval in a revised form at the May 15, 2003 Advisory Committee Meeting) (to be codified at FED. R. APP. P. 32.1). See discussion *infra* Part VI (discussing elements of Proposed Appellate Rule 32.1); see also Liptak, *supra* note 4 (discussing the proposed rule).

¹² Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 94 (1998).

¹³ Zaphiriou, *supra* note 7, at 51-52.

scholars.¹⁴ The influence of natural law¹⁵ during this time period infused the interpretation of Roman law, and thus the development of civil law, with a fundamental and comprehensive sense of morality.¹⁶ The Continental approach is both more dogmatic and didactic,¹⁷ in part because it was originally based on Roman law, and in part because the Roman writings were interpreted under the assumptions of a God-given natural law.¹⁸

Roman law origination ultimately led to the development of the code, as elucidated by legal scholars, as the authoritative source of law within the Continental approach.¹⁹ Primarily because legal scholars maintain preeminence, decisions do not *bind* civil law judges but merely “*inspire* them”

¹⁴ *Id.*

¹⁵ “According to natural law legal theory, the authority of at least some legal standards necessarily derives . . . from considerations having to do with the moral merit of those standards.” UNIVERSITY OF TENNESSEE AT MARTIN, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, at <http://www.utm.edu/research/iep/n/natlaw.htm> (last visited Jan. 8, 2004).

¹⁶ Zaphiriou, *supra* note 7, at 51-52.

¹⁷ *Id.* “Dogma” is defined as “a definite authoritative tenet” and “didactic” as “designed or intended to teach” and “making moral observations.” See MERRIAM-WEBSTER DICTIONARY, available at <http://www.m-w.com> (last visited Jan. 8, 2004).

¹⁸ William Blackstone states of natural law:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 41 (University of Chicago Press 1979).

¹⁹ Zaphiriou, *supra* note 7, at 47-48, 52 (stating that the influence of natural law “filled in the vacuum during the Dark Ages” and led developing “civil codes [to] refer expressly to morality”).

Roman law was not simply interpreted and applied in a blanket form in all civil law countries. Throughout the last two centuries alone there has been a significant amount of legal scholarship and development of the code as interpreted from Roman law. In addition, each country has its own scholarship and historical practices which personalize the code to its needs. Nonetheless, there does seem to be an “overwhelming sense of continuity of development.” REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY 98 (2001).

Take Germany for example. In 1495 “[t]he whole body of Roman law, in complexu, was . . . given the rank of statutory law in Germany.” VON MEHREN & GORDLEY, *supra* note 7, at 11. This law was the Roman law, not in the form of the sixth century *Corpus iuris*, but the law as it was interpreted in light of natural law by medieval scholars. *Id.* Some parts of the Roman law were simply ignored and some remained primarily Germanic as it stood before the adoption of the Roman law. *Id.* In addition, throughout the fourteenth and fifteenth centuries many cities and regions reformed their legal systems to reincorporate Germanic elements which had been replaced. *Id.* This continuum of development has not halted. Thus, the idea of a blanket form of adopted Roman law simply does not exist in the civil law system, though the force of Roman ideals dominates to varying degrees.

in their final interpretation of the code.²⁰ Instead, legal scholars take a heightened role because their interpretation of the code is considered authoritative in judicial decision making.

Because the code is the authoritative starting point in civil law countries, it is to this source that civil law judges turn when beginning legal reasoning.²¹ In the general methodology behind civil law legal reasoning, a judge begins by identifying the code provision that governs the present situation or issue.²² Once that code provision is determined, judges rely upon logic to move from the generalities of individual code provisions to case-specific decisions.²³ Described by one scholar as "the Drawer Theory,"²⁴ this process is a deductive approach whereby the civil law judge "proceeds from a broad principle, expressed in general terms, then considers the facts of the particular case and finally, as in a syllogism, applies the principle to the facts so as to reach a conclusion."²⁵ It is important to note that this type of deductive reasoning allows civil law practitioners and

²⁰ VON MEHREN & GORDLEY, *supra* note 7, at 1135 (citing A. COLIN & H. CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS § 36, at 40 (Julliot de la Morandière ed., 11th ed. 1947)).

²¹ *Id.* at 1134-35 (stating that the code, or the general body of statutory law, is the authoritative starting point for legal reasoning in France and Germany); see also Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, in PETER G. STEIN, THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 131, 131 (1988) (stating "the official myth in the civil law is that, although academic writings have authority, judicial decisions have none; in practice, however, great attention is paid to the latter").

²² VON MEHREN & GORDLEY, *supra* note 7, at 1134-35. However, "[s]uch is not the case in every field of private law. For example, in both French and German law very few legislatively given starting point [sic] for legal reasoning are available [sic] in the field of private international law." *Id.* at 1134 n.19.

²³ See Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1597 (1992) [hereinafter Stein, *Roman Law*].

²⁴ See Phillipe Bruno, *The Common Law From a Civil Lawyer's Perspective*, in INTRODUCTION TO FOREIGN LEGAL SYSTEMS 1, 8 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994). This theory describes the civil law methodology as one element of reasoning leading logically to the next until the answer is discovered within the code itself. *Id.* at 8-9. This methodology is "analogous to pulling drawers, one-by-one, until one drawer contains the answer to the problem." *Id.* at 8. In other words, the civil law judge first goes to one provision to determine its applicability. If that provision works or if the facts can be forced into that provision, then he has found the answer. If, however, that provision cannot govern the case at hand, the judge must then look to the next provision to determine applicability. This process goes on and on until the judge locates the applicable provision of the Code. Once the applicable provision is located, he looks to it to find the appropriate rule of law. *Id.* at 8-9. If the rule of law found is ambiguous it is then interpreted and clarified as directed by academic writings. See Stein, *Roman Law*, *supra* note 23, at 1597. Only once the rule of law is found in the code, and the writings of scholars consulted, does the civil law judge consider judicial decisions to clarify an interpretation or understanding. *Id.*

²⁵ Stein, *Roman Law*, *supra* note 23, at 1596.

judges to present their arguments as if there can be only one right answer to any legal problem.²⁶ Because of this, civil law judges generally do not issue dissenting opinions.²⁷ Instead, every judgment, even in appellate cases, is given by the court as a whole.²⁸

Though judges may present their arguments as if there is only one right answer to a particular legal question, the Continental approach actually gives trial judges great flexibility in deciding particular issues simply because they are not bound by precedent.²⁹ Each judge can decide which facts or factors to emphasize in applying the general code principle to the specific fact situation.³⁰ However, this process is protected from arbitrariness by a deductive methodology that has only one authoritative starting point.³¹ Furthermore, this starting point, the code, has been legislatively determined and morally introduced and, therefore, provides additional protections for fairness.³²

This analysis is also protected by the manner in which judges in the civil law system are educated, recruited, and promoted. A civil law judge is traditionally revealed as "a fungible person, one of a group of anonymous, almost colorless,

²⁶ *Id.* ("This form of reasoning leads the civil-law lawyer to present a legal argument as if there can be only one right answer to any legal problem, and disagreement on the application of the law to the facts of a case, must, in this way of thinking, be the result of faulty logic by somebody.").

²⁷ *Id.*

²⁸ *Id.*

²⁹ See VON MEHREN & GORDLEY, *supra* note 7, at 1135 n.21. Though there is no stare decisis, "[d]ecisions, especially a series of successive decisions reaching similar results, have as a practical matter considerable influence upon the future judicial handling of comparable situations." *Id.* Further, in theory, "this is not a binding rule of law because . . . in contrast to the case law . . . other courts, and even those which made the decisions that established the *jurisprudence* (case law), retain full freedom to decide in a different way in similar cases that they will be called upon to decide in the future." *Id.* (quoting COLIN & CAPITANT, *supra* note 20) (internal quotations omitted).

³⁰ For example, orthodox French theory, though among the more restrictive in the civil-law community, recognizes the nonmechanical nature of the judicial process by observing that "the written law is neither complete nor unambiguous." *Id.* at 1135. French courts, in rendering judicial decisions, will consider both the language of the code as well as "the social end that rendered the statute necessary." *Id.*

German theory, as well, recognizes the nonmechanical nature necessary in rendering judicial decisions and agrees that codified law is not complete and unambiguous. *Id.* at 1136. German courts, in addition, "have in certain situations the right to deviate from legislatively given rules" and give weight to the words and organization of the code as well as to its legislative history, and various interpretations. *Id.*

³¹ *Id.* at 1134.

³² See discussion *supra* Part II.A (discussing the origination of civil law from natural law).

individuals who hide their personality behind the collegiate responsibility of the court."³³ This begins with the type of legal education provided under the Continental approach: the lecture method.³⁴ These lectures "incline toward an exposition of general principles from which the results in concrete cases are derived by a process of deductive reasoning."³⁵ The lecture method, therefore, mirrors the deductive legal analysis that each prospective civil law judge will someday utilize. The lectures consist of an explanation and elucidation of the specific code provisions that must be applied. This way of teaching provides less opportunity for "a full exploration of the factual background of individual decisions and less incentive for such effort."³⁶ Educators are not seeking, necessarily, to provide examples of specific situations in which the provision at hand operates. Instead, importance is placed on the generalities of each provision so that their full impact can be understood.³⁷ Because no decision binds the next, the specific facts of each case become less important, and there is less incentive for a judge to explore them.

A civil law judge is, in substance, a member of a specialized branch of the general bureaucracy.³⁸ A civil law judge's judicial career begins when he is very young, generally right after he completes his legal education and enters the judiciary at an entry-level position.³⁹ The prospective judge in the civil law system makes a decision to pursue this avenue of law and does not need to wait for an appointment or election.⁴⁰ In fact, one ordinarily enters the judicial branch by passing an examination.⁴¹ In terms of promotion, a young civil law judge can expect to advance to a higher court only "after long service in lower courts."⁴² This system is very slow by nature and adds to the bureaucratic character of the judicial branch. In addition, as career civil servants, civil law judges are not compensated at the same level as legal practitioners or

³³ Stein, *Roman Law*, *supra* note 23, at 1597.

³⁴ VON MEHREN & GORDLEY, *supra* note 7, at 1139.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1148-49.

³⁹ VON MEHREN & GORDLEY, *supra* note 7, at 1148-49.

⁴⁰ *Id.* at 1150.

⁴¹ *Id.* at 1148-49.

⁴² *Id.* at 1148-49.

scholars.⁴³ Though they “enjoy some social prestige and . . . economic security,” being a member of the judiciary is still not very appealing in either of these areas.⁴⁴ As a practical matter, a civil law judge does carry a certain level of prestige. However, it seems as if this prestige may be more properly akin to the prestige awarded to a professor rather than a judge in the United States.

Because of the bureaucratic nature of the judicial bench in civil law countries and the mechanical application of code provisions in decision-making, it is not surprising that civil law judges are described as fungible.⁴⁵ Mature and successful practitioners or legal scholars seldom migrate to the bench⁴⁶ because this would not be an ascension, as it is in the United States. Additionally, appointing a mature individual would inevitably cause a disruption in the fairly regular system of recruitment and advancement.⁴⁷ This combination of a slow, bureaucratic process and the necessity of entering the judiciary at a very young age does not appeal to the most forceful, colorful, or energetic personality types.⁴⁸ Furthermore, “individuality is lost in a collegiate bench that does not permit the expression of concurring or dissenting opinions.”⁴⁹ Though Germany’s “handling of the facts and the law . . . is fuller than in French decisions,” neither France nor Germany permits members of its judiciary to sign their opinions, let alone state a dissent.⁵⁰ All opinions come from the court as a whole. Again, the civil law judge is in a position where his decisions must be subjugated to the opinions of the other members of the court.⁵¹

⁴³ *Id.* at 1148 n.80. Von Mehren and Gordley state that “a French judge does not earn as much as a good lawyer, but is well paid for a civil servant,” *id.*, and that “[t]he economic situation of the German judge [also] appears to be unsatisfactory.” *Id.* at 1148-49.

⁴⁴ VON MEHREN & GORDLEY, *supra* note 7, at 1148-50.

⁴⁵ Stein, *Roman Law*, *supra* note 23, at 1597.

⁴⁶ See VON MEHREN & GORDLEY, *supra* note 7, at 1148-49. Von Mehren and Gordley also go on to describe some changes occurring in the civil law system. “One of the reforms today urged in Germany is to recruit judges from among persons of mature age who have proved themselves in other forms of legal activity.” *Id.* at 1149 n.83.

⁴⁷ *Id.* at 1150.

⁴⁸ *Id.* at 1149 n.84 (stating “[t]he customs of civil-code countries do not develop a Bench or Bar of comparable prestige, creativeness or independence . . . Court opinions rarely bear the name of the writer, dissents are not permitted, and the judicial post offers less incentive to originality in the judge”).

⁴⁹ *Id.* at 1149.

⁵⁰ VON MEHREN & GORDLEY, *supra* note 7, at 1140-41 & n.53.

⁵¹ See *id.* at 1140 n.53 (citing Batiffol, *Contrastes entre l'esprit juridique anglo-saxon et l'esprit juridique continental*, 14 *Annales de Droit et de Science*

Thus, it should come as no surprise that the typical Continental judge tends to be an anonymous figure, indistinguishable from other members of the judiciary.

The limited function and role of the civil law bench coincides with the bureaucratic method of appointment to the bench, as well as with subsequent advancement. Civil law judges do not create the law, as an American judge does.⁵² Instead their role is to interpret and apply the written law as directed by legal scholars.⁵³

Yet, from another point of view, civil law judges have a great deal of individual power. Because their decision-making capacity is not limited by prior decisions, they are able to bring a sense of flexibility and individuality to decision making. Moreover, they are able to respond more precisely to the different parties' interests. However, this is limited by the prominence of academics, whose writings are persuasive interpretations of the code. Therefore, while civil law judges have ultimate power in adjudicating *specific* disputes, their ability to affect the *general* law is more limited.⁵⁴

B. Common Law

The common law method was founded in England on ancient local rules and customs.⁵⁵ With the centralization of power in feudal times, this amalgamation of rules and customs began to evolve in King's courts into the principles under which it now operates.⁵⁶ The common law, as it was known in England, migrated to this country with the first English colonists.⁵⁷ After the separation from England, the colonists in each state adopted, by express provision or through judicial decisions, the principles of common law.⁵⁸ The common law is

Politique 3, at 7 (1954)) ("[I]n France, the judge takes an oath, when he is named, not to reveal the differences of opinion on the bench.").

⁵² See RAYMOND YOUNGS, SOURCEBOOK ON GERMAN LAW 4-6 (1994).

⁵³ *Id.*

⁵⁴ *Id.* at 52. This is not entirely true since other decisions in the civil law system are often used to clarify an understanding or interpretation of a code provision. However, such decisions are secondary authority at best and not binding as authoritative law.

⁵⁵ 15A AM. JUR. 2D *Common Law* § 3 (2002).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* At times throughout the history of the American legal system, civil law ideals had a great effect on contemporaneous thinking. In addition, many jurisdictions adopted portions of the civil law. See *infra* text accompanying note 68.

broadly concerned with public policy, tradition, and precedent, and these broad concerns have led to a system that is typically justified on the grounds of basic fairness, gradualness,⁵⁹ adaptability,⁶⁰ predictability, stability,⁶¹ and rule precision.⁶² On the other hand, the common law approach may also be considered less creative and less rational than the typical codified system.⁶³ For our purposes it is important to note that today the common law prevails throughout the United States except where it has been explicitly modified or repealed by statute.⁶⁴

As opposed to the civil law system, the U.S. legal system relies upon the idea of *stare decisis*, or precedent.⁶⁵ This has led to a great and inherent respect for tradition within the common law system. In fact, some scholars believe that tradition should be adhered to as “one of the great social forces of justice”⁶⁶ and that the binding force of precedent is best illuminated when

⁵⁹ GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 97 (1982) (stating that “[c]ommon law rules become dominant slowly over time in response to many separate decisions in real cases by many disparate judges”).

⁶⁰ Cappalli, *supra* note 12, at 99.

⁶¹ *Id.* at 100 (citing RICHARD B. CAPPALLI, THE AMERICAN COMMON LAW METHOD ch.10 (1997)) (stating that “[s]ignificant change in the common law is infrequent, mostly because legal change is slow-paced and incremental . . . [which] means that common law rules are reasonably stable and that their context and use are reasonably predictable”).

⁶² *Id.* at 99.

⁶³ Bruno, *supra* note 24, at 2 (stating that codification is a “construction of the mind, designed to impose a rational and well defined legal order on a particular society”).

⁶⁴ 15A AM. JUR 2D *Common Law* § 10 (2002). Exceptions to this statement include the state of Louisiana, and the territory of Puerto Rico, where the civil law prevails in civil matters. Because this Note is focusing on the federal law, these anomalies, among others, will not be dealt with.

For further illumination on the role of the civil law in the United States, see *Miller v. Letzerich*, 49 S.W.2d 404, 409 (Tex. 1932) (holding that statutes in force in Texas before the introduction of the common law must be construed in light of Mexican civil law). See also *Menendez v. Rodriguez*, 143 So. 223 (Fla. 1932) (holding that the civil law of Spain is not in force in Florida except as portions of such civil law may be incorporated in statutory enactments).

⁶⁵ Black’s Law Dictionary defines *stare decisis* as meaning “to abide by, or adhere to, decided cases.” BLACK’S LAW DICTIONARY 1406 (6th ed. 1990), cited in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 954 (1992). The Supreme Court has also acknowledged that *stare decisis* is a powerful concern that binds courts to legal precepts. *Holder v. Hall*, 512 U.S. 874, 944 (1994). The Court goes on to state, however, that “*stare decisis* ‘is a principle of policy’ and it ‘is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.’” *Id.* at 945 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

⁶⁶ Luban, *supra* note 8, at 1036 (quoting Justice Felix Frankfurter and citing BERNARD SCHWARTZ & STEPHAN LESHER, INSIDE THE WARREN COURT 68 (1983)).

viewed in light of the traditionalist premise that "the past possesses an authority of its own."⁶⁷

Precedent is not the only source of law in the U.S. system. In fact, statutes are the source of much law in the United States.⁶⁸ In situations where the law has been developed through statutes, created and approved by the legislature, legal analysis is much closer to the civil law system. However important statutes are in framing the law in the U.S. system, where the source of law is statutory, the effects of non-precedential decisions do not rise to the same level and thus will not be specifically addressed in this Note.⁶⁹

⁶⁷ *Id.* at 1040 (citing Kronman, *supra* note 8, at 1046).

⁶⁸ This Note exclusively focuses on common law. For a brief discussion of how unpublished opinions affect statutory law, see *infra* note 69.

⁶⁹ To clarify this point, where legal analysis begins with a legislatively enacted statute, rather than with a line of cases decided by judges in their individual capacities, the law has a greater presumption of legitimacy in part because the legislature is deemed to be an administrative arm of the people. THOMAS JEFFERSON, *Letter from Thomas Jefferson to John Taylor (May 28, 1816)*, in 11 THE WORKS OF THOMAS JEFFERSON 527 (Paul Leicester Ford ed. 1904-05) (stating "[t]he mass of citizens is the safest depository of their own rights"). Thus statutory laws, in theory, have internal correctives which arise from the responsibility legislators have to their constituencies, as well as the watchdog role that members of the various constituencies take in monitoring their representatives. *Id.*; see also Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91, 102 (1991) ("The probability of defeat at the next election deters officials from even seeming to infringe on civil rights."). Ideally statutes will contain the values and morals of a group of people representing the values and morals of the entire nation. *Id.* ("it is a particular set of processes that make governmental decisions morally binding: the people's freely choosing their representatives, those representatives' proposing, debating, and enacting policy (and later standing for reelection), and then executive officers' enforcing that policy according to directives from the people's representatives"). Similar correctives exist within the civil law system which utilize legislatively enacted codes, originating in Roman law and infused with natural law morality. See discussion *supra* Part II.A (discussion concerning the origination of civil law from natural law). As such, statutory law has a greater affinity with the code system in civil law countries.

Statutory law is equally important in the U.S. system, and according to some scholars, increasingly prevalent and controlling. See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995 (1982); Robert F. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803, 804 (1984) (noting the dramatic increase in the importance of statutes in the American legal system). However, where legal analysis begins with statutory law, conversion into a civil law system does not bear the same consequences. In essence, the statutory system, being akin to civil law codes, has similar internal correctives which negate many of the problems that arise when precedents are treated as codes. Legislative legitimacy is one of these internal correctives. Though statutory law is essential in the U.S. system, the effects that arise from the conversion of decisional aspects of the U.S. system into statutory or code aspects, absent those necessary internal correctives leads to a corrosion of the system at all levels. For example, analogous case law is used to interpret applicable statutes and to discover legislative intent. However, when case law is corrupted through unavailability or arbitrary availability, this affects judicial interpretation of legislation.

Although precedents, and statutes for that matter, are the authoritative starting point for legal analysis within the U.S. system, they are not the only factors taken into account by judges in the common law system. In fact, the common law decision-maker may consider the “entire wealth of received tradition and usage, fundamental principles, modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than the mere words in which they are expressed.”⁷⁰ Thus, judges in the U.S. legal system pay a great deal of attention to the public policies that underlie the rule of law when applying it to the case at hand.⁷¹ The policies found within precedential law in the U.S. system are the counterparts to the natural law morality that infuses the civil law codes. Because public policies change as the tide of public opinion ebbs and flows, the U.S. system must have the ability to adjust accordingly. Precedential law creates a system that is dynamic and has an inherent capacity for growth and change.

On its most basic level, the common law system is concerned with facts, and the reasoning underlying decisions in the U.S. legal system reflects that focus.⁷² While in the civil law the authoritative starting point for judicial decision making is the code, in the U.S. legal system, the authoritative starting point is a statute⁷³ or, as we will focus on here, a line of cases.⁷⁴ As opposed to the civil law system where a code provision *is* the law, in the U.S. legal system a practitioner can look at dozens of court decisions and still wonder what the rule of law is.⁷⁵ As opposed to one starting point and one answer presented, the common law can present many possible starting points (precedents) and many possible answers, including concurring and dissenting opinions.⁷⁶ In this approach the unifying factor is the facts. Tellingly, in most situations, there is no way to

It is important to note that where a statute has been subject to a line of decisions which have a controlling impact on its interpretation in an individual fact pattern, that statutory interpretation is subject to the same weaknesses discussed in this Note in regards to purely precedential, or judge made, law.

⁷⁰ 15A AM. JUR. 2D *Common Law* § 1 (2002).

⁷¹ *Id.* § 2.

⁷² See *infra* text accompanying note 101.

⁷³ See *supra* text accompanying note 69.

⁷⁴ VON MEHREN & GORDLEY, *supra* note 7, at 1133.

⁷⁵ Bruno, *supra* note 24, at 4-5.

⁷⁶ This statement is simplified for purposes of this Note as both systems allow for varying results in differing degrees. Furthermore, each system also allows variance to the starting point in legal analysis.

locate the law until the facts have been pinned down. It is usually not difficult to find authority that supports whatever proposition is posited. The difficulty lies in determining "what effect a slightly different shade of facts will have" on the outcome of a case and "to predict the speed of the current in a changing stream of law."⁷⁷ Thus, in order to frame a conclusion based on a changing state of law, a common law practitioner or judge is forced to distinguish precedents based on facts until he can go no further. The rule of law that remains is the answer.⁷⁸ This methodology can be understood as the Stepping Stone Approach.⁷⁹ It is the common law methodology that begins with a line of cases, applies the facts, and distinguishes precedents until it determines the rule of law.

The application of law in the common law system is also affected by the education, recruitment, and advancement of judges within its system. In contrast to the Continental lecture method,⁸⁰ the U.S. system uses case theory as its general method of legal education.⁸¹ Case theory tends to emphasize considerations of policy and fact, rather than the exposition of general principles.⁸² This serves the function of directing the attention of prospective judges to the "nonmechanical nature of the judicial process" because each set of facts will always be

⁷⁷ VON MEHREN & GORDLEY, *supra* note 7, at 1134 n.15 (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).

⁷⁸ Bruno, *supra* note 24, at 4-5.

⁷⁹ The methodology of U.S. legal analysis can be described as a Stepping Stone Approach. The analysis starts with consideration of the facts. Under this approach a common law practitioner or judge finds the rule of law by looking first to the actual events, parties and circumstances of the case at hand. This methodology is similar to crossing a creek by jumping from rock to rock. On one shore is the land of facts, or the place where actual people are doing actual events, and, on the other side, is the rule of law. In order to reach the rule of law, a judge or practitioner must jump from precedent to precedent, or rock to rock, and with each leap, distinguish his facts from the facts that support each previous case. In this way, the common law lawyer can reach the rule of law and, on looking back, see the line of cases that brought him there. Without the facts, this analysis could not even begin. And without precedents, or the stepping stones, there is no way to reach the rule of law. *See generally* Cappalli, *supra* note 12, at 98-99; Bruno, *supra* note 24, at 4-5.

⁸⁰ *See* discussion *supra* Part II.A.

⁸¹ VON MEHREN & GORDLEY, *supra* note 7, at 1139. This is a broad generalization. Though case theory has been and still is the primary education method of law schools within the United States, there is a strong and continuing debate on whether case law education is the most desirable or should be the only method. *See generally* Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 AM. U. INT'L L. REV. 815 (2002). Different methods are utilized on a smaller scale within every school, clinical training being one prominent example. *Id.* at 827.

⁸² VON MEHREN & GORDLEY, *supra* note 7, at 1139.

unique to each case.⁸³ In essence, a law student in the United States becomes increasingly aware of the individuality of each specific fact pattern, and begins each analysis with an exposition of its particularities, rather than an exposition of generalities. Furthermore, most schools base fundamental legal courses on national law,⁸⁴ rather than on the particularities of a certain jurisdiction.⁸⁵ Therefore, the common law method of educating is not rigidly dogmatic but rather inherently incorporates a greater scope of factors for decision making.⁸⁶ This method of educating prospective judges has a great effect on the ultimate decision-making processes used by these individuals, as well as on the entire U.S. system. Because national law covers a broad geographical area, the particular factual situations faced are diverse. As such, a student of national law is exposed to a broad gamut of situations that permit him to develop a store of experiences from which to draw upon in the future.

Moreover, in the U.S. legal system, the bench has historically attracted men and women with "forceful personalities" away from lucrative practicing professions.⁸⁷ The ideal of a strong judicial personality has further developed as legal professionals in the U.S. system continue to view judges as lawmakers. Furthermore, most judges are elected or appointed at a mature age and in the midst of successful careers, bringing with them the kind of self-assurance and confidence that comes with professional success.⁸⁸ They often

⁸³ *Id.*

⁸⁴ This "national law" tends to be either federal law, which is applicable in each state within its federal courts, or an amalgamation of various state law which demonstrates the majority and minority trends of the specific course of study. *Id.* (stating that "the common law that is taught [cannot] be rigidly dogmatic" since it is based on approximately 49 different systems of substantive law).

⁸⁵ *Id.*

⁸⁶ See *supra* note 84.

⁸⁷ VON MEHREN & GORDLEY, *supra* note 7, at 1148-49. While the phrase "forceful judicial personalities" is perhaps a bit presumptuous, it is clear that judges, both male and female, who occupy the bench in the U.S. federal appellate system are, on the whole, confident decision makers who have the ability to formulate and present determinative opinions. Judges in the U.S. system have predecessors such as Judge Learned Hand and Judge Benjamin Cardozo to look to for guidance in their roles as judges. These judicial examples lead other judges to mimic and perpetuate strong personalities as they recognize that this is desirable in the U.S. system. In addition, the important role of the Supreme Court, as well as the immense respect the Justices of the current bench receive, lends credence and continuance to these judicial attitudes. Thus, though a presumptuous statement, I believe that judges, at the very least, bring the *ideal* of the forceful judicial personality when ascending the bench.

⁸⁸ *Id.* at 1150.

come to the judiciary with the idea that "the judge is the hero of the common law."⁸⁹ Judges in the U.S. system are "thus encouraged and stimulated by historical example to leave [their] mark on the law."⁹⁰ More importantly, a judge in the common law system is not a member of a bureaucratic institution as is the civil law judge.⁹¹ American judges do not have to serve for many years in a lower court in order to be appointed to a higher court. Individuals can be directly appointed or elected to higher courts, or spend their entire lives in a lower court.⁹² As such, there is not a typically bureaucratic aspect to their recruitment, and the appointment of mature individuals does not hinder the recruitment or advancement of others in the same sense that it does in the civil system.

In addition to their essential law-making role, judges in U.S. courts also perform an important political function through judicial review of the constitutionality of legislative and executive action.⁹³ As such, appointment to the federal bench, at any level, is highly desirable and carries with it a sense of prestige. This prestige continues because judges in the U.S. legal system form a small and elite group, and judges in the appellate system are an even smaller and more elite part of the greater whole. "[T]he call to maintain a small and exclusive federal appellate judiciary has not come from the public, or even from the bar . . . [but] appears to be championed by federal judges . . . rooted in a preference for a small-court culture."⁹⁴ Judges, coming from generally powerful and successful careers, bring the effects of this success to the bench.⁹⁵ Without this perception of being a member of an elite society, mature and successful practitioners and scholars would not ascend to the bench in the U.S. legal system – the incentive simply would not exist.⁹⁶

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1146.

⁹² See VON MEHREN & GORDLEY, *supra* note 7, at 1150.

⁹³ *Id.* at 1146. See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁹⁴ William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 338 (1996) (quoting Judge Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 JUDICATURE 288 (1994)).

⁹⁵ VON MEHREN & GORDLEY, *supra* note 7, at 1150.

⁹⁶ See *supra* note 87 and accompanying text; cf. discussion *supra* Part II.A (discussing the role of judges in the civil law system).

III. THE EXISTENCE AND PREVALENCE OF NON-PRECEDENTIAL DECISIONS FREEZES PRECEDENT

The U.S. legal system, “inseparably identified with the decisions of the courts,”⁹⁷ becomes frozen when decisions are divorced from their underlying situation-specific patterns.⁹⁸ In other words, stagnation occurs where the connection with *facts* is lost. This diminished identification began with the 1964 Judicial Conference of the United States when policies permitting unpublished and non-citable decisions in the federal circuit courts came into effect.⁹⁹ These no-citation rules, as a general proposition, allow judges in the federal courts of appeals to “authorize the publication of only those opinions which are of general precedential value”¹⁰⁰ Where non-citable decisions are prevalent, the rules of law determining a specific outcome have become divorced from fact.¹⁰¹

⁹⁷ 15A AM. JUR. 2D *Common Law* § 1 (2002).

⁹⁸ Again, this does not address the issue of statutory law. See discussion *supra* note 69.

⁹⁹ ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

¹⁰⁰ *Id.* The no-citation recommendation of the Judicial Conference of the United States also applies to the district courts. However, the limited scope of this Note prohibits the consideration of this facet of the recommendation.

¹⁰¹ See discussion *infra* Part III.B (discussing frozen precedent). It is important to note that decisions that are published and become the opinions set forth by the circuit courts are, in fact, based on a real set of facts. This includes those opinions that stem from a line of cases, a significant portion of which have been relegated to the realm of non-precedential authority. However, these decisions, even though *based in facts* are nonetheless *divorced from fact* precisely because all instances of precedent are not available for the practitioner to distinguish or analogize. This is most effectively discussed from the practical standpoint. For example, imagine you are a lawyer for a small firm and a client approaches you with a legal problem. When you research this problem to discover the rule of law you will most likely find at least a small variety of cases which illuminate the issues you have extracted from your client's problems. With these cases in hand you begin to move from case to case, distinguishing or analogizing your client's factual situation. In this way you will eventually find the rule of law. The problem arises, however, when you are faced with at least one, though perhaps a number of cases which deal with your client's issue but are deemed “unpublished.” Though “unpublished,” these cases nevertheless shed light on how courts have been treating the resolution of your issue. The difficulty is that when you go to court, your client's problem may be resolved in an entirely different way than the way in which the problems in the unpublished opinions were decided. As such, this new decision, though *based on* his factual situation, is in fact *divorced* from the factual situations in other like instances.

There is also an argument that some unpublished opinions, such as those decided in equity, or based on a totality of the circumstances test, call for judicial discretion and thus would not lead to frozen precedent. However, any time that facts are applied to a test or a rule of law, whether based in equity, or based on simple judicial discretion, they illuminate the way that the rule of law has been applied and will likely be applied in the future. It is a great disadvantage to litigants and

A prime example of this phenomenon occurred in the case of *Johnson v. Knable*.¹⁰² In *Johnson*, the plaintiff, a prison inmate, was denied a position working in the prison's education department. As a result of this denial, the inmate brought an action against the prison alleging that he was denied the job due to his sexual orientation. The Fourth Circuit held that if, in fact, the prison officials did deny the inmate a position due to his sexual orientation, they may have violated the plaintiff's equal protection rights. This issue was one of first impression for the Fourth Circuit and would perhaps have "made homosexuality subject to strict scrutiny review under the Equal Protection Clause."¹⁰³ Yet, the decision was unpublished.¹⁰⁴ "Thus, the court created a progressive rule for civil rights litigants and then hid it from public scrutiny."¹⁰⁵

Johnson is a clear example of the risks inherent in the use of unpublished opinions. One commentator has even gone so far as to claim that *Johnson* was intentionally unpublished by the Fourth Circuit in an attempt to "hide [a] controversial decision[]" and "shield" that decision from review.¹⁰⁶ Moreover, this decision may have allowed the Fourth Circuit to "chart a more progressive course than it ordinarily would have taken."¹⁰⁷ While this may or may not have been the intention of the Fourth Circuit, the fact remains that an issue of first impression was relegated to the realm of hidden law through the court's use of the unpublished opinion format.¹⁰⁸

practitioners to have this hidden from view. Moreover, precedent does in fact become frozen in the sense that fact-sensitive legal tests will not evolve or develop along the lines in which they are designed. Even with a totality of the circumstances test, a court will look to prior decisions to find the scope of its application. When precedent is frozen, the outer edges of a rule of law become blurred, and the potential for arbitrariness increases.

¹⁰² No. 90-7388, 1991 U.S. App. LEXIS 12125 (4th Cir. May 28, 1991).

¹⁰³ Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 128 (1995).

¹⁰⁴ *Id.* at 110.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 110, 128.

¹⁰⁷ *Id.* at 128.

¹⁰⁸ Slavitt goes on to note that "[b]ecause an unpublished opinion cannot be cited as precedent, the Supreme Court is hesitant to devote its limited resources to reviewing a case that will have little future effect." *Id.* at 127. On the other hand, it is important to acknowledge that the Supreme Court has granted certiorari to appeals from unpublished decisions. See, e.g., *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, No. 00-56703, 2002, U.S. App. LEXIS 7426 (9th Cir. Apr. 19, 2002), *cert. granted*, 123 S. Ct. 816 (2003); *Rural Tel. Serv. Co. v. Feist Publ'ns, Inc.*, No. 88-1679, 1990 U.S. App. LEXIS 25881 (10th Cir. Mar. 8, 1990), *cert. granted*, 498 U.S. 808 (1990).

The *Johnson* case demonstrates an example of frozen precedent. The decision departed from established law and created a rule of law around a new factual situation. However, because it was unpublished, no new litigant could cite to either its facts or its rule of law to determine his own situation. Once a principle becomes unavailable, the common law can no longer operate with the Stepping Stone Approach¹⁰⁹ and decisions become tangential and precedent frozen in time.

It is at this point that the analogy to the civil law system becomes helpful. In fact, it is at this point that the common law judge begins making decisions using deduction akin to the Drawer Theory.¹¹⁰ To illuminate this shift, this Part will first discuss the origination of, and reasoning behind, the federal appellate courts' no-citation rules. Then it will further discuss the creation of frozen precedent.

A. *The Origination Of, and Rationale Underlying, Federal Appellate Courts' No-Citation Rules*

In 1964 the Judicial Conference of the United States made a recommendation that the federal circuit courts adopt rules authorizing the publication of only those decisions whose opinions would be of general precedential value.¹¹¹ Since that time every federal court of appeals has adopted a rule allowing

¹⁰⁹ See discussion *supra* Part II.B.

¹¹⁰ See discussion *supra* Part II.A.

¹¹¹ Johanna S. Schiavoni, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859, 1860 (2002). For example, the Fourth Circuit rule states as follows:

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

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

4TH CIR. R. 36(a), available at <http://www.ca4.uscourts.gov/pdf/rules.pdf>. Other courts follow different, but similar rules. For example, the 7th Circuit will publish an opinion when it "establishes a new, or changes an existing rule of law." 7TH CIR. R. 53(c)(1)(i). The Eighth Circuit encourages publication of an opinion when it "establishes a new rule of law or questions or changes an existing rule of law in this Circuit." 8TH CIR. R. 4(a). In addition, the Sixth Circuit provides for publication of an opinion that "discusses a legal or factual issue of continuing public interest," 6TH CIR. R. 206(a)(3), while the D.C. Circuit allows publication when an opinion "warrants publication in light of other factors that give it general public interest." D.C. CIR. R. 36(a)(2)(G).

selective publication of opinions and restricting the precedential value of those unpublished opinions.¹¹² In general, unpublished opinions are not published in bound volumes, such as the Federal Reporter.¹¹³ However, they are today widely available in electronic form on Westlaw or LexisNexis, and many are also available on the producing court's website.¹¹⁴ Thus, though these decisions are termed "unpublished" they are in fact available to most practitioners and even to many litigants.¹¹⁵ The crux is that though they are available in the sense that they can be located and read, they are not widely available for citation and are afforded no precedential value.¹¹⁶ Practitioners are, in some cases, forbidden from citing to these decisions, even merely for their persuasive value, in court proceedings and filings.¹¹⁷

The rationale underlying the use of non-precedential opinions, as well as the recommendation of the Judicial Conference permitting their use, is based primarily on a practical concern of alleviating burgeoning circuit court caseloads.¹¹⁸ For example, in 1960 a federal circuit court judge was required to make decisions and write opinions on approximately fifty-seven cases per year, while a judge in 1999 was confronted with the daunting task of adjudicating approximately 305 cases per year. These exploding caseloads led the Committee on Long Range Planning to seek a remedy in the form of no-citation rules.¹¹⁹

In addition, the Committee sought to slow the increase in the number of reported opinions out of a sense that these proliferating opinions could lead a judge to make inconsistent

¹¹² See *supra* note 111 and accompanying text.

¹¹³ See, e.g., Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 253 tbl.1 (2001) (setting forth various courts' citation and publication rules).

¹¹⁴ See, e.g., *id.*

¹¹⁵ See *supra* note 1 and accompanying text (discussing one original reason for no-citation policies as being their wide unavailability to certain classes of litigants).

¹¹⁶ See also *supra* notes 1-4 and accompanying text.

¹¹⁷ Liptak, *supra* note 4 (providing graphical information).

¹¹⁸ Schiavoni, *supra* note 111, at 1860-61. Between 1934 and 1960, circuit court filings grew at an average annual rate of only about 0.5%. In 1960, however, 3,899 appeals were filed before 68 circuit court judges. In 1994, there were 48,322 filings before 179 judges while in 1999 those numbers had increased to 54,693 filings for 179 judges. The number of filings in the federal appellate courts thus jumped 1240%, while the number of judges increased by only 263%. See Roger Parloff, *Publication Rights: It's Time to End the Patently Unfair Practice of Selective Precedent*, AM. LAW., Oct. 2000, at 15.

¹¹⁹ Parloff, *supra* note 118.

rulings.¹²⁰ The fear was that “promiscuous publication . . . could compromise the integrity of the common law by making it increasingly likely that judges, unable to digest the burgeoning volumes of case law, would inadvertently make inconsistent rulings.”¹²¹ Though this appears unlikely for the simple reason that a judge will generally look to the most recent authoritative precedent, the possibility of inconsistent decisions nonetheless exists.¹²²

Since no-citation rules have been advanced, both theoretically and in practice, many scholars have debated the constitutionality and desirability of unpublished, non-citable decisions. In opposition to the rationale underlying the no-citation rules, some scholars have suggested that decisions should be published and citable because (1) “[t]hey explain to the parties why the decision came down the way it did . . .;” (2) “they provide some assurance that the decision is based on rational, legitimate criteria rather than less permissible ones;” (3) “[they] enable the decision to make law for future decisions;” (4) “[they] contribute to stability in the law . . . [because] decisions are based on previous ones;” (5) they “tell the public something about what[] is going on in their courts;” (6) they “contribute to efficiency since it[] is easier to make a decision if you lean to some extent on what other people have done;” (7) they tell clients and lawyers what the next step should be; and (8) they serve to further accountability.¹²³ In addition to the pragmatic concerns, opponents of no-citation rules argue that these rules are unconstitutional in that they violate freedom of speech,¹²⁴ separation of powers,¹²⁵ equal protection, and due

¹²⁰ *Id.*

¹²¹ David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1143 (2002).

¹²² In my view, when a judge looks to case law he generally looks to the most recent statement on the rule of law by persuasive jurisdictions. While this is, of course, oversimplified, it is essential to recognize that appellate judges have a set of principles which lead them to automatically sift through the masses of case law to find that which is most applicable. First among these principles is the particular factual setting of the case at hand. Second among these is the weight of authority the law carries. Typically a judge will look to the immediately superior federal system, in this case, the Supreme Court, and to their own jurisdiction to find the rule of law. This argument is also not persuasive because along with the burgeoning case law, has come an increase in law clerks, staff attorneys and student interns. Judges, though no doubt personally involved in much of the writing that emerges from their courtroom, are not left totally unattended with an impregnable mass of case law to delve through before each opinion.

¹²³ *Scylla and Charybdis*, *supra* note 3, at 5-7.

¹²⁴ See Thomas F. Kibbey, *Standardizing the Rules Restricting Publication and Citation in the Federal Courts of Appeals*, 63 OHIO ST. L.J. 833, 849 (2002).

process.¹²⁶ Regardless of whether no-citation rules are constitutional, or even desirable, the fact is that they exist and, in existing, are creating a body of *hidden law*.¹²⁷ Simple statistics support this proposition. For example, today the average number of opinions per active judge is 168 while the average number of signed opinions is only fifty-four.¹²⁸ Moreover, the average number of signed opinions in 1960 was about the same as it is today.¹²⁹ Consequently, although the number of filings has increased exponentially, the number of opinions issued remains approximately the same. What this means, essentially, is that although more factual situations are being presented to the courts for adjudication, the same amount of actual law is being created. Inevitably, some factual situations slip through the cracks and disappear into a world of underground law. Since law in the U.S. legal system is based in facts, when facts go the law loses its ability to recognize the correct rule of law. Non-precedential decisions, at best, stagnate rules of law, and at worst, nullify the creation of law.

B. *The Creation of Frozen Precedent*

Taking the “best” case scenario as presented directly above, where cases are non-citable and non-precedential, case

¹²⁵ See *Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir. 2000) (discussing no citation rules in light of separation of powers), *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000).

¹²⁶ Christian F. Southwick, *Unprecedented: The Eighth Circuit Repaves Antiquas Vias with a New Constitutional Doctrine*, 21 REV. LITIG. 191, 215 (2002) (stating that “[t]he disparate impact of non-publication on certain classes of litigants raises at least a colorable equal protection violation” and suggesting that “the inability of litigants to cite previously decided cases as precedent could so contravene[] established legal and judicial norms that it constitutes a violation of due process”).

¹²⁷ In six circuits, “no-citation rules” set forth a complete prohibition on references to unpublished opinions within court proceedings, including briefs and arguments. Greenwald & Schwarz, *supra* note 121, at 1139. Four other circuits allow the citations for persuasive value, but disfavor them and strongly discourage their use. *Id.* at 1140.

In addition, the Advisory Committee on Appellate Rules has stated that “[i]t is difficult to justify a system under which the ‘unpublished’ opinions of the D.C. Circuit Court can be cited to the Seventh Circuit, but the ‘unpublished’ opinions of the Seventh Circuit cannot be cited to the Seventh Circuit.” See Alito Memorandum, *supra* note 1.

¹²⁸ Administrative Office of the U.S. Courts, *Federal Court Management Statistics 2001: U.S. Court of Appeals – Judicial Caseload Profile*, available at <http://www.uscourts.gov/cgi-bin/cmsa2001.pl> (last visited Aug. 21, 2003).

¹²⁹ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 53, 154 (1996).

law stagnates.¹³⁰ As a general proposition, “[t]he common law process of law creation never ends because each case precedent adds to the corpus of case law, whether minutely or mightily.”¹³¹ Thus, these precedents cause case law to be continually refreshed by the injection of new factual situations. Nonetheless, even where the U.S. system is functioning with a common law methodology, there comes a point where a lawyer or a judge “enters the system with a particular problem, searches for, and finds a finite set of precedents.”¹³² At that specific point, the rule of law governing the case at hand is frozen, and the lawyer or judge can determine the “answer” to her problem. However, this “answer” exists for a theoretically limited amount of time because when a new decision is made the applicable rule of law is ultimately changed.¹³³ This refreshing is necessary for the U.S. system to function fairly because “[b]ehind each formulation of law sits one or more specific judicial precedents with highly detailed case facts, rationales elaborated by . . . precedent-setting courts, and the additional verbal ‘shadows’ cast by their judicial opinions.”¹³⁴

When a lawyer enters the system to follow his facts down the line of precedents to the rule of law he has found only the law at the moment, and a decision about his case can and should change the law. Unfortunately, when an appellate court deems that decision unpublishable and non-citable, it does *not* add to the corpus of case law but instead becomes a tangential and wholly particularized individual decision. The decision is limited to the precise instance and does not elaborate a

¹³⁰ It can be argued that because judges publish approximately the same number of signed opinions today as in 1960, it must follow that, *absolutely*, the law has continued to develop at a continuous rate. However, in *comparative terms*, case law has stagnated because judges do not publish 80% of all decisions rendered at the appellate level. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 2, tbl. S-3. Thus, though the number remains constant, the percentage has significantly decreased.

It is this comparative number with which we are primarily concerned because it divorces law from underlying factual situations. The divorce itself causes stagnation because the law cannot react to and develop from the particular factual situations that it is faced with. When litigation burgeons, so should the law. Since that does not occur with the promulgation of non-precedential decisions, the law stagnates. See *supra* note 118.

¹³¹ Cappalli, *supra* note 12, at 93.

¹³² *Id.*

¹³³ The rule of law will change even where no new permutation of the rule itself is advanced simply because the particularized factual situation will have been added to the line of cases leading to the rule. Even where, however unlikely, no new factual situation can be recognized, the rule of law is still altered, at the very least, in its weight of persuasion or authority.

¹³⁴ Cappalli, *supra* note 12, at 93.

rationale that can apply in a more abstract manner to additional factual situations. Thus, the "highly detailed case facts, rationales . . . and . . . verbal shadows"¹³⁵ which create the law in the U.S. legal system are lost and the law is frozen in the same state that it was in prior to the current decision.¹³⁶ When courts render tangential decisions over and over again, the law remains in its current state though there was opportunity to advance. When common law facts become divorced from common law decisions, the law stops changing in response to society and to the ever-developing concepts of policy orated by that society.¹³⁷ Lines of precedents from which fact-specific cases are removed can no longer function fairly and efficiently as common law, and the law has stagnated.

IV. THE EFFECTS OF CONVERSION

When a layer of precedent frozen at a moment in time becomes divorced from subsequent actual events and situations, fact becomes *subsumed* under law.¹³⁸ Subsumption and its effects can be understood by the analogy to the civil law

¹³⁵ *Id.*

¹³⁶ Taking this analysis further, it could be argued that because settlements also freeze the law, and, in fact, do so to a greater extent than the vast amount of unpublished decisions created at the appellate level today, they should also be prohibited. Taking this argument to its logical conclusion, it could be argued that every legal dispute, whether the parties wish to be involved in a lawsuit or not, should be forced to be adjudicated by the courts in order to render case law complete. This, however, is *not* the logical extension of the argument that unpublished opinions create code law because in the case of settlements the parties are making a decision only *between themselves*. Presumably, none of the litigious parties involved in the settlement will ever make a similar decision for other parties. As such, their decision is made by and affects only themselves and if it is unfair, they each, theoretically, had a part in the decision-making process. Judge-made decisions however, not only do not involve the decision-making input of any litigious party (in the sense implied here), but, more importantly, the judge rendering the decision is making it for other parties and may utilize the same rule of law to render a decision for another set of parties in the future. Thus, settlements do not rise to the level of unpublished decisions in the creation of frozen law.

¹³⁷ See Mandell, *supra* note 3, at 1269 ("In a hypothetical situation, it is conceivable that on Monday a judge may interpret a . . . [factual setting] as creating a specific right of recovery in an unpublished opinion, while on Tuesday, another judge in the same court facing identical factual circumstances will have an opposite holding . . .").

¹³⁸ Subsume means "to include or place within something larger or more comprehensive: encompass as a subordinate or component element." MERRIAM-WEBSTER DICTIONARY, *supra* note 17 (giving the example, "red, green, and yellow are *subsumed* under the term 'color'"). See also Cappalli, *supra* note 12, at 91 (subsumption is the "final moment in the deductive process when the judge's . . . mind bridges the gap between the narrowest relevant rule of law and the specific facts of a legal controversy").

methodology. When precedent becomes frozen, it becomes, in many ways, akin to the civil law code system. Thus, as in the civil law methodology, the only way to reach this frozen precedent, where fact analogy fails, is through logic. Though both systems utilize both facts and logic as important factors in legal analysis, when fact becomes subsumed under logic, the common law system loses some necessary internal correctives within its form of legal reasoning, and the fairness of the U.S. system of legal reasoning is compromised.

A. *Subsumption Question: Abstraction Versus Facts*

It is possible to understand the unfortunate consequences fact subsumption yields by considering frozen precedent in light of the Continental system. In the same way that a code rule will be searched out, applied, and then returned to the "drawer" in the same condition in which it is found, frozen precedent can be interpreted, applied to a factual situation, and then returned without any demonstrable changes due to this application. Just as the new decision in the code system has little to no bearing on future decisions based on that rule of law, neither does the new common law decision. Moreover, because the common law system does not contain the same internal correctives as the civil law system, when the law does not adequately reach the facts, the risk of erroneous decision making increases.

While the civil law system appears to function well by using logic as the lubricant of its legal analysis, in the U.S. system logic alone cannot lead to a fair and just rule of law. Logic, in abstraction, "is the mental operation of particular humans operating in particular communities in particular places"¹³⁹ In other words, there must be someone who has associated a generality with a certain set of particularities in order to facilitate application.¹⁴⁰ This has occurred in the civil law system with the interpretation and application by legal scholars of a general thematic convention. Judges and practitioners in the civil law system rely on academic writings that thoughtfully bridge the gap between the abstraction and the rule of law.¹⁴¹ However, the U.S. system, comprised of

¹³⁹ Cappalli, *supra* note 12, at 101.

¹⁴⁰ *Id.* at 99 (stating that there must always be someone to "pick or create the word which represents a certain set of particularities").

¹⁴¹ Stein, *Roman Law*, *supra* note 23, at 1597.

decisions made by individuals with distinct value systems, has not set down a comprehensive scheme of logic abstraction. Thus, logic in the U.S. system cannot reach the current patterns of interest vying for attention within the case at hand, and, to a lesser extent though not a lesser effect, within society as a whole, without a recognition of the factual particularities. In other words, it is as if several of the stepping stones, or fact patterns, have been removed. A person jumping across now has a far greater distance to cover. Logic, as it is used in the drawer methodology, is not imbued in the common law system with enough safeguards, or perhaps, the right types of safeguards, to allow a safe and adequate bridge to be built. Thus logic fails to provide the necessary bridge between existing precedents.

Underlying facts tie the logic abstractions of U.S. judges to prior cases, thus increasing the chances of a fair and equitable resolution of disputes, much like the interpretation of legal scholars ties civil law judges. Moreover, the Continental approach, and the legal reasoning methodology that accompanies it, contains internal correctives that assist in bridging the logic abstraction. First, a civil law judge, applying the logical application of a code provision, calculates whether a specific issue is within the meaning of a categorical provision by "reasoning broadly, deploying the resources of history, experience, training and purpose, along with logic."¹⁴² A civil law judge has the benefit of a well-developed and fairly comprehensive set of generalities in the form of the civil code. Most importantly, these generalities have the force of history behind them. Though the civil system does not utilize *stare decisis*,¹⁴³ code systems have been in use since the age of the Roman Empire¹⁴⁴ and have been adopted by code countries with the modifications and additions their legislatures have deemed appropriate.¹⁴⁵ This has lent the civil codes, and those who interpret those codes, an additional level of guidance perhaps lacking in the U.S. system. The generalities employed in reaching the rule of law have withstood the test of time in many cases, or are, perhaps, new responses arising from the test of time. Thus the logic necessary to bridge abstraction has

¹⁴² Cappalli, *supra* note 12, at 101.

¹⁴³ See *supra* note 9 and accompanying parenthetical information.

¹⁴⁴ See ZIMMERMANN, *supra* note 19, at 2-3.

¹⁴⁵ *Id.*

the assistance of both time and history in locating a fair resolution.

Secondly, the civil code, as interpreted originally by medieval scholars, contains a sense of morality not necessarily present in a *pervasive* form throughout American precedent.¹⁴⁶ This is not to say that common law contains no moral values; as a matter of fact, societal morals and values are important concerns of judges as they make decisions.¹⁴⁷ However, these concerns are not, on the whole, legislatively determined, and thus there is no guarantee that they: (1) exist; (2) are fundamentally the same in each situation; (3) are understood at a level appropriate for application; or (4) are pervasive and comprehensive. Because the civil code is legislatively determined it is endowed with a higher presumption of legitimacy than traditional common law decisions, at least as far as its moral prescriptions are concerned.¹⁴⁸

Finally, since civil law judges rarely affect the generalized law, but have immense decision-making power in each individual decision, any arbitrary decisions made are confined to a specific dispute.¹⁴⁹ Since there is no binding precedent, judges will not be inclined to follow a ruling that is arbitrary. Instead, each judge has complete discretion to decide her own way. Applying again the analogy to the civil law, it is possible to understand how the absence of these internal correctives can lead to difficulties when common law precedent is frozen.

¹⁴⁶ See Zaphiriou, *supra* note 7, at 51-52. This is not an assertion that the code form contains a moral or value system that is superior to any individual morals or values present in laws within the U.S. legal system. I am simply acknowledging the single moral system based on natural law from which the code system arose. This allowed a system to be created that was generally similar in its value system throughout each individual code provision. In comparison, the U.S. system, where law is decision based, has arisen from the individual perceptions of values and morals of various men and women. Though this is an overstatement in the sense that medieval scholars interpreting the Roman Pandect were also individuals, and, as well, various systems of interpretative values have tended to take root in the U.S. legal system throughout its brief history, it is nonetheless significant that there was one main interpretive value system at the origination of code law.

¹⁴⁷ *Id.*

¹⁴⁸ Michael S. Fried, *Logical Foundations of Preference Aggregation*, 94 COLUM. L. REV. 2678, 2723 (1994) (citing Calabresi, *supra* note 59, at 97); see also *supra* note 69 and accompanying text.

¹⁴⁹ See *supra* notes 24, 29 and accompanying text.

When the facts are subsumed under the law, then experience cannot bridge the gap to the precedents.¹⁵⁰ Where the civil law uses logic to reach the rule of law, the U.S. legal system relies on factual experience. When factual experiences are missing the risk arises that stones are missing from the Stepping Stone Approach, and, therefore, that the distance between each precedent becomes too great for common law logic. Courts are then limited to viewing the generalities of the rule of law, and cannot observe the actual operation of the specific rule in a fact-specific context. Experience does not exist without actuality: actual people doing actual things. If you cannot reach the factual events underlying a decision, you cannot reach the reasoning either. Without experience, common law judges move into a role more similar to that of a civil law judge and make the decision based upon a vast logical leap of application of facts to law, rather than law to facts, or at the very least, to an analogy of the facts.

This type of interpretation presents a highly increased risk of arbitrary decision making. As a civil law decision maker must do, the common law judge must now interpret precedent only for the purpose of resolving the case currently before him.¹⁵¹ There is no new meaning added to the precedents, and the common law judge has lost an important check on his power – accountability.¹⁵² When judges are permitted to stray from established legal principles, they are then able to wield

¹⁵⁰ See *supra* note 101 and accompanying text (providing an illustration of this point).

¹⁵¹ Cappalli, *supra* note 12, at 99 (citing Norberto Bobbio).

¹⁵² It is important to note at this point that litigants whose adjudication is determined in an unpublished opinion have the same right to appeal the judgment as do those whose decisions are entered in a published opinion. See, e.g., *supra* note 108 and accompanying text. Though judicial review gives a semblance of accountability to this process, it seems that it would be difficult, if not impossible, to determine the appropriateness of a decision when the analysis and reasoning behind the decision is indeterminable. Judge Kozinski, one of the staunchest defenders of no-citation policies, has himself indicated that unpublished opinions rendered by judges are “worth nothing at all” as precedent.” Liptak, *supra* note 4. He further states that unpublished opinions “[s]imply don’t get vetted the way that binding opinions do.” *Id.* In fact, Judge Kozinski indicated that he has already altered his approach to writing unpublished opinions and has “started saying less and less to the parties.” *Id.* He states that an unpublished opinion is “read by lawyers [though] [i]t shouldn’t be. It’s meant as a letter from [the] court to parties . . . [a]nd we would tell them much more if you didn’t insist on sharing it, if you didn’t insist on using it in the next case, we [would] tell you a whole lot more about what we’re doing.” *Scylla and Charybdis*, *supra* note 3, at 23. Thus accountability is clearly frustrated by the lack of information and analysis in unpublished opinions from which superior courts can analyze the decision being rendered.

both judicial and legislative power, increasing the risk of arbitrary and tangential decisions.¹⁵³ Though they are still technically bound to the rules of law established in precedential cases, in these situations the thought and analysis underlying the decision never surface. When judges are not forced to adhere to or reveal the analysis leading to a specific decision, they are not only free from one restraint on non-accountability with regards to the decision, but are also able to dodge difficult and time consuming issues and abandon established rules of law. In fact, judges who do not actually pen their reasoning are not forced to fully explore its permutations, and in the worst case scenario, may not even understand their own reasoning.¹⁵⁴ The absence of accountability leads to the absence of responsibility, and the absence of both breeds sloth and indifference.¹⁵⁵

It is important to recognize that logic is used beneficially and necessarily under both the Continental and the U.S. methodologies. Moreover, U.S. judges have available for their use both deductive and inductive reasoning, as do their Continental counterparts. Continental judges are neither inherently better at logic application, nor even necessarily better trained at finding and applying code or code-like rules of law. Nor is it even the case that academics give more legitimacy to the interpretation of rules of law in the Continental system since the U.S. system, too, has a large group of highly trained and prolific legal scholars. The analogy employed here is used simply to highlight the dramatic way in which the *risks* of arbitrary and tangential decision making are increased in a system not traditionally designed for the interpretation of stagnate rules of law.

V. INTERNAL CORRECTIVES

Though the U.S. system contains its own internal correctives, these correctives are designed to protect a system that is functioning as a common law system. When the system begins to take on attributes of a civil law system, then it acts outside the protective scope of the common law correctives.

¹⁵³ Schiavoni, *supra* note 121, at 1863-64.

¹⁵⁴ Richman & Reynolds, *supra* note 94, at 284.

¹⁵⁵ *Id.*

A. *Public Policy*

One internal corrective inherent in the common law system is the tradition of looking to public policy when balancing the interests involved in legal disputes.¹⁵⁶ When precedent becomes frozen judges lose the ability to recognize the patterns of interest belonging to each party.¹⁵⁷ In general, the theory underlying judicial decision making that prevails in a legal system, whether common or civil, affects judicial practice by reminding judges of the patterns of interest that are demanding recognition in each instance.¹⁵⁸ Specifically looking to the U.S. legal system, with its dependence upon investigation and elucidation of facts, and the application of facts to a series of previously decided cases, "directs the judge's attention to the pattern of interests pressing for recognition."¹⁵⁹ By forcing a judge to delve deep into the specific facts of the case at hand, and apply these to analogous fact patterns from which judicial reasoning arose, the judge is forced to see the interests vying for satisfaction.¹⁶⁰ It is only within the context of a specific fact pattern that a judge can effectively determine whether the interest of X should sacrifice to the interest of Y.

Thus, policy considerations allow societal concerns to press for recognition. However, when decisions are non-precedential, the specific analogies of multiple factual scenarios are hidden from view.¹⁶¹ More importantly, the reasoning and societal purposes shadowing these specific decisions are hidden from view. As such, the decision maker is faced with a layer of frozen precedent that is divorced, not only from fact, but also from current societal concerns. Again, the *Johnson* example aptly demonstrates this bifurcation of law and facts.¹⁶² In that case, the inmate was in fact homosexual and allegedly denied a position based on this fact. The legal principle that grew out of that fact was that legislation singling out homosexuals might be subject to strict scrutiny review under the Equal Protection Clause. However, in not publishing this case, a future

¹⁵⁶ See VON MEHREN & GORDLEY, *supra* note 7, at 1139.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Richman & Reynolds, *supra* note 94, at 282-83 (stating that "even if the opinion does no more than restate existing legal doctrine, it can show how the doctrine applies to different facts").

¹⁶² See discussion *supra* Part III and notes 102-10 and accompanying text.

homosexual litigant could not demonstrate that the Fourth Circuit had ever applied the fact of homosexuality to its equal protection jurisprudence. As such, the facts have become divorced from the law.

While it is nonetheless true that many unpublished opinions are available for a judge to consider, if not cite or use as precedent, it seems unlikely that judges who must utilize unpublished opinions to control burgeoning dockets in the first place will have the time or inclination to sift through unpublished opinions that are not even the law when researching a factual situation before them. However, whether a judge would take the time to sift through tens of thousands of fact-sensitive unpublished opinions is irrelevant because when the facts are divorced from the rule of law the risk of arbitrariness arises.¹⁶³ It is this risk – this new element of discordance – that is of the biggest concern.

Additionally, it may be argued that patterns of interest cannot adequately surface in individual cases and will, therefore, mitigate the risk discussed above. It is true that the patterns vying for attention absolutely *cannot* surface in one or two individual cases. This problem is precisely why frozen precedent substantially increases the risk of arbitrariness: because the patterns of interests cannot adequately surface in individual cases. Just as public studies, or surveys, utilize a large portion of public opinion to understand societal interests, the more thoroughly fact patterns are unearthed and the more thoroughly judges, practitioners, and litigants can understand the appropriate legal and judicial rules of law, and the public policies that underlie them. The more fact patterns are hidden, the less able parties are to determine the rule of law.

B. The Judicial Bench

The manner in which judges view their function, ascend to the bench, procure advancement and compensation, and perceive their position in society, creates internal correctives that protect a legal system from arbitrary decision making. Within the U.S. system, “judges are likely to find self-expression in judicial lawmaking.”¹⁶⁴ They recognize that they are not simply deciding disputes, but are creating law and

¹⁶³ See Alito Memorandum, *supra* note 1 (stating that “[t]he thirteen courts of appeals have cumulatively issued tens of thousands of ‘unpublished opinions’”).

¹⁶⁴ VON MEHREN & GORDLEY, *supra* note 7, at 1150.

affecting the interpretation of rules of law down through history. Though this sounds like a frightening proposition, the U.S. legal system contains checks and balances that limit judicial discretion and protect against arbitrary decision making.

First, the common law is historically based on tradition, and judicial law has an inherent respect for this tradition.¹⁶⁵ This respect for tradition, grounded in *stare decisis*, prevents a judge from making radical and vast changes to the rules of law before him.¹⁶⁶ Second, as a pragmatic consideration, a judge who makes a vast and radical change to existing rules of law runs a high risk of being overturned by a superior court.¹⁶⁷ No judge likes his reasoning and decisions called into question.¹⁶⁸ Adhering closely to fundamental precedents or making minimal and incremental changes significantly decreases the likelihood that a reviewing court will find reversible error in the judge's decision. Third, the common law judge, in the case of opinions that are fully within the common law system,¹⁶⁹ not only decides the cases and writes the opinions, but signs the opinions as well. A judge in the common law system cannot hide behind the bench.¹⁷⁰ Instead, the decisions made, and the names of those who made them, are public information – information that is out there for all to trace back to the

¹⁶⁵ Luban, *supra* note 8, at 1036. Luban discusses Otto Neurath's vision of a ship being built at sea as an example of how tradition adheres the common law to a slow and incremental pace of change. Much like a ship being built at sea, where only a few planks can be replaced at a time, only a few practices at a time can be reformed under the common law, while the rest must be "accepted on reflex." *Id.* (citing Otto Neurath, *Protokollsätze*, 3 *ERKENNTIS* 204 (1932), discussed in WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 123-24 (1960)).

¹⁶⁶ *Id.*

¹⁶⁷ Stein, *Roman Law*, *supra* note 23, at 1596-97 (stating that the common law judge, as the "oracle of the law . . . takes personal responsibility for his decisions").

¹⁶⁸ Being overturned is viewed as a significant strike against a judge's judicial capabilities. *Id.*

¹⁶⁹ This includes opinions that are signed, published, and citable.

¹⁷⁰ VON MEHREN & GORDLEY, *supra* note 7, at 1140. Von Mehren and Gordley state:

An American decision begins, as a rule, with an elaborate statement of the facts and includes a careful discussion of precedents. The name of the author of the opinion is given, as are the names of the other judges on the court where the case was decided by a collegiate bench. Dissents are recorded. Concurring and dissenting opinions are permitted and are relatively frequent. When the decision is later before another court as precedent, it thus contains a record, at least in part, of the considerations that lay behind it and of the doubts some judges may have had as to the results reached.

Id.

source.¹⁷¹ Thus, opinions that judges write typically *are* well reasoned in great part because this sense of accountability keeps a judge from straying too far from the precedential path.¹⁷²

However, when a common law judge is presented with frozen precedent, like a code in a civil law environment, the risk of arbitrary decision making increases, simply because of the way each system views the function of a judge. In the common law system, judges can affect a far-reaching change on the general law, but are constrained by the tradition-based notion of *stare decisis*. Unfortunately, when this notion is eliminated, the common law judge has potentially unlimited discretion to make decisions in the specific case at hand, much as a civil law judge does. While it is certainly true that the risk of being overturned and the respect for tradition continue to provide an important check on unfair decision making, without the proper operation of *stare decisis* volatility will increase, and arbitrary decision making with it.

VI. RECOMMENDATIONS

In order to decrease the risk of arbitrary and tangential decisions stemming from frozen precedent, the U.S. system must either add internal correctives that mirror those within a civil law system or allow citation to unpublished opinions. The former recommendation would not only be highly disruptive to the U.S. system as it exists today, but impossible to implement. In order to accomplish this task, the circuit courts would have to approve and adopt additional protections against arbitrariness in the form of a nationwide moral code from which to begin value-based analysis, authoritative reliance on legal academics, and a bureaucratic form of recruitment,

¹⁷¹ This sense of responsibility is another rationale underlying no-citation policies. The idea is that when judges are faced with an extraordinary amount of cases to decide, they are unable to write reasoned opinions for each and every one of them. See, e.g., Liptak, *supra* note 4 (citing Judge Alex Kozinski as stating that writing a binding opinion "is an exacting and extremely time-consuming task" that sometimes requires 70 or 80 drafts over several months").

¹⁷² Richman & Reynolds, *supra* note 94, at 282-83.

When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin.

Id.

advancement, and compensation of judges.¹⁷³ Even if the circuit courts were to come to a consensus to implement these modifications, the United States legal educators would then have to come together to change legal education from case method to lecture method. Clearly these changes are not going to happen in the United States.

Likewise, we could take the route of requiring that all opinions be published. This would be met with extreme opposition, however, precisely because the rationales underlying the implementation of no-citation rules have not been eliminated.¹⁷⁴ On the contrary, caseloads continue to burgeon and there seems to be no sign of a sudden increase in appointments of circuit court judges. Thus, we are left only with the option of permitting citation to non-precedential opinions. Allowing citation to non-precedential opinions, and therefore, *all* opinions rendered, will allow each factual situation to influence precedential case law. Though unpublished opinions may not be precedential in and of themselves, permitting their citation, even in a mere persuasive form, allows litigants to conceptualize the rules of law affecting their specific factual situation to the extent that elements of their factual situation have been previously adjudicated.¹⁷⁵ Furthermore, it will allow judges to reach the true policies and values underlying precedents, as well as be able to more clearly recognize and conceptualize the patterns of interests vying for attention. In this way, though precedent will still be frozen as far as its ability to bind subsequent courts, it will not be converted to the functional equivalent of a civil code because judges will be able to utilize experience in making decisions, and will not be forced to utilize logic principles alone. Though not as efficient as maintaining full precedential case law in all situations, persuasive opinions are still persuasive, and litigants will be able to utilize them thusly.

Allowing citation to unpublished opinions is not only logistically easier to implement than the previous route described, but is also the way the federal appellate system is moving. At the May 2003 Advisory Committee meeting, the Advisory Committee on Appellate Rules approved by a vote of

¹⁷³ See discussion *supra* Part II.A.

¹⁷⁴ See *supra* note 1 and accompanying text.

¹⁷⁵ There is a great deal of legal jurisprudence which argues against allowing citation to unpublished opinions for reasons other than those set forth in this Note. See *supra* note 3 and accompanying text.

seven to one, with one abstention, Proposed Appellate Rule 32.1, a rule that would require all federal circuit courts to permit the citation of unpublished opinions in court documents.¹⁷⁶ After a period of incubation through various committees, the Supreme Court would have the opportunity to adopt the rule by May 2005, and it would go into effect by December 2005.¹⁷⁷ Proposed Appellate Rule 32.1 is considered a major development because there has been such a high level of resistance to its implementation for over twenty years.¹⁷⁸ However, Proposed Appellate Rule 32.1 demonstrates the legal community's "growing 'aversion to secret law.'"¹⁷⁹ This trend is further justified by the fact that both the Texas Supreme Court and the United States Court of Appeals for the District of Columbia reversed their restrictions on citing non-precedential

¹⁷⁶ See Alito Memorandum, see ADVISORY COMMITTEE MINUTES, *supra* note 1, at 28-31, 35-39. See also Liptak, *supra* note 4; *Federal Rulemaking - Advisory Rules Committees Actions: Fall 2002 Meetings*, available at <http://www.uscourts.gov/rules/> (last visited Feb. 8, 2004).

¹⁷⁷ At this time, Proposed Appellate Rule 32.1 has been published for comments, and the bench and bar will have until approximately February 2004 to make submissions. These comments will then be considered by the Advisory Committee at its Spring 2004 meeting, at which time determinations with regards to suggested modifications will be made, and a vote will be taken for approval. If the Advisory Committee votes to approve the Rule, it will then go to the Standing Committee for consideration at its June 2004 meeting. If the Standing Committee approves the rule, it will go to the Judicial Conference in September 2004, and, if approved at this stage, on to the Supreme Court which will have until May 1, 2005 to decide whether to adopt it. After its adoption, Proposed Appellate Rule 32.1 will go to Congress, and would ultimately take effect on December 1, 2005. Committee for the Rule of Law, *News and Events* (Oct. 29, 2003), at <http://www.nonpublication.com/EVENTS.HTML>.

Proposed Appellate Rule reads as follows:

Rule 32.1. Citation of Judicial Dispositions

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

See Alito Memorandum, *supra* note 1.

¹⁷⁸ Liptak, *supra* note 4 (citing Arthur D. Hellman, law professor at the University of Pittsburgh).

¹⁷⁹ *Id.* (citing Stephen R. Barnett, law professor at the University of California).

opinions on January 1, 2003.¹⁸⁰ Though Proposed Appellate Rule 32.1 is "extremely limited" because "[i]t takes no position on whether refusing to treat an 'unpublished' opinion as binding precedent is constitutional," under its rubric "a court of appeals may not prohibit a party from citing to an 'unpublished' opinion for its persuasive value or for any other reason."¹⁸¹ Moreover, adoption of Proposed Appellate Rule 32.1 does not mean that unpublished opinions would become precedential.¹⁸² In fact, of the three alternative forms of Proposed Appellate Rule 32.1 considered, not one prohibited the judiciary from issuing non-precedential decisions entirely.¹⁸³

Although merely persuasive authority, the ability to cite to unpublished opinions would help alleviate the possibility of arbitrary decisions resulting from frozen precedent. In this situation frozen precedent would continue to occur, however, judges and litigants would at least be able to review all the factual situations that relate to their own circumstances. Thus judges could use experience rather than logic to deduce the appropriate balance of equities between litigants. Facts would no longer be separated from the rule of law, the patterns of interests would surface in a more meaningful way, and the risks of arbitrary decision making would decrease.

Whatever the benefits or risks of incorporating Proposed Appellate Rule 32.1, it is clear that its adoption will partially remedy the negative effects of unpublished opinions.¹⁸⁴

¹⁸⁰ *Id.*

¹⁸¹ See Alito Memorandum, *supra* note 1.

¹⁸² *Id.*

The arguments about whether citation of unpublished decisions should be allowed is one of three related issues involving such opinions. The second is whether courts are bound to follow such decisions as precedent. And the third is whether litigants are even entitled to a statement of the appeals court's reasoning. About 1,350 of the 29,000 decisions issued by the federal appeals courts last year consisted of a word or phrase (usually, 'affirmed') and contained no reasoning.

Id.

¹⁸³ Advisory Committee Minutes, *supra* note 1, at 22-39.

The Reporter said that he was presenting to the Committee three alternative drafts of a proposed Rule 32.1. The first – Alternative A – was the broadest. It specifically authorizes courts to issue non-precedential opinions and permits their citation without qualification. The second – Alternative B – takes a middle position. Unlike Alternative A, it addresses only the citation of non-precedential opinions. However, unlike Alternative C, it permits the citation of such opinions without qualification. The third – Alternative C – is the narrowest. It addresses only the citation of non-precedential opinions, and it permits such citation only in limited circumstances.

Id. at 35.

¹⁸⁴ See discussions *supra* Parts II.B and III.

However, only full precedential weight will completely eradicate the problems of frozen precedent, as demonstrated in the analogy with the civil law code. Permitting persuasive citation in all circuit courts is a step closer to the solution, and is a step that is not only possible, but likely to occur. Yet that is not enough. Unpublished opinions do not permit precedent to grow. Stones will continue to be missing along the path to the rule of law, and judges will be forced to use logic to span a gap that is just too large.

VII. CONCLUSION

As discussed above, the virus of unpublished opinions creates a layer of frozen precedent within the U.S. legal system. This is a result of decisions that do not build, either minutely or mightily, upon the system of precedents binding each particular rule of law. Because under the federal circuit courts' no-citation rules decisions do not have to be either published or precedential, they exist, in a sense, out of time. In other words, they do not affect the law and cannot lead practitioners or judges to a decision by increasing clarity or understanding. This frozen precedent, in effect, treats a common law system like a civil law system because it begins to exist like a code. The facts become subsumed under the law, and a judge must use logic, rather than experience, to reach a decision. Under the common law system, this can never truly be done.

It has been said that "[t]o the logic of civil law, one must oppose the pragmatism of the common law. To the relative rigidity of the former, one must point out the flexibility of the latter. To the clarity and transparency of one, one must oppose the relative opacity of the other."¹⁸⁵ While each system functions successfully, each also contains its own internal correctives that inherently respond to threats of arbitrariness and unfairness. It is important to recognize that these arbitrary decisions are not necessarily intentional – rather, it is a function of frozen precedent that eliminates important internal correctives and checks and balances. Nonetheless, these tangential and arbitrary decisions will ultimately degrade the function, efficiency, faith in and fundamental fairness of the

¹⁸⁵ Bruno, *supra* note 24, at 7.

U.S. legal system.¹⁸⁶ And although Proposed Appellate Rule 32.1 takes an important step towards correcting the risks of unpublished opinions, it is only through the complete eradication of the use of unpublished, non-precedential decisions that the common law can function in a fair and just manner.

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¹⁸⁶ “Frederick Kempin suggests that without a firm doctrine of stare decisis ‘courts could search for the ‘true’ law without regard to any binding authority in prior cases’. . . .” Mandell, *supra* note 3, at 1288 (citing Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 33 (1959)).

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