

Fall 9-1-2005

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Recommended Citation

Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 Wash. & Lee L. Rev. 1553 (2005), <https://scholarlycommons.law.wlu.edu/wlulr/vol62/iss4/5>

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Take a Letter, Your Honor: Outing the Judicial Epistemology of *Hart v. Massanari*

Penelope Pether*

Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world,
 . . . everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.¹

Trading . . . not just [on] the contemptuous demonstration that powerful people don't have to be acute or right, but even more, the contemptuous demonstration . . . of how obtuseness itself arms the powerful against their enemies. . . .²

Beyond the communication of the sentence, what took place at this interview was never known.³

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1. 1 William Butler Yeats, *The Second Coming*, in THE COLLECTED WORKS OF W.B. YEATS 189 (Richard J. Finneman ed., 1989).

2. See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 7 (1990) (describing the majority's statements in *Bowers v. Hardwick* that "the right to engage in sodomy is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' . . . [as], at best, facetious." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986))).

3. HERMAN MELVILLE, *Billy Budd, Sailor*, in *PIERRE*; ISRAEL POTTER; *THE PIAZZA TALES*;

I. Introduction

These epigraphs have a dramatic tone. They are also unabashedly literary. Those who take the position that the concern expressed by some judges,⁴ most practicing litigators,⁵ and many scholars⁶ about unpublication and the other practices of private judging that are proliferating in the United States courts is "[m]uch ado about little"⁷ might find them melodramatic on the one hand, trivial texts—because they are, like unpublished opinions, "not law"—on the other.⁸

But then, as scholars of literature know, comedy can be a serious business. As Tim Nelson writes, "[m]ost good comedies contain potentially tragic scenes. . . . [I]n *Much Ado About Nothing*, a guiltless woman is repudiated and disgraced at the altar,"⁹ a trope the bleak potential of which is plumbed in Shakespeare's problem play *Measure for Measure*.¹⁰ It is a trope that teaches

THE CONFIDENCE-MAN; UNCOLLECTED PROSE; BILLY BUDD 1351, 1418 (Harrison Hayford & Merton M. Sealts, Jr. eds., Library of Am. 1984) (1962).

4. See, e.g., Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 219 (1999) (expressing discomfort about producing unpublished opinions); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1450, 1487 (2004) [hereinafter Pether, *Inequitable Injunctions*] (citing several judges expressing concern about unpublished opinions); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995) [hereinafter Wald, *Rhetoric*] (criticizing results of unpublished opinions); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 786 (1983) [hereinafter Wald, *Problem*] (asserting that publication is an essential judicial function).

5. See, e.g., William T. Hangle, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 664 (2002) (advocating for publication of nonbinding opinions); TIM REAGAN ET AL., FEDERAL JUDICIAL CENTER, CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS 15 (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/citatio2.pdf/\\$file/citatio2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/citatio2.pdf/$file/citatio2.pdf) (presenting statistics that support assertion that trial lawyers favor publication); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 407 tbl.2 (2002) (presenting statistics which show the percentage of lawyers who believe citation restrictions are a problem).

6. See, e.g., Robel, *supra* note 5, at 417 (advocating a ban on unpublished opinions).

7. Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005).

8. Even a circuit as (recently) permissive about the citation of unpublished opinions as the D.C. Circuit holds that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition." D.C. CIR. R. 36(c)(2).

9. T.G.A. NELSON, COMEDY: AN INTRODUCTION TO COMEDY IN LITERATURE, DRAMA, AND CINEMA 30 (1990).

10. Penelope Pether, *Measured Judgments?: Histories, Pedagogies, and the Possibility*

us that the banality so characteristic of soap opera—that iteration of melodrama that is a staple of what one might call the entertainment arm of the military-industrial complex—can also be the stuff of the tragic, of great and often painful significance in the everyday life of ordinary people. Which is to say that things may not be as trivial as they may be made to seem.

In *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*,¹¹ I argued that the private history of contemporary institutionalized unpublication of judicial opinions began as a judicial backlash against the desegregation mandate of *Brown v. Board of Education*.¹² I then mapped the frequently overlapping practices of unpublication, depublishing, and stipulated withdrawal of judicial opinions,¹³ which have structurally subordinating effects on a range of marginalized groups¹⁴ and exact a toll on the rule of law.¹⁵ Finally, I argued that the institutionalization of these practices since the 1960s¹⁶ had a corrupting effect on the national judicial habitus.¹⁷

This Article responds to some recent developments in various federal judicial institutions¹⁸ regarding the modest proposal for reform of institutionalized unpublication.¹⁹ It focuses on both a key institutional actor and a seminal legal text which stand in opposition to that reform initiative: Judge Kozinski of the United States Court of Appeals for the Ninth Circuit and his opinion in *Hart v. Massanari*.²⁰ If the debate about unpublication is a contest about two things that I take very seriously indeed, epistemology and the

of Equity, 14 LAW & LITERATURE 489, 490 (2002).

11. Pether, *Inequitable Injunctions*, *supra* note 4.

12. *Id.* at 1441–42 n.20, 1445 (citing *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955)).

13. *Id.* at 1442–83.

14. *Id.* at 1504–14.

15. *Id.* at 1483–1504.

16. *Id.* at 1444–65.

17. That habitus has been described as the "embodied experience" which makes members of particular cultures or professions "who they are." PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 53 (1990). Bourdieu has written on legal professional subject formation. See generally Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

18. See *infra* note 210 and accompanying text (recounting the Judicial Conference of the United States' consideration of proposed Federal Rule of Appellate Procedure 32.1 through its Standing Committee on Rules of Practice and Procedure and its Advisory Committee on Appellate Rules).

19. Proposed Rule 32.1 would prevent federal courts from banning citation of any of their unpublished opinions. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 31 (2003).

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

constitutive law of the land that is the most powerful in the contemporary world, then this Article's task is to suggest that the stakes symbolized by the proposed amendment,²¹ an amendment until recently apparently doomed to fail,²² are extraordinarily high. In short, it suggests why we should all take very seriously what we can learn from this paradoxically fierce skirmish over a small piece of procedural delegated legislation. Until a recent reversal in its fortunes, that legislation apparently was doomed despite evidence suggesting that most lawyers are in favor of it and judicial objections to it are unpersuasive,²³ because it was said to be too controversial.²⁴ That controversy had been escalated, if not generated,²⁵ by a powerful judge²⁶ with a track record of "hostility to dissent"²⁷ by means that include his alleged egregious practice of enrolling lawyers who appear before his circuit in the political agitation over FRAP 32.1.²⁸ The legislation was threatened because of what it symbolizes—that we have ceased to be a common law country.

Part II of this Article undertakes a detailed critical discourse analysis of the construction of a revisionist history of the United States doctrine of precedent in *Hart*. Critical discourse analysis is a method of reading texts against other texts²⁹ starting from the premise that discourses—cultural stories

21. See *supra* note 19 and accompanying text (discussing proposed amendment which would mandate the end of citation bans in the federal appellate courts).

22. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1471 (expressing grave doubt as to the amendment's chance of passage). The amendment has recently cleared apparently the most significant hurdle to its passage, approval by the United States Judicial Conference. News Release, Administrative Office of the U.S. Courts, Conference Memorializes Late Chief Justice Acts on Administrative, Legislative Matters (Sept. 20, 2005), available at http://www.uscourts.gov/Press_Releases/judconf092005.html. But see *infra* note 210 (noting that the conference restricted the operation of the proposed rule to opinions issued "on or after January 1, 2007").

23. See REAGAN ET AL., *supra* note 5, at 3–19 (collecting evidence regarding support for unpublication reform).

24. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1471 (listing opponents of unpublication rules).

25. See *id.* at 1470 n.170 (noting a writing campaign instigated by Judge Kozinski to preserve a public hearing on proposed FRAP 32.1).

26. See *id.* (referring to Judge Kozinski).

27. Thomas M. Devine & Donald G. Aplin, *Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection*, 4 ANTIOCH L.J. 5, 27 (1986).

28. A former colleague was issued an invitation to speak to the Ninth Circuit on this topic; he was subsequently asked to speak on a different topic. E-mail from Steve Wermeil, Associate Professor of Law, American University, Washington College of Law, to Penelope Pether, Professor of Law, Villanova University (June 14, 2005, 12:11 EST) (on file with the Washington and Lee Law Review).

29. This method draws on the work of Norman Fairclough, Gunther Kress, and Michel Foucault.

which we produce and through which we make sense of and thus produce "reality"—in turn shape us as professionals, the institutions in which we work, and the discourses we in turn mobilize in our work through the processes of "subject formation." Further, it posits that those discourses "circulate without authorship and without discursive and disciplinary controls."³⁰ Critical discourse analysis goes on to collapse the opposition between text and its consumer/creator, a relationship akin to the opposition between mind and body. It posits that "the only way that intertextual links between texts can be made is through the specifics of habituated, trained, coloured and gendered bodies."³¹ The analysis thus concludes that "[f]eminist discourse analysis pays particular attention to the embodied experience of those who pass judgment and make the law."³² Critical discourse analysis, then, argues for reading texts intertextually, seeking to make visible the ways in which institutions and their discourses and "practices of subject formation" shape us. It searches for a discourse's "external conditions of existence, its appearance and its regularity"³³ that make it possible for people with particular kinds of histories to know certain things and not others, to think certain things and not others.

This Article begins by analyzing the discourse of rectitude and fidelity to the common law in *Anastasoff v. United States*,³⁴ *Hart's* companion-piece and immediate progenitor, and the fluctuating discourses of *Hart*. In *Anastasoff*, the late Judge Richard Arnold held that the Eighth Circuit's ban on citing unpublished opinions was unconstitutional because it was ultra vires of Article III judicial power.³⁵ One of *Hart's* discourses depends on a vision of Article III judicial power both plenary and supplemented by administrative authority such that Article III power is not implicated by unpublication. The other is a discourse of constraint that is ironically, and never admitted to be, self-imposed. *Hart* claims a two-tiered system of judicial decisionmaking, which enables judges to prospectively declare some opinions precedential and others not, is not unconstitutional. (This is one aspect of modern institutionalized unpublication—citation bans are another.) Rather, it is business as usual, dignified by a distinctively Anglo-American legal tradition.

30. Penelope Pether, *Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project*, 24 S. ILL. U. L.J. 53, 59 (1999) [hereinafter Pether, *Critical Discourse Analysis*].

31. *Id.* at 60.

32. *Id.*

33. *Id.*

34. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000).

35. *Id.* at 905.

Next, this Article goes on to read *Hart* against other texts including *Anastasoff* and the precedent *Hart* adduces. Intertextual reading will suggest how the law we read, write, and practice is all the law we have. It will further suggest in what image the texts, the institutions, and the discourses of the law in turn shape the judges who make it.

Recent events in what were my home jurisdictions as I wrote this article, the Fourth Circuit and the D.C. Circuit, and more generally in Great Britain, the seat of the common law, have involved the power of governments and the importance of an independent judiciary. In conjunction with the contributions of my colleagues in this Symposium, they have prompted the use of my methodological strategy in this Article. This strategy is designed to trouble the emergent and insistent dominant discourses about unpublication and the curious U.S. variant of "the common law." In the manner of another common law country, it "respectfully dissents."

This dissenting opinion is given its specific occasion both by the Symposium of which this Article forms part, and by the history of the recent proposal to amend the Federal Rules of Appellate Procedure. That amendment, if it becomes law, would undo arguably the least problematic aspect of modern institutionalized unpublication: the citation bans that in many jurisdictions (1) expose attorneys who cite unpublished opinions back to the courts that issued them to sanctions, and (2) spare judges the embarrassment of having to confront the propriety and fairness of treating similarly-situated litigants differently.

Judicial ethics questions of these kinds have particularly high stakes in parts of the common law world in light of the aftermath of events including the 9/11 attacks on the World Trade Center and the Pentagon, the Bali bombings, and those on the transportation systems of London and Madrid. Those events have provoked imperatives to curtail the civil liberties of some among us, "terrorists" and "enemy combatants." As a practical matter, judges are all that stand between individuals at risk of having their civil liberties curtailed and the power of the state. Difficult as it may be to some reading this Article to concede, current abridgements of civil liberties run the potential risk of undermining the efficacy of what we call the Rule of Law in regulating civil society.

Thus, if Judge Kozinski is correct that the United States' system of precedent has diverged from the common law,³⁶ there are signs that as a result we are also at risk of the dominant ethos of the U.S. federal judiciary ceasing to

36. This divergence itself is in many ways a result of the power he asserts to legitimize modern institutionalized unpublication.

be that of common law judges. Rather, we have the emergence of a theory and practice of judicial lawmaking that is explicitly legislative and brooks no effective constraints other than judicial fiat. Accordingly, the symbolic stakes of the fate of the proposed Federal Rule of Appellate Procedure 32.1, for all the modesty of the proposed reform itself, are extraordinarily high.

Part III of this Article articulates the basis for the dissenting opinion about what has become "business as usual," not only in the federal courts of appeals, the subject of my analysis here, but also in federal district courts and state courts. It argues that *Hart* displays constitutive and symptomatic "hostility to dissent"³⁷ and a corrosive influence on the habitus—the "embodied experience" constitutive of the professional identity³⁸—of the United States federal judiciary. This Article draws on Sedgwick's insight that a "complex drama of ignorance and knowledge is the . . . usual carrier of political struggle,"³⁹ and on the evidence of the imbrication and constitutive significance of race relations⁴⁰ in the development and maintenance of the system of institutionalized unpublication of judicial opinions. It suggests that the powerful "ignorance effects" institutionalized by the modern unpublication regime in the U.S. courts of appeals have a significance beyond the immediate realm of what opinions may be cited, to whom, and when. Their significance extends through the habituated interpretive practices of the members of the federal bench to the fabric of the law itself.

Sedgwick describes a paradigm she identifies as the "epistemology of the closet"—the harnessing of the studied "obtuseness" of "the powerful"⁴¹—which operates to "structure meaning"⁴² in this culture. Using this insight, Part III argues that the modern systematization of unpublication has created since the 1960s a troubling and characteristic divergence of the U.S. federal courts from the "common law." The crux of the divergence is that modern systematized unpublication has produced a congeries of "ignorance effects . . . , harnessed, licensed, and regulated on a mass scale for striking enforcements,"⁴³ of what the rhetorician of law Peter Goodrich has described as legal texts' techniques of legal

37. This quality has been ascribed to Judge Kozinski. Devine & Aplin, *supra* note 27, at 27.

38. BOURDIEU, *THE LOGIC OF PRACTICE*, *supra* note 17, at 53.

39. SEDGWICK, *supra* note 2, at 6.

40. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1441–42 & n.20 (suggesting courts used unpublished opinions to discriminate against minorities).

41. See SEDGWICK, *supra* note 2, at 7 (arguing that "obtuseness itself arms the powerful against their enemies").

42. See *id.* at 11 (hypothesizing that "certain binarisms that structure meaning in a culture may be 'ineffaceably marked' by association with the modern crisis of homo/heterosexual definition").

43. *Id.* at 5.

monologue and dialogue, by which the texts of the law seek to pretend to a neutral rationality and to suppress alternative discourses.⁴⁴ These alternative discourses might be likened to the voices of dissent.

Part III reads the justificatory discourse of *Hart v. Massanari*⁴⁵ against another set of texts, also emanating from the federal appellate bench, about modern institutional unpublication. This justificatory discourse constitutes the practices of the federal appellate courts and their procedures for the making of law through its interpretation and application, as does the different cultural story that emerges from the second set of judicial texts. In turn, this discourse shapes the professional identities of the members of the federal appellate bench, who, in turn, make law that is both substantive and adjudicative.

II. *The Discourses of Anastasoff and Hart*

Faye Anastasoff filed a claim for a tax refund that was—just—timely: It was mailed one day before the relevant statutory cutoff.⁴⁶ When it arrived at the Internal Revenue Service, it was—just—late because the IRS could only repay overpaid taxes if the taxes had been paid within three years to the day before receipt and filing at the IRS of the refund claim.⁴⁷ Her claim got there one day late.⁴⁸ Ms. Anastasoff's claim that the "Mailbox Rule" should save her claim failed in the federal district court and again on appeal.⁴⁹ In what must have seemed to Ms. Anastasoff to be the paradigm of "Catch 22," the court held that although the Mailbox Rule rescues claims that are received late although postmarked in time, it does not rescue claims that are postmarked within the statute of limitations when received after that statute of limitations has run if the claim is otherwise on time.⁵⁰ In other words, Ms. Anastasoff lost her claim because she filed in what would be paradoxical to call the nick of time.

The Eighth Circuit's decision was based⁵¹ on its decision in *Christie v. United States*⁵²—memorialized in an unpublished opinion issued eight years

44. See PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* 186–208 (1986) (discussing generally legal rhetoric).

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

46. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 899, 905.

52. *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam).

before. Ms. Anastasoff argued, in an apparently faithful reading of Eighth Circuit Rule 23A(i), which provided, *inter alia*, that "[u]npublished opinions are not precedent," that the court of appeals was not bound to follow *Christie*.⁵³

The opinion gave Judge Richard Arnold, who, together with former D.C. Circuit Judge Patricia Wald, has been the federal judge most public and insistent in his criticism of one aspect⁵⁴ of the system of contemporary institutionalized unpublication of judicial opinions—the designation of unpublished opinions as nonprecedential⁵⁵—the opportunity, writing for the panel, to hold Eighth Circuit Rule 23A(i) "unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"⁵⁶ Ms. Anastasoff's petition for rehearing en banc raised the constitutional issue, claiming in part that the constitutional holding was in error,⁵⁷ and she argued on appeal that the case was not rendered moot, in part because "the status of unpublished opinions is of great importance to the bar and bench,"⁵⁸ by the IRS's actions of paying her refund and issuing a ruling announcing that it acquiesced in the Second Circuit's rule in *Weisbart v. United States*⁵⁹ that the Mailbox Rule could save claims like Ms. Anastasoff's. Yet again, Ms. Anastasoff was unsuccessful: Judge Arnold, writing for the court en banc, held his earlier opinion moot.⁶⁰

Nonetheless, unlike its predecessor, *In re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted November 18, 1986*,⁶¹ which had suggested that modern institutionalized unpublication might be rendered unconstitutional on equal protection and due process grounds as well as because it may be *ultra vires* of Article III, Judge Arnold's opinion specifies the basis of the *ultra vires* claim. For this reason and because Judge Kozinski's revisionist history of U.S. precedent in *Hart* seeks explicitly to contradict it,⁶² its reasoning merits critical analysis.

53. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000).

54. See Arnold, *supra* note 4, at 220–25 (discussing the designation of unpublished opinions as nonprecedential); Wald, *Rhetoric*, *supra* note 4, at 1373–76 (same); Wald, *Problem*, *supra* note 4, at 783 n.41 (same).

55. *Anastasoff*, 223 F.3d at 899–904.

56. *Id.* at 899.

57. *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000).

58. *Id.*

59. *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000).

60. *Anastasoff*, 235 F.3d at 1056.

61. *In re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986*, 955 F.2d 36 (10th Cir. 1992).

62. *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001).

Opening with powerful symbolism, Judge Arnold draws authority initially from the jurisprudence of the *Marbury* Court,⁶³ which reasoned that, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule."⁶⁴ This articulation of the nature of the common law process—the articulation of rules and their interpretation in application in subsequent cases, is followed rapidly by an appeal to the necessity to treat like cases alike: "This . . . declaration of law . . . must be applied in subsequent cases to similarly situated parties."⁶⁵ The opening argument also makes an appeal to a significantly different discourse than the discourse of precedent as iron-clad control on future courts and litigants mobilized by Judge Kozinski in *Hart*:⁶⁶ A court's "declaration of law" in each case "is authoritative to the extent necessary for the decision."⁶⁷

Taken together, Judge Arnold opines, "[t]hese principles . . . form the doctrine of precedent."⁶⁸ His next appeal to authority is to the understanding of the Founders. Their understanding of precedent was that courts declare or articulate rules (formulae that connote the legal fiction that common law judges do not make law, but rather discern and announce previously existing legal rules) and interpret them in each application. Similarly situated litigants must be treated similarly and the iterativity of precedent is necessarily incremental.⁶⁹ The next step in Judge Arnold's reasoning, the claim of authority for his holding of unconstitutionality on *ultra vires* grounds, is less well supported. He cites the language of Article III as his only direct support for the claim that "[t]he Framers . . . considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution."⁷⁰ Article III's text—perhaps merely descriptive, perhaps pregnant with connotation, merely provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time

63. *Anastasoff v. United States*, 223 F.3d 898, 899–900 (8th Cir. 2000).

64. *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 177 (1803).

65. *Anastasoff*, 223 F.3d at 900.

66. *Hart*, 266 F.3d at 1174.

67. *Anastasoff*, 223 F.3d at 900.

68. *Id.*

69. See *id.* at 899–900 (stating that "every judicial decision is a declaration and interpretation of a general principle or rule of law," which is "authoritative to the extent necessary for the decision," and "must be applied in subsequent cases to similarly situated parties").

70. *Id.* at 900.

ordain and establish."⁷¹ In a flurry of citations to authority, from Professor Morton Horwitz to Sir William Blackstone to (simultaneously) Roman, Norman, and the earliest of English Law, Judge Arnold bridges the gap between his English sources of the doctrine of precedent and its embracing by the Founders.⁷² Then, citing Coke, he essays the rhetorically powerful claim that "assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government."⁷³ The Framers thus "had inherited a very favorable view of precedent from the seventeenth century" via Coke.⁷⁴

He concludes that "the doctrine of precedent was not merely well-established [at the Nation's founding]; it was the historic method of judicial decision-making, and well-regarded as a bulwark of judicial independence in past struggles for liberty."⁷⁵ Judge Arnold next qualifies Coke as "the legal authority most admired and most often cited by American patriots" and impeaches the "only critic of the doctrine of precedent," Hobbes, "who regarded the authority of precedent as an affront to the absolute power of the Sovereign."⁷⁶ In a rhetorical gesture that is the equivalent of having one's cake and eating it too, he then invokes but relegates to a footnote those modern scholars who "tend to justify the authority of precedent on equitable or prudential grounds" comprising "fundamental fairness, i.e., that like cases should be treated alike; . . . the need for predictability; and . . . as an aid to judicial decision-making, to prevent unnecessary reconsideration of established matters."⁷⁷ Judge Arnold simultaneously privileges the authority of the eighteenth century (most influentially expounded by Blackstone), that "the judge's duty to follow precedent derives from the nature of the judicial power itself."⁷⁸

What follows is an argument for the inextricability of judicial power and "the judge's duty to follow precedent."⁷⁹ This involves a complex interlinking

71. U.S. CONST. art III, § 1, cl. 1.

72. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860*, at 8–9 (1977); J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 227 (1990); Sir William Holdsworth, *Case Law*, 50 L.Q.R. 180 (1934); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *69 (1765)).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 900 n.6.

77. *Id.* at 901 n.7 (citing Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987)).

78. *Id.* at 901.

79. *Id.*

of the legal fiction that judges discover but do not make law; the concession that this involves "not only choosing the appropriate legal principle but also expounding and interpreting it"; and the claim that "[i]n determining the law in one case, judges bind those in subsequent cases."⁸⁰ Judge Arnold disaggregates the concept of respect for precedent from the necessity for a published judicial opinion, citing Blackstone as authority for the proposition that the "record of the judicial proceedings and decision alone is sufficient evidence of the legal principles necessary to support the decision."⁸¹ He concludes that "the judicial power is limited by [precedents]," and then makes a claim for the reception of this eighteenth century British philosophy of law by the Framers.⁸²

Judge Arnold goes on rapidly to touch on other justificatory discourses for the doctrine of precedent. It "keep[s] . . . the law stable," and "is . . . essential for the separation of legislative and judicial power."⁸³ Invoking Blackstone, Judge Arnold catalogs the implications of that aspect of separation of powers. Judges constrained by the doctrine of precedent do not make law, unlike legislators, and thus they avoid arbitrariness.⁸⁴ In this constraint "'consists [the] one main preservative of public liberty."⁸⁵ In a now-familiar rhetorical gesture, Judge Arnold ascribes the view to the Framers, to Federalists and Anti-Federalists alike, quoting extensively from Hamilton and Madison.⁸⁶ He then disaggregates symbolic authority of the record of judicial decisions from actual authority. Given an ambient culture of "limited publication of judicial opinions" historically, he claims, citing Coke and American sources from the eighteenth, nineteenth, and twentieth centuries, "judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or a lawyer's unpublished memorandum."⁸⁷

Judge Arnold's peroration again cites the eighteenth century and the Framers, and adds the authority of Joseph Story for the proposition that "the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III."⁸⁸ He concludes his extensive quotation from Story noting that "'a departure from [the doctrine of precedent] would have been deemed [by the

80. *Id.*

81. *Id.* at 901 n.9.

82. *Id.* at 901 n.8.

83. *Id.* at 901.

84. *Id.*

85. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *258–59).

86. *See id.* at 901–03 nn.10–13 (quoting numerous sources that state that judicial adherence to precedent is a guard against arbitrariness and threats to liberty).

87. *Id.* at 903 n.14.

88. *Id.* at 903–04 n.14.

Framers] an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."⁸⁹ Setting up a counter argument to the proposition that "[i]t is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent,"⁹⁰ he concludes with a combination of appeals to sense and reason and a rhetorical gesture as dramatic as Story's:

If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if this is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not on *fiat*.⁹¹

Thus, the proposed rule change would remove only the most embarrassing of the effects of the system of institutionalized unpublication, but no more. It would not address what Judge Arnold identifies as one of the significant problems caused by modern institutionalized unpublication, the temptation towards judicial misconduct and to an associated culture of duplicity that arises from courts repeatedly failing to follow their own criteria for designating certain opinions unpublished and thus unprecedential.⁹² There is a certain attractiveness to Judge Arnold's rhetoric of judicial rectitude and his call for constraints on judicial power. This discourse runs dramatically counter to the discourse of the necessity of judges prospectively controlling the law. It also contradicts the judge-aggrandizing rationale of Judge Kozinski for a binary system of judging that he says is necessitated by ironclad precedential opinions. If judicial opinions or "reasons for judgment," however, depend for their

89. See *id.* at 903–04 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–78 (1833)).

90. *Id.* at 904.

91. *Id.*

92. Arnold, *supra* note 4, at 223–24.

accuracy in accounting for what produced a judge's decision in any case on the intellectual honesty, ethical awareness, and capacity for critical self-analysis possessed by the individual judicial officer, little of value would be lost by eliminating reasoning that seeks merely to constrain the future.

Judge Arnold's rhetoric rests on the authority of English jurisprudence of the eighteenth century and that of the Framers, emphasizing both precedent's control over judicial lawmaking, and the authority of the law and the people versus that of capricious monarchs or judges. In contrast, Judge Kozinski's rhetoric tells a story of modernity, of a doctrine of selectively rigid precedent that has emerged in the United States federal courts, and is distinct from common law precedent, and of judge as legislator who decides when the time has come to attempt to bind those who follow to the letter of legal rules. And as *Anastasoff* dealt with the precedential status of unpublished opinions, so *Hart* deals with another of the obvious effects of modern institutionalized unpublication. The issue arose as the result of an appeal.⁹³ It had nothing to do with the substance of the appeal. Rather, it was set in motion by the Ninth Circuit's Notice to Show Cause issued to the appellant's attorney, which required him to show cause why he should not be disciplined for citing an unpublished opinion in his brief, contrary to 9th Cir. R. 36-3.⁹⁴ The appellant's attorney's response to the Notice to Show Cause was to argue that the rule might be unconstitutional, as a result of *Anastasoff*.⁹⁵ There is a certain poignant irony in the fact that the unpublished opinion that caused the controversy arose from an appeal by a social security applicant who might be viewed as the paradigm of those on the margins of society whom modern institutionalized unpublication structurally subordinates, and often explicitly treats differently by assigning their appeals either characteristically or as a matter of policy to the nonargument track. This means they may receive little or even no judicial attention in their progress through Article III courts. Carol Z. Rice, the appellant in *Rice v. Chater*,⁹⁶ was a forty-year-old woman with an IQ of 79 and a range of medical problems who lived with her parents.⁹⁷ Her only jobs had been housekeeping for an uncle and babysitting at the rate of "one dollar per day."⁹⁸ Not only is the subject matter of the offending

93. *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001).

94. *Id.* at 1159.

95. *Id.*

96. *Rice v. Chater*, 98 F.3d 1346, 1996 WL 583605, at *1 (9th Cir. Oct. 9, 1996).

97. *Id.* at *1-2.

98. *See id.* at *1-3 (stating that appellant had been diagnosed as a malingerer by a psychologist appointed by the ALJ who heard her application for supplemental security income disability benefits, and was refused a supplemental hearing which would have enabled her to

unpublished opinion poignantly apt, but there is also an equally apt irony that *Hart* has nothing to say about the appeal in that case itself, being rather a lengthy dissertation on judicial power.

Judge Kozinski opens by labeling *Anastasoff's* invitation to the bar to breach Rule 36-3 seductive, and labels any alleged relevance of *Anastasoff's* holding to Rule 36-3's constitutionality "mistaken" and speculative.⁹⁹ He characterizes Judge Arnold's argument about Article III as "preclud[ing] . . . federal courts from making rulings that are not binding in future cases"; striking at Judge Arnold's careful avoidance of the claim that common law judges make rather than discover the law, he parses that as meaning that "they are required to *make* law in every case."¹⁰⁰

Judge Kozinski interposes a footnoted criticism of Judge Arnold's citation of *Story*. He deems it read out of context. Judge Kozinski claims that context limits the concept of binding precedent to the effect of the decisions of the Supreme Court on the courts of the states.¹⁰¹ He then begins to articulate his own theory of precedent, one which draws on the authority of a distinctively American "modern legal system":

. . . *Anastasoff* overstates the case. Rules that empower courts of appeal to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents; . . . such rules have a much more limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of inferior courts of the circuit, will be bound by particular

engage with the psychologist's report, which the ALJ had decided to admit into evidence although it had been obtained post-hearing). Flaws in the quality of the preparation of her case meant that the expert who was available to testify about her mental impairments was not qualified to do so. *Id.* at *6–7. Other qualified experts had not made the formal diagnosis necessary to constitute "medical evidence." *Id.* These facts, combined with the ALJ's conclusions about Ms. Rice's honesty led the Ninth Circuit to affirm the magistrate judge's grant of a motion for summary judgment to the Commissioner of the Social Security Administration. *Id.* at *7–8.

99. See *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (arguing that the speculations of the *Rice* court were mistaken).

100. *Id.* at 1159–60 (emphasis in original).

101. See *id.* at 1160 n.3 (stating that *Story's* argument about precedent was confined to the supremacy of the Supreme Court over lower courts (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 376–78 (1833))). Judge Arnold appears to get the better of the contest here. While Judge Kozinski is right that the context concerns the power of the Supreme Court, it is specifically directed towards the Supreme Court's pre-eminent power in federal constitutional judicial review. *Story* goes on to make a generalized claim about the operation of precedent in "the whole system of jurisprudence" in a "government of laws, and not of men." STORY, *supra*.

rulings. This is hardly the same as turning our back on all precedents, or on the concept of precedent altogether.¹⁰²

It is worth noting, in light of Judge Kozinski's subsequent rule-controlling discourse, that this passage suggests that the only genuine basis for the asserted necessity to devote extensive time and craft to those few opinions deemed precedential and thus published is foreclosing interpretability. This passage also undermines the claim that the binary system produces consistency.¹⁰³ Judge Kozinski's focus is on the individual judge who writes published opinions and on such a judge's authority.

Judge Kozinski then takes issue with Judge Arnold's claim that Article III judicial power is subject to an implied constitutional limitation which allows courts to declare some of their decisions nonprecedential.¹⁰⁴ Interspersed with this portion of Judge Kozinski's argument is an appeal to the exigencies of practicality and modernity¹⁰⁵ and to the way in which the U.S. federal courts have come to "do business."¹⁰⁶ This appeal is coupled with the claim that "much of what the federal courts do could be modified or eliminated without offending the Constitution."¹⁰⁷

Judge Kozinski then proceeds to caution against "freez[ing] the law into the mold cast in the eighteenth century."¹⁰⁸ He catalogues and criticizes eighteenth century U.S. judicial practices that have fallen into disuse,¹⁰⁹ and in doing so calls into question the accuracy of Judge Arnold's account of the doctrine of precedent at the time of the Framers.¹¹⁰ Judge Kozinski then effectively accuses Judge Arnold of intellectual bad faith in "pick[ing] and choos[ing] those ancient practices [he] find[s] salutary as a matter of policy, and give[s] them constitutional status."¹¹¹ In a revealing aside, as this first criticism is introduced, Judge Kozinski introduces a theme that recurs in the

102. *Hart*, 266 F.3d at 1160.

103. Judge Kozinski makes this point. *Id.* at 1179.

104. *See id.* at 1160–62 nn.4–5 (arguing that Article III does not limit the power of courts to issue nonprecedential opinions).

105. *See id.* at 1160–62 (enumerating the common practices of modern courts that differ from earlier courts).

106. *Id.* at 1161 (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–64 (1953)).

107. *Id.*

108. *Id.* at 1162.

109. *See id.* (noting changes in the law since the eighteenth century).

110. *See id.* at 1162 n.6 (discussing the question of what weight was given to precedent at the time of the Framing).

111. *Id.* at 1163.

opinion: the virtues of judicial opinions speaking monologically, with one authoritative voice that is resistant to future interpretivity.¹¹²

Judge Kozinski then embarks on an elaborate exposition of the differences between precedent at the time of the Framers and precedent in the modern federal courts. The proposition that the "overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of the judicial power,"¹¹³ is made revealingly without citation to authority. The judge goes on to claim both that contemporary conceptions of precedent are "stricter" than those of the Framers and that, in any event, the reason that there is no "express prohibition against issuing nonprecedential opinions [is that] . . . the Framers would have seen nothing wrong with the practice."¹¹⁴

Judge Kozinski moves on to make a series of arguments for the elasticity of precedent in the eighteenth century. Along the way, he casts scorn borrowed from Austin on the legal fiction repeatedly, if obliquely, invoked by Judge Arnold that the common law is "found" by the judges as the need for it arises. Those arguments range from ones based on doctrinal pronouncements¹¹⁵ and jurisprudential theories¹¹⁶ to ones deriving from a range of claims about the material practices of court hierarchy,¹¹⁷ reporting,¹¹⁸ and the training¹¹⁹ of those who purport to make the law. He then sources the conception of two classes of "precedent"—the binding and persuasive types—in the Exchequer Chamber.¹²⁰ He expands this distinction into that between "the law" and "the opinion of a

112. *Id.* at 1163 n.6 (opining that "[n]ine judges speaking separately may well agree on the outcome of a case, but they cannot give the kind of specific guidance as to the conduct of future cases that can be found in a single opinion speaking for the court").

113. *Id.* at 1163.

114. *Id.*

115. *Id.* at 1163 n.9.

116. *Id.* at 1164 n.8.

117. *See id.* at 1164–65 & nn.10, 13 (quoting and citing R.W.M. DIAS, JURISPRUDENCE 30–31 (1964); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 151, 162–63, 348 (1956)) (noting that a hierarchy of courts is a necessary prerequisite to the precedential value of case law).

118. *See Hart v. Massanari*, 266 F.3d 1155, 1165–67 nn.9, 10, & 15–18 (9th Cir. 2001) (citing numerous authorities for the proposition that common law judges had many different justifications for not following precedent).

119. *See id.* at 1165 n.11, 1167 n.19 (stating that the practice of law by laymen devalued the precedential import of case law).

120. *See id.* at 1165 n.13 (arguing that the fact that decisions in the Exchequer Court were considered binding precedent demonstrates that decisions outside that court were not generally considered binding).

judge," which might be mistaken,¹²¹ and makes a curious point that purports to be a common law generalization: "For centuries, the most important sources of law were not judicial opinions themselves, [because of scarcity] but treatises that restated the law," but which his source limits to "the first century of American jurisprudence[']s]" reliance on Blackstone.¹²²

It seems likely that English law reports were scarcer in colonies than in England itself, but this is beside the point. What it connotes is a U.S. conception of the hardness of doctrine that is at the heart of Langdell's legal science. Contemporary U.S. lawyers and judges are cast in the mold of Langdell's doctrine by their education in its texts and pedagogical practices. This conception is at one with Judge Kozinski's almost civilist understanding of those legal texts as authoritative, and of those of judges as generally not. This aspect of Judge Kozinski's theory of precedent becomes more visible when he is unable to differentiate methodologically between a court's generation of binding and persuasive precedent.¹²³ What differentiates the U.S. federal courts' precedential system from that of the common law,¹²⁴ on his account, is that the former binds the future, the latter is bound to follow the past.

This aspect of Judge Kozinski's *habitus*¹²⁵ becomes increasingly visible as he moves to the heart of his revisionist doctrine of U.S. precedent. Judge Kozinski's discourse about the Framers' attitude towards judicial officers differs sharply from Judge Arnold's discourse. It replaces one on being ruled by law and protecting citizens against the excesses of the ruler, with one about government officers whose power was the subject of "contestation."¹²⁶ The flexibility—originating in its derivation from custom—of English common law is used to suggest that Judge Kozinski's and thus modernity's theory of precedent is more rigid than that of the Framers.¹²⁷ It also leads into the "modern" view, placed—possibly strategically—in the mouths of lawyers and not of Judge Kozinski himself, that judges make rather than discover the law.¹²⁸

121. *Id.* at 1165.

122. *Id.* at 1165–66 & n.14.

123. *See id.* at 1172 (stating that "controlling authority has much in common with persuasive authority").

124. *See id.* at 1165 n.13 (noting the persuasive nature of common law decisions).

125. *See* BOURDIEU, *THE LOGIC OF PRACTICE*, *supra* note 17, at 52 (defining *habitus* as a system of structured, structuring dispositions).

126. *See* *Hart v. Massanari*, 266 F.3d 1155, 1167 n.20 (9th Cir. 2001) (stating that at time of the Framing, the concept of precedent was subject to debate).

127. *See id.* at 1167 (stating that common law "was a reflection of custom, and custom had built-in flexibility").

128. *See id.* at 1168 (stating that lawyers "began to believe that judges made, not found, the

This combination of the acknowledgment that judges make law and the emergence of opinion reporting is cited as the grounds for the emergence of judicial opinions—as if for the first time—as "binding precedent."¹²⁹

Judge Kozinski then briefly introduces an argument on which he relies heavily later in the opinion to justify modern institutionalized unpublication, the topic of the final part of the opinion. He notes the difficulty of judges informing themselves about a burgeoning body of precedent and the necessity for prudent judges to "keep the law clean," as their English predecessors did by adopting selective reporting of opinions. He elaborates on the binary classes of persuasive and binding opinions¹³⁰ and begins to differentiate the common law from the system of precedent that operates in the contemporary U.S. federal courts.¹³¹ He does this in part by emphasizing the hierarchical system of precedent that operates in federal courts,¹³² and in part by explicitly articulating an argument central to his discourse on precedent. Binding authority—"very powerful medicine"¹³³—must be crafted using "precise language,"¹³⁴ via a process of "collegial[ity]"¹³⁵ so that the court speaks with one voice, rather than admitting of dissent—or dialogue.

Judge Kozinski then pairs an argument about the disorder that would ensue if the federal courts' system of differentiating binding and persuasive precedent was abandoned with an insistence on his view that this system is merely a matter of policy choice and not a constitutional matter.¹³⁶ The crux of these paired arguments is that if Article III courts must constitutionally follow precedent, rather than determine which opinions are precedential and which are not as a matter of policy, then this would apply to the federal district courts. On

law").

129. *Id.*

130. *See id.* at 1174 n.30 (providing a summary of the role that persuasive and binding authority plays in judicial opinions).

131. *See id.* at 1165 n.13 (claiming that at common law, binding precedent was only created by the Exchequer Chamber, and that circuit judges regularly decided cases without referring to reporters).

132. *See id.* at 1170–73 (explaining that Supreme Court opinions serve as binding precedent for all federal courts, and circuit courts must follow previous decisions within the circuit, unless overruled by the Supreme Court or the circuit in an en banc ruling, but that the circuit courts are not bound by the decisions of other circuits).

133. *Id.* at 1171.

134. *Id.*

135. *Id.* at 1171 n.26.

136. *See id.* at 1174, 1176 n.30 (stating that courts would operate much less efficiently if not required to follow binding authority, and noting that in California "court of appeal panels are not bound by the opinions of other panels, even those within the same district").

Judge Kozinski's account, those courts do not have the power to issue binding precedent (as a matter of policy choice).

This argument has two flaws. First, if Judge Arnold is eventually proven right, the matter is one of an absence of constitutional power to decide which opinions are precedential and which are not. Then indeed, the district courts, on those occasions when judges rather than juries decide cases, would likewise lack the power to determine precedential status via fiat and would be obliged to follow precedent within the structure of that common law commonplace, an hierarchical system of appellate justice. The potential results would be a corrective to the rule of law and structural subordination problems that follow the present system of institutionalized unpublication. Those problems include, most obviously, arbitrariness and its various collateral costs—those which derive from disrespect for the judiciary, the courts, and the law. Further, because the United States federal courts, like their common law predecessors, follow a system of precedent that depends in part on court hierarchy and a differentiation between trial and appellate jurisdiction and function, the extent to which federal district court judges would have a disruptive law-divining, -declaring, or -making function (depending on one's view of how common law decisionmaking characteristically operates) seems extremely limited. This is especially true given the much more widespread use of juries in fully litigated matters in the United States than elsewhere in the common law world, particularly in civil cases. Error correction, after all, is an integral part of "writing the law."

The final part of the opinion opens with a reiteration of the claim that binding precedent is a creation of the United States federal courts that postdates both Article III and English common law,¹³⁷ this time, however, introduced in a way that is a harbinger of Judge Kozinski's Janus-faced discourse on various aspects of the system of modern institutionalized unpublication. One paragraph opens with the statement that while "the principle of precedent was well established in the common law courts . . . we do not agree that it was known and applied in the strict sense in which we apply binding authority today."¹³⁸ Yet near the end, it concedes the proposition that "[t]he concept of binding case precedent, though it was known at common law, was used exceedingly sparingly."¹³⁹ This latter claim is supported only by an earlier footnote that extremely selectively and indeed tendentiously parses¹⁴⁰ Plucknett's account of

137. See *id.* at 1174–75 (stating that binding precedent did not play the same role in common law courts, or courts at the time the Constitution was written, as it does today).

138. *Id.*

139. *Id.*

140. *Id.* Plucknett's discussion is an historical one that articulates the passage from the

the effect of proceedings of the Court of Exchequer Chamber as evidence that "clearly suggests common law judges knew the distinction between binding and persuasive precedent."¹⁴¹ What ensues is a discourse on the rigidity of the

"Year Book period" to "The Age of the Reporters." Specifically, in a complex and fairly sophisticated discussion about the changing roles of "custom" and "precedent" in constituting the law, he differentiates between the practice of the Year Book period, during which "cases [were] used only as evidence of the existence of a custom of the court," and the view that emerged in the seventeenth century that a decision of all the judges of England in the Exchequer Chamber "was a binding precedent." THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 347–48 (5th ed. 1956). Plucknett's discussion continues with a look at the modern view of binding precedent which emerged in the nineteenth century. *Id.* at 349–50. He also notes elsewhere that "[w]hile it lasted, the Court of Exchequer Chamber did much to take the place of a system of appellate courts" before such a system developed, although it differed from them in only being able to be set in train by judges rather than parties. *Id.* at 163. Thus, Plucknett's point is about the authoritativeness of texts and courts and about the complexities of the paradox of common law's dual origins in "custom" and the unitary law of the land rather than of "law" in the contemporary sense. I should note both that I am aware that adjudging competing truth claims is risky in context and that it is not my point here. My point is that within a range of tolerance shaped by the *habitus* of lawyers and the judges some of them become, precedent is as binding, persuasive, or interpretable as one chooses to make it. Further, institutional decisions by courts about the degree to which they formally bind successor or inferior courts or for that matter decisions akin to those a court like the Court of Exchequer Chamber or the Supreme Court makes when it settles issues of legal interpretation about which there are differing views between lesser courts or among judges (all of which we will assume for the sake of argument more or less approach the law ethically rather than what I will—tendentiously—call tendentiously) are of a different order from judges being able to pick and choose which of their own decisions are on the books and to which they are obliged to pay any interpretive fealty and which they are free to depart from in like circumstances. There is also a question of selective citation as well as interpretation of precedents. *See, e.g.*, GOODRICH, *supra* note 44, at 71–72 (summarizing the history of precedential citation in England). Goodrich notes:

It was, however, only with the aid of principles drawn from the academies and the civil law, that the common law [in England, which, it is worth noting, unlike the United States does not have a written constitution and where courts applying British law have no power to declare acts of government unconstitutional] could be developed into a coherent and largely self-sufficient system of legal decision-making. In 1861, in *Beamish v. Beamish* . . . the House of Lords decided that precedent decisions of the House were to be binding in future cases, even upon the House itself. . . . [This] view . . . remained the law until in 1966 the House of Lords issued a Practice Statement declaring that, in a limited number of circumstances, the House would no longer be bound to follow its earlier decisions. The lower courts, the Court of Appeal in particular, however, remain bound by their own earlier decisions and the system of precedent in general is still doctrinally stated to be one of binding or strict precedent.

Id. Or at least it was until the British courts followed the lead of the U.S. in 2001 and required lawyers to seek courts' permission before citing unreported opinions to them. *See Pether, Inequitable Injunctions*, *supra* note 4, at 1439 n.11 (noting the new limitation on citing unreported opinions).

141. *Hart v. Massanari*, 266 F.3d 1155, 1165 n.13 (9th Cir. 2001).

doctrine of binding precedent and the power of the unitary opinion. Binding precedent in the federal courts is "strict,"¹⁴² provides "rigid constraint,"¹⁴³ and is "the backbone of much of the federal judicial system today."¹⁴⁴ The "single case . . . [is] sufficient to establish a particular rule of law."¹⁴⁵

Moving on to complicate this discourse in articulating his case for selective rather than strict binding precedent, Judge Kozinski has a little suggestive—indeed perhaps cynical—"originalist" fun at the expense of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*.¹⁴⁶ He suggests that the system of selective binding precedent gives originalists the capacity to depart from precedents that are unconstitutional.¹⁴⁷ He also begins the discourse on quality that is used near the opinion's end to justify selective rather than strict binding precedent by proposing that strict binding precedent is flawed by mere priority in cases where the lawyers who are the first to raise a point are inadequate.¹⁴⁸ Let us leave aside for now the logical problems in squaring a claim for the necessity for "binding precedent" of any stripe with a system where judges can effectively do whatever they like, to whomever they like, whenever they feel like it, because only they have the power to say what counts as precedent and what does not. Instead, let us focus on what is valued here, the authority of the individual court. Indeed, it is often the power of the individual judge, given the power of the drafter, on Judge Kozinski's account, to constrain future interpretability and achieve the univocality of a published "single opinion speaking for the court" that he privileges.¹⁴⁹ This power may often be cynically bargained for or be the product of forced consensus.¹⁵⁰

Judge Kozinski's peroration at once anatomizes the published opinion and seeks to account for the necessity of modern institutionalized unpublication on efficiency grounds. The system of unpublished opinions is legislative, bespeaking a codifying impulse. It aims to "develop . . . a coherent and internally consistent body of caselaw to serve as binding authority . . .

142. *Id.* at 1174.

143. *Id.*

144. *Id.* at 1175.

145. *Id.* at 1174–75.

146. *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309 (1994).

147. *See Hart v. Massanari*, 266 F.3d 1155, 1175 n.31 (9th Cir. 2001) (stating that rigid adherence to the principle of binding precedent "forces judges in certain instances to act in ways they may consider to be contrary to the Constitution").

148. *Id.*

149. *Id.* at 1162 n.6.

150. *See, e.g., Pether, Inequitable Injunctions*, *supra* note 4, at 1487 (noting that some judges agree not to dissent in a case as long as the opinion is not published).

Precedential opinions are meant to govern . . . future cases"¹⁵¹ Their drafters must remove those facts which might "provide a spurious basis for distinguishing the case in the future" and "envision the countless permutations of facts that might arise in the universe of future cases."¹⁵² This "solemn judicial act" takes a lot of time to do, Judge Kozinski reasons. Judges cannot be expected to do it in every case, but only in a "manageable number of cases," consigning the others to "unpublished dispositions and judgment orders."¹⁵³

Judge Kozinski goes on to make claims for the quality of those unpublished dispositions and for their judicial authorship. Those claims will be subject to a rather different kind of discourse analysis in Part III of this Article. Suffice it to say at this point that consigning to a footnote the possibility of "irresponsible and unaccountable practices" enabled by the two-tiered system of judging is troubling. The same applies to a highly selective choice of sources used to substantiate the claim that judges are kept "honest" by the current system.¹⁵⁴ There are many authorities, among them federal judges, who have expressed radically differing views.¹⁵⁵ Indeed, a recent study shows a pattern among Democratic appointees to the Ninth Circuit of deciding asylum cases with published opinions differently from those with unpublished opinions.¹⁵⁶

More troubling still is a claim by the most public proponent of maintaining what is arguably the least significant and the least problematic of the various highly problematic aspects of modern institutionalized unpublication: citation bans. This claim alleges that because "a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented An unpublished

151. *Hart*, 266 F.3d at 1176.

152. *Id.*

153. *Id.* at 1177. The question of this emergent third category of judicial decisions, "judgment orders," is a matter for another day, but the recent report emanating from the Federal Judicial Center on the proposed rule change suggests that it is here and not in unpublished opinions that most of the decisions of the federal court are currently "memorialized" (if I might be excused a pun that would be merely exasperated were the stakes of judicial ethics in a constitutional system providing for judicial review of the constitutionality of governmental actions not so high). *REAGAN ET AL.*, *supra* note 5, at 70.

154. *Hart v. Massanari*, 266 F.3d 1155, 1178 n.35 (9th Cir. 2001).

155. See, e.g., Pether, *Inequitable Injunctions*, *supra* note 4, at 1487–88 (pointing to an example in which the decision whether to publish an opinion was based on which clerk needed to author an opinion to aid in future employment searches, and to cases where judges have used unpublished opinions as a means of punishing litigants and lawyers).

156. See David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 864–66 (2005) (concluding that the decision whether or not to publish a judicial opinion has a significant impact on how some judges vote on the merits of a case).

disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and essential rationale of the court's decision."¹⁵⁷ What makes it troubling is that I am familiar with what is revealed by a cursory search of what is made available as a result of the Ninth Circuit's implementation of a recent federal law¹⁵⁸ apparently requiring the federal courts to post all of their unpublished opinions on their websites in "text searchable format."¹⁵⁹ Take, for example, the following unpublished opinion issued by a panel of the Ninth Circuit:

Miguel Nava Rivas seeks reversal of his conviction of three counts: (1) conspiracy to possess marijuana with intent to distribute, 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), and 846; (2) possession with intent to distribute marijuana, and aiding others to do the same, 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(vii), and 18 U.S.C. § 2; and (3) conspiracy to import marijuana, 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(2), and 963. Rivas asserts that there was insufficient evidence to sustain any of these three counts. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found each element of the crime beyond a reasonable doubt. *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992). Rivas also challenges the admission of testimony by the government's expert witness. The district court did not abuse its discretion, let alone commit plain error, *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000), by admitting the witness testimony.

AFFIRMED¹⁶⁰

Judge Kozinski himself has criticized a judge who "offered nothing at all to justify his actions—not a case, not a statute, not a bankruptcy treatise, not a law review article, not a student note, not even a blawg," and has criticized federal judges who "refuse . . . to give reasons for [their] actions" and praised those who "give . . . reasons for [their] orders."¹⁶¹

In closing, this part of the Article has suggested that Judge Kozinski's revisionist history of precedent is, in his view, that the United States federal

157. *Hart*, 266 F.3d at 1177–78.

158. Circuits can apparently indefinitely defer compliance with the requirement.

159. E-Government Act of 2002, Pub. L. No. 107-347 (codified at 44 U.S.C. § 3501 Sec. 205(a)(5)).

160. *United States v. Rivas*, No. 03-10594 (9th Cir. Oct. 14, 2004), available at [http://www.ca9.uscourts.gov/coa/memdispo.nsf/pdfview/071505/\\$File/03-10594.pdf](http://www.ca9.uscourts.gov/coa/memdispo.nsf/pdfview/071505/$File/03-10594.pdf). Many unpublished opinions merely affirm without giving *any* reasons for the decision. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1465 n.139 (pointing to estimates that concluded that about 7% of all opinions issued in the federal courts of appeal are one-word opinions).

161. *In re Complaint of Judicial Misconduct*, No.03–89031, slip op. 29, 34 (9th Cir. Sept. 29, 2005) (Kozinski, J., dissenting) (memorandum).

courts are not common law courts. They claim much more power for the judge and manifest much less tolerance for the messiness of interpretability that differentiates the common from the civil law. Part III of this Article compares the final section of *Hart* with other texts to explore the implications of Judge Kozinski's model of the judge and his power, which diverge so significantly from those mobilized by Judge Arnold. The conclusion is that in *Hart*, Judge Kozinski is asking us to take a lot on trust, and that the record invites a decision against him.

III. Dissenting Judgment

What is here meant by the common law, a term with multiple meanings? In this Article, common law refers to law that is judge-made (or interpreted, which this Article takes to be the self-same thing). It means a practice of law-making with a curious double heritage. The first is rooted in a colonial power's attempt to entrench state power by standardizing and centralizing law that until then had been both decentralized and normatively responsive to local conditions.¹⁶² The second heritage is the ideological commitment to custom¹⁶³ and the material practices associated with the transmission and application of customary law and involved in the habituation and training of lawyers and judges on the one hand, and the practices of circuit-riding on the other.¹⁶⁴ The latter inculcated in the elite (white male) members of the inner bar, who still overwhelmingly become common law judges, a culture of independence—we might call it dissent—and of a professional *amour propre* fashioned on the fantasy of or desire for what the late Jacques Derrida famously called "the possibility of justice" (in her infinite variability).

The first of these manifestations of judicial culture is one that Prime Minister Blair has had to recently confront, to his cost, in the person of Lord Irvine of Lairg. Lord Irvine, the former Lord Chancellor and Prime Minister Blair's former pupil-master, provided leadership for the House of Lords' opposition to the British government's proposed antiterrorist legislation.¹⁶⁵

162. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *416 (mentioning the Saxon efforts to reduce the power of local courts and extend the jurisdiction of the King's courts); FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 79 (2d ed., Little Brown & Co. 1899) (noting that a "good deal" of English law was in writing at the time of the Norman Conquest).

163. See, e.g., J.G.A. Pocock, THE ANCIENT CONSTITUTION AND FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SIXTEENTH CENTURY 31 (2d ed. 1987).

164. GOODRICH, *supra* note 44, at 42 (1986).

165. Greg Hurst, *Lords Revolt Over Anti-terror Bill*, TIMES (London), Mar. 8, 2005, at 6.

This opposition led to the locating of decisionmaking power to circumscribe what we might call civil liberties or due process—specifically the issuing of any type of "control order" rather than only "orders for house arrest, which would require derogation from the European Convention on Human Rights"—in the bench rather than the executive arm of government, as the Prime Minister had wanted. The second manifestation is not unrelated to the first: The clearest articulation of its spirit is found in the suggestion of the distinguished New Zealand jurist Lord Cooke of Thorndon that even in those common law countries without constitutionally entrenched, written Bills of Rights, there are individual rights beyond the reach of government that the common law judiciary is bound to protect.¹⁶⁶

Of specific concern is the phenomenon of enemy combatant cases that emerged from the Supreme Court's last term.¹⁶⁷ This resulted in a decision in a subsequent enemy combatant case by Judge Joyce Hens Green of the United States District Court for the District of Columbia,¹⁶⁸ a court in the D.C. Circuit,

166. See *N.Z. Drivers' Ass'n v. N.Z. Road Carriers*, [1982] 1 N.Z.L.R. 374, 390 (questioning "the extent to which in New Zealand even an Act of Parliament can take away the right of citizens to resort to the ordinary Courts of law for determination of their rights"). This is a clear articulation of a view of constitutional judicial power and responsibility perhaps obliquely suggested in *Carolene Products'* over-determined footnote 4. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (describing a possible "narrower scope for operation of a presumption of unconstitutionality when legislation appears on its face to be within a specific prohibition of the Constitution" (emphasis added)).

167. See *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (reversing and remanding consideration of Padilla's petition for writ of habeas corpus for entry of an order of dismissal without prejudice on jurisdictional grounds, and thus not reaching the Government's appeal for review on the merits of the Second Circuit Court of Appeals' decision to grant Padilla the writ of habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that due process requires a citizen held in the United States as an enemy combatant "must receive notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

168. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005) (holding, *inter alia*, that the Fifth Amendment right to due process applied to detainees held as "enemy combatants" at Guantanamo Bay, and that the petitioners had stated a claim for violation of due process based in insufficiency of notice of factual bases for their detention and denial of the opportunity to challenge it). But see *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005), *cert. granted*, 2005 WL 2922488 (U.S. Nov. 7, 2005) (reversing District Court decision that Hamdan "could not be tried by a military commission unless a competent tribunal determined that he was not a prisoner of war under the 1949 Geneva Convention"); *Khalid v. Bush*, 355 F. Supp.2d 311, 321, 330 (D.D.C. 2005) (holding, *inter alia*, that the separation of powers made it impermissible for courts to inquire into the conditions of executive detention of non-resident aliens captured and detained outside the United States, and that these detainees have no legally cognizable rights). See also *Al-Joudi v. Bush*, No. Civ.A. 05-301 (GK), slip. op. 2005 WL 774847, at *6 (D.D.C. Apr. 4, 2005) (granting Saudi detainees' motion for a temporary restraining order and preliminary injunction requiring respondents to provide counsel for petitioners and the court with thirty days advance notice of any intended removal from

which comparatively recently ended citation bans on unpublished (and still formally nonprecedential) opinions. It is a circuit whose judges opined, albeit anonymously, that they did so because they did not like secret law and which produced the current Chief Justice of the Supreme Court, who is said to favor the end of citation bans and who will need to address FRAP 32.1.¹⁶⁹ It is also a circuit that produced the former Judge Wald, who, apart from the late Judge Richard Arnold, has perhaps been the most trenchant, frank, and courageous judicial opponent of unpublication.¹⁷⁰

That circuit also numbers among its judges David Tatel, who on February 15, 2005, in *In re Grand Jury Subpoena, Judith Miller*,¹⁷¹ invoked Lewis Powell, an alumnus of Washington and Lee University,¹⁷² and a Federal Rule, in this case, Rule 501 of the Federal Rules of Evidence.¹⁷³ Judge Tatel took a doctrinal step that seems to be an equivalent of Lord Cooke's in this nation's

Guantanamo); *Qassim v. Bush*, 382 F. Supp. 2d 126, 129 (D.D.C. 2005) (ordering hearing for purposes of determining conditions under which Uighur Guantanamo detainees who had been found not to be enemy combatants would live pending their relocation to another country); *Associated Press v. U.S. Dep't of Def.*, 2005 WL 2065171, at *2 (S.D.N.Y. 2005) (ruling that Department of Defense required to question detainees as to whether they wished information about their identities to be released to Associated Press). *But see* *Almurbati v. Bush*, 366 F. Supp. 2d 72, 82 (D.D.C. 2005) (denying motion by Bahraini detainees for preliminary injunction prohibiting respondents from transferring any of them from Guantanamo without first providing advance written notice); *Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 680, 682 (D.S.C. 2005) (holding that the Authorization for Use of Military Force allowed for a Quatari national's detention and denying his motion for summary judgment on his petition for the writ of habeas corpus); *Paracha v. Bush*, 374 F. Supp. 2d 118, 121 (D.D.C. 2005) (denying Guantanamo detainee's motion for preliminary injunction ordering his removal from isolation and prohibiting his rendition to the custody of another country where he may face the threat of torture and motion for permission to proceed and appeal in forma pauperis); *O.K. v. Bush*, 377 F. Supp. 2d 102, 118 (D.D.C. 2005) (denying Canadian national detainee at Guantanamo's motion for preliminary injunction barring government from subjecting him to torture or interrogation and a preliminary injunction ordering the government to provide his counsel and the court with thirty days' notice prior to transferring him to a foreign country); *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005) (holding that the President possessed authority to detain enemy combatant).

169. See Tony Mauro, *Judicial Conference Supports Citing Unpublished Opinions*, LEGAL TIMES, Sept. 18, 2005, at 12 (quoting then Judge Roberts as saying that lawyers "ought to be able to tell a court what it has done"); see also 28 U.S.C. § 2072(a) (stating "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure for . . . courts of appeals").

170. See generally Wald, *Rhetoric*, *supra* note 4; Wald, *Problem*, *supra* note 4.

171. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

172. See *id.* at 987 (recommending a "case by case" approach to a possible constitutional qualified privilege for journalists in the grand jury context (citing *Branzburg v. Miller*, 408 U.S. 665, 710 (1972) (Powell, J., concurring))).

173. See *id.* at 989 ("[A]uthorizing federal courts to develop evidentiary privileges in federal question cases according to 'the principles of the common law as they may be interpreted . . . in the light of reason and experience.'").

curious constitutional context.¹⁷⁴ Judge Tatel concluded that a common law First Amendment privilege for journalists in relation to grand jury proceedings "remains open,"¹⁷⁵ and that failing to recognize the privilege "shirk[s] the common law function assigned by Rule 501 and 'freeze[s] the law.'"¹⁷⁶ The use to which I am putting Judge Tatel's doctrinal work perhaps¹⁷⁷ sits uneasily with an opinion with redacted sections. To the extent that it does, it might be seen to be a legal text that explicitly balances the conflict between the possibilities and necessity of common law-making, and its abandonment in the interests of control on the one hand and judicial power exercised in its own interests on the other (which may be much the same thing). And it does so at a critical moment in the development of the nation's common law and the constitution of its judiciary. Judge Tatel's model of the far reaches of the power of the common law judge is a model that discerns the legal authority for such power in the face of government attempts to circumscribe the "rights" of individuals in the interest of executive powers. It does not profess ignorance of evidence of inequality effects or of costs to rule of law discourse in the interests of asserting the power to treat some classes of citizens differently from others,

174. And who has also criticized citation bans, although not the binary opposition of precedential and unprecedential decisions. See David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815, 816-17 (1996) (evaluating potential advantages and disadvantages of lifting citation bans).

175. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005).

176. *Id.* at 995 (citing *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

177. There is the alternative view that the redactions (which in any event in the context of alleged illegal leaks from the Executive are perhaps less problematic than they seem at first blush to be) explicitly foreground silence, rather than covering absences in public information with claims that only the litigants have an interest in the information and that it is in any event both available to them and to the public. Further, this is all in a context in which federal appellate courts issue unpublished memorandum decisions which give no reasons for the court's decision and that some circuits' (including the 9th) implementation of the E-Government Act of 2002, Pub. L. No. 107-347 (codified at 44 U.S.C. § 3501 Sec. 205(a)(5))'s requirement that their opinions be published on their websites in a "text searchable format" involves them listing on their websites memorandum opinions that may only be meaningfully searched if one knows the matter number, the case name, or the date of disposition, providing no other means of searching the database of unpublished opinions. I should also note that the differing "truth claims" of Judges Arnold and Kozinski on whether common law judges discover or make the law are both from my perspective neither here nor there. The critical difference between their versions of the doctrine of precedent is rather their competing views about the power of courts to disregard their earlier decisions by fiat as a result of the regime of modern institutionalized unpublication. Further, there is in this context a real if superficially subtle difference between judges who seek to curtail the power of executive government to interfere with citizens' protection from its unfair use of power and those who seek to assert their own power to behave unfairly, beyond the reach of any check or balance. I should also note my awareness of double irony inherent in the fact that what Miller was seeking to protect was a right to keep secret information from the Executive which had allegedly in its turn leaked "secret" information.

to treat similarly-situated persons differently, and to apply the law it makes or discovers or not, as it pleases. It is, in short, a discourse of the common law as both responsive to appeals to its authority and as appealing to a rhetoric of responsibility. Discourse Analysis concerns itself with regularly occurring cultural stories that both produce the individual habitus, and, of most relevance to my use of it in this part, with "look[ing] for the external conditions of [a discourse's] existence, its appearance and its regularity," prompting us to ask "how is it possible to know that, to think that."¹⁷⁸

Why does this article conclude that we have ceased to be a common law country? Because we are normalizing and rendering normative a judicial culture that has replaced constitutive investments in judicial independence and various rule of law effects with one that is heedless of the call of Lord Cooke, and that frequently betrays a combination of cynicism and disingenuousness. Some better placed to know what goes on behind the closed doors of chambers have described conduct that merits the label corruption.¹⁷⁹ It seems, however, most tellingly and troublingly to manifest a lack of comprehension and valuing of the enormous responsibility of the common law judicial office in Anglo-American constitutional democracies.

Before moving to a critical discourse analysis of a series of texts authored by Judge Kozinski and others with privileged access to the workings of modern institutionalized unpublication, consider some concrete and particular facts. Just under 80%¹⁸⁰ of the opinions of the United States Courts of Appeals are unpublished. This fact alerts us to another: This is where and how most "common," or more accurately, judge-made law is presently being forged.

This signifies first that such opinions are difficult to research. That difficulty is exacerbated by lack of both economic resources and the legal version of "cultural capital" possessed by repeat-player law practices or practices which act for well-resourced repeat player litigants.¹⁸¹ Second, it

178. See Pether, *Critical Discourse Analysis*, *supra* note 30, at 60 (citing to unpublished manuscript).

179. See, e.g., Wald, *Rhetoric*, *supra* note 4, at 1374 (opining that modern institutionalized unpublication "allows for deviousness and abuse").

180. In 2000, it averaged 79.8 %; the Fourth Circuit led at 90.5%. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1436, 1437 n.5, 1465 n.139 (pointing to estimates provided by Judge Margaret McKeown of the Ninth Circuit).

181. See *id.* at 1465–67 nn.141 & 144 (explaining that court websites do not often provide a convenient means of searching unpublished opinions, and that only those unpublished opinions that are released for publication ever make it into the Federal Appendix, LEXIS, or Westlaw); see also *Hart v. Massanari*, 266 F.3d 1155, 1169 (9th Cir. 2001) (explaining that searching for unpublished decisions is difficult). Many lawyers who claim that they routinely search unpublished opinions on LEXIS or Westlaw are clearly not aware of the likely limitation of the universe of material they have access to.

signifies that—contrary to the frequent apologist claims that citation bans are confined to a few places—in most state and federal courts, citing unpublished opinions back to the court that decided them (except in extraordinarily narrow circumstances, and even then, in only some jurisdictions)¹⁸² is forbidden and thus sanctionable.¹⁸³ Finally, it signifies that these decisions are, almost everywhere, rendered formally "non-precedential."¹⁸⁴

All this occurred through the doubled development of screening and institutionalized unpublication in federal courts during the latter half of the 20th century.¹⁸⁵ The practice was justified by the claim that the volume of precedent prevented indexing by courts' law libraries,¹⁸⁶ a problem that technology could now potentially solve, if the judges would cooperate.¹⁸⁷ Citation bans were also justified by the claim that the volume of precedent had become overwhelming,¹⁸⁸ a weak claim given that contemporary research suggests that good judges and lawyers routinely research unpublished opinions if they can get access to them.¹⁸⁹ There was also, as I have written, a secret history underpinning these developments in case management technology, namely, judicial anger and disdain in response to the implementation of *Brown* and the contemporary revolution in the rights of criminal defendants and those convicted of crimes.¹⁹⁰

Numerous contemporary justifications for maintaining the various practices that constitute institutionalized unpublication, (including screening, citation bans, and so on) are extended. A frequent claim is that judicial time will be saved by circumscription of the legal research universe. This is a

182. These generally include *res judicata*, collateral estoppel, law of the case, and double jeopardy.

183. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1536–79 (citing publication and citation rules that govern state courts).

184. *Id.*

185. See *id.* at 1445–64, 1449 n.62 (providing an overview of the development of institutionalized unpublication and screening in federal courts).

186. See *id.* at 1444 (noting that during the 1960s and 1970s, judges argued that indexing all judicial opinions could be an overwhelming task).

187. See *id.* at 1516 (pointing to courts' reluctance to provide adequate search tools for unpublished opinions).

188. See *id.* at 1443–44 (noting the Federal Judicial Conference's use of this rationale in the 1960s and 1970s).

189. See *id.* at 1487 n.288 (explaining that many practicing lawyers and judges research unpublished opinions when possible); REAGAN ET AL., *supra* note 5, at 16–17 (noting that a large percentage of lawyers find that unpublished opinions are useful when they are allowed to cite them).

190. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1444–45, 1517 n.481 (explaining the influence that the increase in civil rights and prisoner *pro se* appeals had on decisions not to publish opinions).

questionable proposition both because at least some judges appear not to do much of the research themselves, and because, as Lauren Robel's work suggests, those who do routinely research as much of the corpus of unpublished authority as they can get their hands on.¹⁹¹ Another claim is that judges have insufficient time to produce more than a few publishable-quality opinions,¹⁹² a claim contestable given: the relatively low opinion-writing rate of U.S. judges by international standards; their unique reliance on clerks and staff attorneys to do much of their writing;¹⁹³ the fact that some of the most ardent proponents of this view are also trenchantly opposed to any expansion in the size of the Article III judiciary¹⁹⁴ and that, at least in one notable case, seem to devote considerable time to writing things other than opinions—video-game reviews for the Wall Street Journal, for example.¹⁹⁵ The last justification, "law-cleaning," is, on closer examination, a discourse of control or circumscription of the possibilities of development of the common law in response to the many appeals that diverse culture produces.

What emerges from the history constructed by proponents of modern institutionalized unpublication and their discourse of justification for its continuation is a gap between what is spoken and unspoken, between those seeking to maintain the status quo and those with no such investments, as between published and unpublished opinions. As I will go on to suggest, parallel with this double discourse is a gap between the "public" and "private" utterances from some members of the judiciary on the subject of unpublication.

In *The Epistemology of the Closet*, Sedgwick is explicitly concerned with theorizing, selectively mapping, and reading deconstructively the emergence of the binary pair "heterosexual/homosexual" in the late nineteenth-century. Her thesis is that "many of the major nodes of thought and knowledge in twentieth-century Western culture as a whole are structured—indeed, fractured—by a chronic, now endemic crisis of homo/heterosexual definition,"¹⁹⁶ and that this

191. See *id.* at 1487, 1517 n.288 (pointing out that many lawyers and judges read unpublished opinions).

192. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1177 nn.32–33 (9th Cir. 2001) (stating that few, if any, courts have the resources to write publishable opinions in every case).

193. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1533 (mentioning that judges in other common law "first-world democracies" rely less on clerks than do United States federal judges).

194. See *id.* at 1518 n.491, 1532–33 (noting the opposition to an increase in the number of federal judges that exists in some parts of the federal bench).

195. See Alex Kozinski, *Puzznic and Other Video Enigmas*, WALL ST. J., Mar. 20, 1991, at A20; *Guide to Nintendo Shopping*, WALL ST. J., Jan. 31, 1990, at A16 (exemplifying Judge Kozinski's other writing projects).

196. SEDGWICK, *supra* note 2, at 1.

"nominally marginal . . . set of definitional issues" is central "to the important knowledges and understandings of twentieth-century Western culture as a whole."¹⁹⁷ Sedgwick's analysis serves as a paradigm for a binary definitional system that has come to characterize the production of common law in the United States since the middle of the twentieth century. This is applicable specifically since *Brown*'s desegregation mandate saw a largely constitutionally racist southern judiciary, embodied in the judges of the United States Court of Appeals for the Fourth Circuit, imagine an institutional substitute for Jim Crow.¹⁹⁸ Race is as constitutive of the culture of the United States as the "epistemology of the closet" is of twentieth-century western culture, something that Sedgwick herself notes in passing.¹⁹⁹ In Sedgwick's terms, the closet leaves "no space in the culture exempt" from its "potent incoherences of . . . definition."²⁰⁰

However, Sedgwick explicitly invites a more general exploration of the purchase potentially opened up by her analysis of the "relations of the closet," which "have the potential for being peculiarly revealing . . . about speech acts more generally."²⁰¹ Sedgwick extends an invitation to deploy her epistemological insight beyond the "modern homo/heterosexual definitional crisis." Her purpose, she writes, is "*not to know* how far [the book's] . . . insights and projects are generalizable, not . . . to say in advance where the semantic specificity of these issues gives over to (or: itself structures?) the syntax of a 'broader' or more abstractable critical project."²⁰² Her analytical method, she writes, has the ability "in the hands of an inquirer with different needs, talents, or positionings, to clarify the distinctive kinds of resistance offered to it from different spaces on the social map. . . ." ²⁰³

Sedgwick's deconstructive reading of texts peculiarly symptomatic of the late nineteenth-century's "radical condensation of sexual categories" in order to explore its "unpredictably varied and acute implications and consequences" notes that this binary split "took place in a setting . . . of urgent homophobic pressure to devalue one of the two nominally symmetrical forms. . . ." ²⁰⁴ So too, the institutionalization of the binary published/unpublished took place in a period when reaction against the direction constituted by *Brown* arguably

197. *Id.* at 2.

198. Pether, *Inequitable Injunctions*, *supra* note 4, at 1441 n.20.

199. SEDGWICK, *supra* note 2, at 32.

200. *Id.* at 2.

201. *Id.* at 3.

202. *Id.* at 12 (emphasis in original).

203. *Id.* at 14.

204. *Id.* at 9.

exerted a similar pressure on resistant legal institutions and actors to devalue the United States's paradigmatic racial minority.²⁰⁵

Sedgwick takes pains to argue that while the binary homosexual/heterosexual is apparently symmetrically binary,²⁰⁶ the two terms:

actually subsist in a more unsettled and dynamic tacit relation according to which, first, term B is not symmetrical with but subordinated to term A; but, second, the ontologically valorized term A actually depends for its meaning on the simultaneous subsumption and exclusion of term B; hence, third, the question of priority between the supposed central and the supposed marginal category of each dyad is irresolvably unstable, an instability caused by the fact that term B is constituted as at once internal and external to term A.²⁰⁷

She goes on to caution that awareness of this "irresolvable instability" does not mean that the binary is powerless, nor that its deconstruction neutralizes its power. Rather, she suggests that the binary may be identified as "peculiarly densely charged with lasting potentials for powerful manipulation . . . precisely . . . [through] the double bind" and that recognizing this "irresolvable instability" makes available "discursive authority" to persons with radically different political investments.²⁰⁸

Below are two texts—quotations—to read against each other and some other (con)texts against which to read them, for the purposes of destabilizing, however fleetingly, the epistemology of the binary opposition of precedent/not precedent, the epistemology of "unpublication," and in the interests anatomizing judicial culture which has made this cease to be a common law country. The quotations are both from Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, the author of *Hart*, and a key player—arguably *the* key player²⁰⁹—in organizing opposition to recent modest

205. "I practiced race discrimination law for many years and found that many district court opinions were available only from the Race Relations Law Reports and did not appear in the F. Supp. It seemed likely that southern district judges were reluctant to send those opinions to West. Had RRLR not aggressively sought to discover all race-related opinions we would have been denied access to important information." E-Mail from Brian K. Landsberg, Professor of Law, University of the Pacific, McGeorge School of Law, to Penelope Pether, Professor of Law, American University, Washington College of Law (Sept. 17, 2004, 16:36:52 EST) (on file with the Washington and Lee Law Review).

206. SEDGWICK, *supra* note 2, at 9.

207. *Id.* at 10.

208. *Id.*

209. See *infra* note 210 (describing Judge Kozinski's efforts to prevent a proposed rule that would bar federal courts from forbidding citations to any of their opinions, orders, judgments, or other written dispositions).

reform measures²¹⁰ proceeding from the Federal Judicial Conference and earlier from the federal legislature, directed at institutionalized unpublication.

First, in *Hart*, emphasizing the labor required in drafting precedential opinions, which he characterized as "a solemn judicial act,"²¹¹ Judge Kozinski opined that only a certain number of highly polished, and thus in his view, publishable, opinions—on average twenty per judge²¹²—could be produced each year.²¹³ As to unpublished opinions, he described these as "more or less,"²¹⁴ a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision.²¹⁵ He invoked the

210. These proposed reforms would see the adopting of proposed Federal Rule of Appellate Procedure 32.1, which would prevent Federal Courts from banning citation of any of their "judicial opinions, orders, judgments, or other written dispositions." On May 22, 2003, the Advisory on Appellate Rules, an advisory committee of the Federal Judicial Conference, reported the proposed rule to the Conference's Standing Committee on Rules of Practice and Procedure, which then sought public comment and conducted hearings on the proposed rule. Judge Kozinski apparently instigated a campaign of letter writing designed to generate and document opposition to the Rule, and intervened with the Solicitor General to prevent Justice Department support for the rule change. Nonetheless, the Advisory Committee voted on Apr. 14, 2004, to recommend the Rule change to the Full Rules Committee of the Conference. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1470–71 nn.170, 174 (2004) (recounting the events that preceded the rule's passage). On June 16, 2004, the Standing Committee returned the rule to the Advisory Committee, directing it to generate empirical data to determine whether the arguments of the proponents or opponents of the rule change were better supported. See generally Brent Kendall, *Citation-Rule Change Hits Obstacle*, DAILY J., June 18, 2004, at <http://www.nonpublication.com/kendall.htm>. On June 17, 2005, at 2:03 p.m., the author received a voicemail message from Tim Reagan, Senior Research Associate of the Federal Judicial Center, informing her that the Standing Committee had voted to approve the Appellate Advisory Committee's Proposed Rule Change permitting citation of unpublished opinions. The full Judicial Conference voted in favor of the rule change on September 20, 2005. The proposed Rule change now must be voted on by the United States Supreme Court, and Congress. Patrick Schiltz, the Reporter for the Advisory Committee, had said of an earlier version of the proposed rule change that it "will be very controversial," and Judge Alito, the Chair of the Advisory Committee, also referring to the original Justice Department proposal for the rule change, indicated that the chief judges of the circuits were divided on it and that several circuits were concerned about it. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1470–71 n.170 (noting comments of several members of the committee that considered the proposed rule change). The Judicial Conference vote seems to have been the fruit, in part, of Judge Alito's support and of the research done by the Federal Judicial Center at the Advisory Committee's request.

211. *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001).

212. *But see supra* note 195 (giving examples of Judge Kozinski's extracurricular writing from the early 1990s: reviews of video games for *The Wall Street Journal*).

213. *Hart*, 266 F.3d at 1176–77.

214. Browsing those opinions currently enjoying their thirty days of crepuscular illumination on the Ninth Circuit's website suggests that "less" is often the appropriate qualifier.

215. *Hart*, 266 F.3d at 1178. See also Joseph Pugliese, *Subcutaneous Law: Embodying the Immigration Amendment Act of 1992*, 21 AUSTRALIAN FEMINIST L.J. 23, 25 (2004) (noting

epistemology of unpublication in the (unusually valorized) implicit binary of private correspondence and public record, thus manifesting the binary's "lasting potentials for powerful manipulation" and demonstrating that this "irresolvable instability" makes available "discursive authority."²¹⁶ The official story he gave was as follows:

That a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented. What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases.²¹⁷

Going on to decry the judicial time that would be wasted if parties were allowed to cite to unpublished opinions, Judge Kozinski was at pains to claim that writing is done by judges.²¹⁸ As noted, Judge Kozinski's discourse on the necessity of the binary publication/unpublication system to enable judges to produce polished or carefully crafted "controlling . . . authority"²¹⁹ may proceed from what in another context has been called his "hostility to dissent."²²⁰ This hostility seems to drive him to make the law speak with one tightly-controlled voice, engaged in what some might call the Quixotic attempt to foreclose interpretability via the "rigid constraint that binding authority provides today."²²¹ There is more to be said about the discourse of control than this, however.

In a conversation, in 2004, with a journalist, in one of the instances where the judge appears both much less guarded about what he goes on the record as saying and remarkably willing to say things that seem at profound odds with what he says elsewhere, he conceded that:

Unpublished dispositions—unlike opinions—are often drafted entirely by law clerks and staff attorneys. . . . There is simply no time or opportunity to fine-tune the language of the disposition. . . . When the people making the sausage tell you it's not safe for human consumption, it seems strange

that "[a] letter,' writes Derrida, 'is always and a priori intercepted, . . . the "subjects" are neither the senders nor the receivers of messages. . . . The letter is constituted by its interception')." Or by its dissentient, or disrespectful, translation and interpretation.

216. SEDGWICK, *supra* note 2, at 10.

217. *Hart v. Massanari*, 266 F.3d 1155, 1177–78 (9th Cir. 2001).

218. *Id.* at 1178.

219. *Id.* at 1172.

220. Devine & Aplin, *supra* note 27, at 27.

221. *Hart*, 266 F.3d at 1174.

indeed to have a committee in Washington tell people to go ahead and eat it anyway.²²²

Added to that second quotation are the insights enabled by the following three (con)texts.

First, Judge Kozinski and his colleague Judge Reinhardt have described the Ninth Circuit's practices of preparing unpublished opinions, "which [according to the judges] are churned out at a rate of more than one per day per panel," as follows:

Most are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our [unpublished opinions] are in screening cases, which are prepared by our central staff. Every month, three judges meet with the staff attorneys who present us with the briefs, records, and proposed [unpublished opinions] in 100 to 150 screening cases. If we unanimously agree that the case can be resolved without oral argument, we make sure the result is correct, but we seldom edit the [unpublished opinion], much less rewrite it from scratch.²²³

Next, in 2002, the then-Chair of the Federal Rules of Evidence Committee opined in the Federal Rules Decisions:

No one can deny, however, that speeding up the production line while cutting back on quality control will increase the risk of mistakes in any operation. It is apparent (although almost never articulated) that some of the circuits attitudes toward their non-reporter published opinions is driven less by the belief that those opinions say nothing new than by the fear that they may say something that is *wrong*.²²⁴

He also noted that decisions about publication may be made not only by individual judges or by committees of judges, but also by clerks or indeed by West publishing.²²⁵ In New York and Colorado, the decision is effectively made by a bureaucrat in the employ of the courts.

222. Tony Mauro, *Difference of Opinion*, LEGAL TIMES, Apr. 12, 2004, at 10.

223. William T. Hangley, *Opinions Hidden, Citations Forbidden: Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 651 (2002).

224. Hangley, *supra* note 223, at 651 (emphasis in original).

225. Hangley notes that "[c]onversations with a number of district court judges disclose that their 'window picking' procedures are anything but uniform. Some judges select the opinions they consider most significant for reporter publication, some leave that task to the clerks, and others leave the entire selection process to West Publishing." Pether, *Inequitable Injunctions*, *supra* note 4, at 1473 (citing Hangley, *supra* note 223, at 660 n.45). "These practices can make a difference: where single judges can decide whether to publish, fewer decisions are consigned to unpublication; Where a majority of judges must decide this, unpublication levels are the highest. Another difference in the practices courts adopt for handling unpublished opinions is that some courts have a published procedure that allows for

Finally, analysis of one of a series of studies made in the 1980s of case-management procedures in the federal courts produced by the Federal Judicial Center, the research arm of the federal courts, establishes that:

In many circuits the associated practices of [unpublication and] 'screening cases for the nonargument track' . . . together with the delegation of much judicial work either to clerks or staff attorneys who are often junior, inexperienced, minimally trained,²²⁶ and dissatisfied with the tasks assigned them, mean that judges often do not read any part of the record of an appeal before 'signing off' on an unpublished opinion written by a [clerk or more often a] staff attorney.²²⁷

Judge Kozinski is in some respects a "straw judge" around whom to construct the argument made here, that we have ceased to be a common law country because we have ceased to produce common law judges, but he is, regrettably, not alone. Below are listed just a few examples of evidence of the increasing pervasiveness of the epistemology of unpublication. In 2003, a former student attempted to secure from an Alaskan court two unpublished opinions allowing same-sex couple adoption on a "second parent" basis.²²⁸ There were no published opinions allowing this practice, and unpublished opinions do not have precedential status in Alaska.²²⁹ He was informed that he had to make a written submission to the court seeking "release" of the two opinions in question, and the court clerk, apparently passing on a message from a judge, expected him to believe that this procedure was required because "the cases are closed by statute because they involve minors."²³⁰ This was despite the fact that the most cursory research would establish that there are volumes of published Alaskan adoption cases, almost all of which, by definition, involve minors. Next, the Ninth Circuit's response to the legislative amendment

parties to petition the court to publish an unpublished opinion. There is evidence that still other courts allow this in the absence of a publicly promulgated rule. Once again, this enables the selective manipulation of precedent by well-informed litigants." Pether, *Inequitable Injunctions*, *supra* note 4, at 1473–74 (internal citations omitted).

226. The clerk is also likely thoroughly infected with a judicial culture that is angered by and despises the litigants and matters characteristically tracked in this way, and is beholden to the judges who hire her for recommendation for future employment.

227. Pether, *Inequitable Injunctions*, *supra* note 4, at 1492 n.314.

228. *See id.* at 1486 n.287 (detailing student's search).

229. *Id.* at 1486, 1537.

230. *Id.* at 1486 n.287. There is a very useful, if vulgar, Australian expression which aptly describes what happened to Mr. Morris here: He was "treated like a mushroom," that is, "fed on bullshit and kept in the dark." He was also expected to expend a lot of (likely fruitless) energy on his inconvenient request for the opinions in the face of an evident falsehood, proceeding from a court, about why they were not available to a member of the public.

requiring posting on websites in "text searchable form"²³¹ was to issue a policy noting that "[e]ffective September 28, 2004, the court's memoranda opinions will be posted on our . . . web page. . . . [and] will be removed after 30 days. Memoranda dispositions issues by the court's screening panels [that is, likely the vast majority of them] are not currently included."²³² The Ninth Circuit's memorandum opinions available on the website are only searchable by matter number, party name, or date; that is, you have to know exactly what you are looking for to search them.²³³

Additionally, there is the phenomenon of what, and this may sound rather old-fashioned, should be documents of public record made preferentially available to West and LEXIS, who are also empowered to alter the texts of those documents and otherwise shape the searchable universe of the common law,²³⁴ while at the same time deriving duopolistic profits from their privileged access.²³⁵ This has a significant inequality effect given that most law graduates practice in small firms with limited financial capacity to subscribe to the Rolls Royce system of "publication"²³⁶ that West and LEXIS control,²³⁷ and given the inability of what is posted on some court websites, where those documents are posted, to be meaningfully searched.²³⁸ There is, in addition, ample evidence that modern institutionalized unpublication, congruent with and bearing the

231. E-Government Act of 2002, Pub. L. No. 107-347 (codified at 44 U.S.C. § 3501 Sec. 205(a)(5)) (requiring, apparently, that federal court opinions be published on court websites in "text searchable format").

232. United States Court of Appeals for the Ninth Circuit webpage, at <http://www.ca9.uscourts.gov/>, (last visited Oct. 22, 2004) (on file with the Washington and Lee Law Review.) The deletion policy does not seem to have been assiduously followed, as at least some opinions more than 30 days old are on the website.

233. As is the case with the Sixth and Seventh Circuits.

234. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1466–68 & n.145 (detailing legal publishers' power to regulate access to and the content of unpublished opinions).

235. See *id.* at 1468 (discussing the hegemony of LEXIS and Westlaw in the legal publishing industry).

236. The system includes both published and unpublished opinions.

237. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1515–17 (discussing the unequal access to unpublished opinions exacerbated by courts' preferential treatment of LEXIS and Westlaw and the advantages their expensive services provide to frequent and often privileged litigants). See generally J.P. MORGAN SECURITIES LTD, EQUITIES RESEARCH, U.S. LEGAL PUBLISHING INDUSTRY: A GROWTH STORY? 3, 5 (2002). Ian Gallacher, Finding the Law: Introducing the Legal Research Curriculum at the Washington College of Law (unpublished manuscript, copy on file with the author).

238. See *supra* note 233 and accompanying text (explaining that memoranda opinions on the websites of the Sixth, Seventh, and Ninth circuits are only searchable by party name, date, or matter number).

traces of the secret history of race discrimination that impelled it in private,²³⁹ operates to produce inequality effects. That is, it operates in discriminatory ways to structurally subordinate certain groups, including: social security appellants, gay men and lesbians, ADA appellants and appellants against NLRB decisions, and indeed appellants against the government generally, pro se appellants and those with poor-quality and poorly-resourced lawyers, and likely also claimants under VAWA, (ironically) under the Prisoner Litigation Reform Act, Civil Rights litigants more generally, prison inmates claiming sexual abuse by prison officers, and criminal law appellants in non- or pre-habeas cases, at least in the Fourth Circuit.²⁴⁰ In addition, there are various costs to the rule of law (or at least to rule of law talk and its material effects). Its aspects include: transparency and due process effects, the compromising of judicial accountability and legitimacy, the stunting of the potential development of the common law, the congeries of theoretical and practical problems in declaring opinions prospectively unprecedented, and what is at least the appearance of the possibility of corruption.²⁴¹ There is widespread evidence that institutionalized unpublication allows repeat players to selectively manipulate precedent by rigging the system to try to keep precedents that operate to their disadvantage unpublished and thus nonprecedential.²⁴² Further, these opinions are often effectively inaccessible to anyone except repeat players who have the resources to keep well-indexed libraries of unpublished opinions and do so as a matter of course.²⁴³

Finally, judges themselves (and attorneys and former judicial clerks) have gone on record noting that what we might call corruption or cynicism combined with disingenuousness operate in the selection of opinions for unpublication, and freely admitting that they often do not follow their own published rules for sorting the publishable from the unpublishable. They also delegate the work of Article III judges to clerks and staff attorneys, most of whom are barely out of

239. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1440–41 n.20 (introducing the argument that "the paradigm of private judging replaced legalized racial discrimination as a structural means for U.S. common law; to exclude 'others' from its protection").

240. See *id.* at 1505–07 nn.402–04 (citing evidence that unpublished opinions form part of a system structured to discriminate against "disadvantaged groups").

241. See *id.* at 1483–88 (discussing unpublished opinions' negative effects on the rule of law).

242. See *id.* at 1511 (arguing that "[j]ust as the poor and other comparatively powerless litigants are disadvantaged by unpublication, depublication, and stipulated withdrawal of judicial opinions, so repeat players and the privileged . . . are advantaged by . . . private judging").

243. *Id.*

law school and who, the evidence suggests, are simply not up to the task,²⁴⁴ both because of their impoverished research and reasoning skills²⁴⁵ and also because of the culture in which they often operate.²⁴⁶ Judge Kozinski, for example, one of the most influential feeder judges for Supreme Court clerkships,²⁴⁷ has gone on record as saying that a key criterion in his selection of clerks is his intolerance for "dissent in chambers."²⁴⁸ Additionally, there is evidence of party-line and other kinds of judicial bias associated with institutionalized unpublication, most recently evinced by a study of the Ninth Circuit's immigration jurisprudence.²⁴⁹

Most recently, in the June 1, 2005 Report on Citations to Unpublished Opinions in the Federal Courts of Appeals of the Federal Judicial Center, there was significant evidence of judicial officers in many circuits opposing the rule change who claimed "special problems" were likely to arise for their circuit if the proposed rule change was implemented when what they actually feared was a projected result of general application such as workload increase.²⁵⁰ That they were unable or unwilling to take care in advancing this argument is indicative of the spread of the "epistemology of unpublication" with its attendant contempt, dishonesty, and corrosiveness.²⁵¹ There is much more obviously troubling and widespread evidence of cynicism and poor standards in predictions of judicial opponents to the proposed change opining that it would

244. See generally Penelope Pether, *Negotiating the Structures of Violence; or, On Not Inventing "The Sullivans,"* 15 SOC. SEMIOTICS 5, 23–26 (2005); Penelope Pether, *Praxis; or the Benefits of Shedding Hostility to Theory, "The Language of Law,"* Forum, 2 LAW, CULTURE AND THE HUMANITIES (forthcoming 2006) [hereinafter Pether, *Praxis*] (presenting conflicting quotes on the quality of unpublished opinions and evidence of the deficient research skills of judicial clerks) (on file with the Washington and Lee Law Review).

245. See Pether, *Praxis*, *supra* note 244 (discussing evidence of clerks and staff attorneys' inadequate research and reasoning skills).

246. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1462 n.132 (describing the culture in which appellate court clerks operate) (citing JOE S. CECIL & DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS, 1987 WL 123661 (F.J.C. 1985)).

247. Edward S. Adam, *A Market-based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129, 137 n.57 (2000) (citing Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998, at A12).

248. Alex Kozinski & Fred Bernstein, *Clerkship Politics*, 2 GREEN BAG 57–59, 62–63, 2d Series, Vol. 2, No. 1 (Autumn 1998), available at http://www.greenbag.org/Kozinski_Dialogue.pdf.

249. See generally Law, *supra* note 156.

250. REAGAN ET AL., *supra* note 5, at Appendix A.

251. This is of a piece with the recently revealed practice of the district court for the Southern District of Florida running a "secret docket" to hide cases from public scrutiny. *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1024 (11th Cir. 2005).

lead to judges, for example, cutting the text of unpublished opinions to a bare minimum, without reasoning,²⁵² and in judges decrying the necessity to carefully check (or indeed meaningfully check at all) the work of clerks and staff attorneys in screened cases.²⁵³ Additionally, a judge on the Ninth Circuit opposing the rule change cited the high volume of immigration cases in that circuit as a reason why the proposed rule change would cause special problems there.²⁵⁴ This concern suggests that the origins of modern institutionalized unpublication, in judicial race bias in the aftermath of *Brown*,²⁵⁵ may support this other "peculiar institution" as well.

The inconsistent stories that emerge in Judge Kozinski's articulation of the epistemology of unpublication suggest the force of Sedgwick's insight into "the contemptuous demonstration that powerful people don't have to be acute or right, but even more, the contemptuous demonstration . . . of how obtuseness itself arms the powerful against their enemies. . . ."²⁵⁶ on the one hand, and what a respectful dissenter might call "inconsistency" on the other. Judge Kozinski's writings on modern institutionalized unpublication manifest a tolerance for what some might call intellectual sloppiness and others disingenuousness. They also exhibit an acceptance of unaccountability to the public and the law and for the work of minimally supervised underlings.

The recent Report of the Federal Judicial Center indicates that while Judge Kozinski may be extreme, he is far from alone. We have ceased to be a common law country for two reasons. First, our methodologically bankrupt system cannot meaningfully differentiate between generating binding and persuasive precedent in any way that does not depend on raw and essentially

252. See, e.g., REAGAN ET AL., *supra* note 5, Judge 7-2 at 85 (stating that the judge would write shorter orders stating, for example, that the "evidence is sufficient" with no further explanation); *id.* Judge 7-1 at 85 (explaining that the judge would be more likely to write "cursory, one-line orders").

253. See, e.g., *id.* Judge 7-1 at 84-85 (opposing increased judicial time supervising staff attorneys and mandating that all opinions be "polished, thoughtfully considered" opinions); *id.* Judge 9-11 at 88 (supporting the current practice of judges reviewing unpublished opinions "minimally, mostly for result"); *id.* Judge 9-21 at 89 (evincing a lack of confidence in opinions written by staff attorneys and the hope that they would never be persuasive authority).

254. See, e.g., *id.* Judge 9-2 at 86-87 (citing problems involved in checking earlier rulings in immigration cases more carefully to avoid intracircuit splits in repetitive situations).

255. See Pether, *Inequitable Injunctions*, *supra* note 4, at 1440-41 (introducing the argument that institutionalized unpublication replaced legalized racial discrimination as the primary means in United States "common law" of excluding others).

256. SEDGWICK, *supra* note 2, at 7 (commenting on the claim in the majority opinion in *Bowers v. Hardwick* that "to claim that a right to engage in sodomy is 'deeply rooted in this nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious").

legislative power. Thus, we have moved to a version of precedent that seeks to bind the future rather than to be informed by the past, the practical justifications of which are at best intellectually impoverished and Janus-faced, and reveal the price to the ethical fiber of the judiciary that this exacts. Second, as long as modern institutionalized unpublication persists, we will not normalize common law judges ethically negotiating the boundaries between past and future, between the nation's law and the law of the land and its people, a demanding and, now perhaps more than ever, critical ethical task.

In closing, it beggars my comprehension, conservatively trained common lawyer that I am, how a judiciary which regards its responsibilities with the gravity they merit could, in the face of this evidence, not be moved to respond to it with alacrity and alarm, but rather engage in the kind of displacement activity that has surrounded FRAP 32.1 for the past two years. The rule of law can be nothing more than a species of last refuge of the scoundrel, or an instrument of colonialism. Or it can, as Lord Cooke and Judge Tatel have suggested, be what is not melodramatic to call the solemn trust of judicial officers in constitutional democracies, where majoritarian tyranny and the risks to individual and civil rights of unchecked executive power are constitutionally possible.

Madison famously wrote that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."²⁵⁷ I believe, perhaps betraying my training and enormous respect for the best of common law judges, that there remains some chance that the United States judiciary will hear the appeal to their office that lawyers and scholars and some of their brethren are making, and respond with seriousness to evidence of the undermining of trust in and respect for our courts and the judicial office that the persistence of the system of institutionalized unpublication causes. This is despite my registering the force of Sedgwick's acute insight that the "irresolvable instability"²⁵⁸ of the system of published/unpublished opinions, precedential/nonprecedential decisions, law/not law signals not that it is easy to supplant but rather a site "*peculiarly* densely charged with lasting potentials for powerful manipulation."²⁵⁹ Until those powerful judicial subjects undertake a

257. *In re Lindsay*, 158 F.3d 1263, 1274 (D.C. Cir. 1998) (citing letter from James Madison to W.T. Berry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910)).

258. See SEDGWICK, *supra* note 2, at 10 (arguing that the system of binary oppositions constitutive of Western epistemology is not symmetrical but rather "unsettled and dynamic" and thus "irresolvably unstable").

259. *Id.* at 10 (emphasis in the original). We must also remember Robert Gordon's insight that "[a] substantial chunk of our legal history is a truly horrifying epic of justice denied and persecution of those who struggle for it. Legal elites, who in the most complacent liberal and

new ethically charged approach to their responsibility to others for the law of the land, those others among us with responsibility for the development of the common law must imagine ways to respond to Madison's counsel.

conservative stories are the statesmen-like vanguard of progressive politics, ceaselessly adapting law to the waking needs of society." Robert W. Gordon, *The Politics of Legal History and the Search for a Usable Past*, 4 BENCHMARK 269, 277 (1990).

