

# The Supreme Court Rules for the Reporting of Opinions: A Critique

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## I. INTRODUCTION

The caseload of American appellate courts, state and federal, has grown astonishingly in recent years. Not only has the number of cases presented for resolution grown dramatically,<sup>1</sup> but their complexity also has increased. The increases in case volume and difficulty have placed great pressure on the judiciary. Appellate judges have sought to reduce that pressure in a number of ways, one of the most common being to reduce the number of opinions that they publish. Doing so, it is believed, saves judges much valuable time because unpublished opinions require less judicial effort to prepare.<sup>2</sup> A reduction in the number of published opinions also makes it easier for attorneys to research and learn the law and reduces the cost of acquiring and storing necessary legal materials.<sup>3</sup> Those benefits have led many appellate courts to decide that not all opinions should be published. Instead, those courts have decided that only opinions that are “law-making” need be made generally available; opinions that “merely” decide cases without adding to the *corpus juris* safely can be left unreported.

Publication, however, cannot be limited without incurring substantial costs.<sup>4</sup> An unpublished opinion is virtually invisible to public scrutiny; hence, the decision not

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1. In the United States courts of appeals for example, filings increased from 5771 in 1965 to 29,630 in 1983—an increase of about 500%. In the Ohio courts of appeals the increase has been 360% from 1965 to 1982 (2469 to 8963). See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 2 (1983); OHIO COURTS SUMMARY 13 (1982); OHIO COURTS SUMMARY 3 (1965).

2. The proposition that reducing the number of published opinions will enhance judicial productivity seems intuitively obvious; moreover, it can claim support from prestigious authority. See, e.g., COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 50 (1975). Nevertheless, the correlation never has been empirically verified. Reynolds & Richman, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 595–98 (1981) [hereinafter cited as *The Price of Reform*]; see also Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1183 n.95 (1978) [hereinafter cited as *Non-Precedential Precedent*].

3. The argument that limited publication saves judges time in the preparation of opinions is directed toward the cost of production of published opinions. The second argument—that limited publication saves courts and lawyers time in their case research is directed more toward the cost of consuming published opinions. See generally *Non-Precedential Precedent*, *supra* note 2, at 1181–89. Interestingly, practicing lawyers to whom we speak about unpublished opinions do not seem grateful for the time saved in research. They usually distrust limited publication out of fear that the court may rely on some authority unavailable to them.

4. These arguments, which are summarized in the text, are discussed in detail in *id.* at 1189–1204.

to publish makes judges less accountable for their decision-making. Decreased accountability in turn leads to both the perception and the possibility of inconsistent, arbitrary, and even biased decisions. Moreover, failure to publish means the decisions are not available to inform the bar of the manner in which the law is developing. The development of "hidden" precedents mocks the concept of stare decisis and presents the distinct possibility of inconsistent decision-making. Further, there is concern that hidden precedents will be known to some members of the bar, but not to others; those who possess such additional knowledge have an unfair advantage over those who do not.<sup>5</sup>

The arguments in favor of limited publication and concern over its impact led, in the 1970s, to the adoption of formal publication plans by many appellate courts. The notion was that such plans would provide judges some guidance in making the publication decision. These plans vary widely in scope and detail; typically, however, they address such topics as who decides whether an opinion is published, what standards control the decision, and what is the precedential value of unpublished opinions.

Publication of Ohio appellate decisions was not governed by formal guidelines until the adoption in 1982 of the Supreme Court Rules for the Reporting of Opinions.<sup>6</sup> The new rules provide those guidelines, but they also create significant problems. This Article evaluates those rules and suggests several changes that will help the court achieve the desired administrative efficiencies with fewer sacrifices of the traditional values of appellate justice.

## II. THE OHIO COURT STRUCTURE

The Ohio judicial system is based on the familiar three-tier model found in most populous states: trial courts of general jurisdiction, intermediate appellate courts (the courts of appeals), and a court of last resort (the supreme court).<sup>7</sup> The Ohio Constitution largely defines the jurisdiction of the supreme court: It has original jurisdiction in some limited matters, such as applications for high peremptory writs,<sup>8</sup> and matters relating to admission to bar and attorney discipline.<sup>9</sup> A right of appeal to the supreme court exists in a small class of cases,<sup>10</sup> and the court also has mandatory jurisdiction when a court of appeals certifies a judgment to be in conflict with another court of appeals' judgment on the same question.<sup>11</sup> In all other cases, the supreme

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5. One method of dealing with this problem has been to forbid the citation of unpublished opinions or to deprive them of precedential value. Some courts (including several United States circuit courts) have chosen this option. See D.C. CIR. R. 8(f), 1ST CIR. R. 14, 7TH CIR. R. 35(b)(iv), 8TH CIR. R. 8(i), 9TH CIR. R. 21(c). The issue is treated in greater detail at *infra*, section V(B)(3).

6. The Supreme Court Rules for the Reporting of Opinions are found at 3 Ohio St. 3d xxi (1983), as well as in the appropriate volumes of both Page's and Baldwin's Ohio Revised Code [hereinafter cited as Sup. Ct. R. Rep. Ops.]. The Rules also are reprinted *infra*, at app. A.

7. See OHIO CONST. art. IV, § 1.

8. *Id.* art. IV, § 2(B)(1)(a)-(c).

9. *Id.* art. IV, § 2(B)(1)(g).

10. *Id.* art. IV, § 2(B)(2)(a). The legislature has also provided for direct appeal from certain administrative agencies. *E.g.*, OHIO REV. CODE ANN. § 4903.12 (Page 1977); see OHIO CONST. art. IV, § 2(B)(2)(c).

11. OHIO CONST. art. IV, § 2(B)(2)(e); see *id.* art. IV, § 3(B)(4).

court's jurisdiction is discretionary.<sup>12</sup>

Ohio is divided geographically into twelve appellate districts, each of which has between three and nine judges.<sup>13</sup> These courts handle the vast bulk of Ohio's appellate caseload. Litigants before all Ohio trial courts and many agencies have a right of appeal.<sup>14</sup> Further, almost all appeals must go through the court of appeals. As a result of the mandatory appellate jurisdiction of the courts of appeals and the largely discretionary nature of the supreme court's jurisdiction, about ninety-seven percent of all appellate terminations occur in the courts of appeals.<sup>15</sup> Thus, these intermediate courts often are in practice the real courts of last resort in Ohio.<sup>16</sup>

Two other provisions of Ohio law serve to exacerbate the workload of the court of appeals. Three judges must hear all cases,<sup>17</sup> and the court must deal with every assignment of error and state in writing the reasons for its decision on each issue.<sup>18</sup>

### III. HISTORY OF THE RULES

Regulation of the reporting of courts of appeals opinions in Ohio began with the constitutional revision of 1912.<sup>19</sup> At that time, article IV, section 6 of the Ohio Constitution was amended to require publication of all supreme court opinions. It also provided that "laws may be passed providing for the reporting of cases in the courts of appeals."<sup>20</sup> In 1919, the Ohio General Assembly passed such a law in response to complaints from the bar about the proliferation of unofficial reports and the expense required to maintain a relatively complete library.<sup>21</sup> Later codified as Ohio Revised Code section 2503.20, that statute<sup>22</sup> provided:

12. *Id.* art. IV, § 2(d).

13. OHIO COURTS SUMMARY 11 (1982).

14. OHIO REV. CODE ANN. § 2505.03 (Page 1981); *id.* § 119.12; see Comment, *Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework*, 46 OHIO ST. L.J. 355, 361-62 (1985). The courts of appeals also have original jurisdiction in a small group of cases. See OHIO CONST. art. IV, § 3(B)(1).

15. In 1982, 8,804 cases were terminated in the courts of appeals. The supreme court terminated 266 appeals. OHIO COURTS SUMMARY 6 (1982) (This figure is the total terminations from the "Merit Docket," less cases of original jurisdiction.).

16. Because Ohio has no stare decisis among the several district courts of appeals, compare *State v. Karnett*, 30 Ohio App. 2d 77, 283 N.E.2d 636 (1972), *rev'd on other grounds*, 34 Ohio St. 2d 193, 297 N.E.2d 537 (1973); with *Securities, Inc. v. Louisville & Nashville R.R. Co.*, 94 Ohio App. 323, 115 N.E.2d 9 (1953), each district has great control over the development of case law in its territory.

17. OHIO CONST. art. IV, § 3(A).

18. OHIO R. APP. P. 12(A).

19. Shaw, *The Legal Significance of the Unpublished Court of Appeals Opinion in Ohio*, 6 CAP. U.L. REV. 393 (1977).

20. The Modern Courts Amendment of 1968 moved these provisions. Ohio Const. art. IV, § 2(c) now contains the requirement for publication of supreme court opinions; the provision permitting laws regulating publication of courts of appeals opinions is now Ohio Const. art. IV, § 3(c).

21. There had been an earlier attempt to remedy the problem of unofficial reporting. On September 21, 1915, Rule XII of the Rules of Practice of the Court of Appeals of Ohio was amended to include language substantially identical to that of the statute. That amendment did not substantially reduce the problem of unofficial reporting. These developments are reported more fully in Shaw, *supra* note 19, at 393; Note, *The Unofficially Reported Case as Authority*, 1 OHIO ST. L.J. 135 (1935).

22. OHIO GEN. CODE § 1483 (Page 1951). The current provisions of the Supreme Court Rules for the Reporting of Opinions contradict the statute in several significant respects. Whether the Rules authoritatively supersede the statute is discussed at *infra* section IV.

[The Supreme Court Reporter] shall prepare for publication and edit, tabulate, and index those opinions and decisions of any court of appeals furnished him for publication by any such court. . . .

No cases in the court of appeals shall be reported for publication except those selected by the several courts of appeals, or by a majority of the judges thereof.

Opinions for permanent publication in book form shall be furnished to the reporter and to no other person. [A]ll such cases must be reported in accordance with this section before they shall be recognized by and receive the official sanction of any court.

The statute appears to give courts of appeals judges complete control over the publication of their opinions. The first quoted portion seems to require the Supreme Court Reporter to publish all opinions furnished by those judges, and the second quoted section gives the judges a veto power over any publication decisions. Finally, the third quoted section appears to withdraw precedential effect from all opinions except those officially reported.

Appearances can be deceiving, however, and the practice under the statute was to disregard at least two of its key provisions. The Supreme Court Reporter did not, in fact, publish all opinions furnished by the courts of appeals.<sup>23</sup> In fact only a small percentage of the total number of opinions was published.<sup>24</sup> Similarly, the statute's "no official sanction" provision, which appears to withdraw precedential effect from unpublished opinions, often was disregarded.<sup>25</sup> The results of these interpretations were most unsatisfactory. By 1979, only one court of appeals opinion in thirty-five was published.<sup>26</sup> Further, the precedential effect of an unreported opinion was anything but clear.

23. Black, *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477, 481 (1981).

24. The numbers of published and unpublished opinions from the Ohio courts of appeals in the last seven years are shown in the table.

Year	Total Terminations	Terminations by Opinion		Opinions Published	
	Number	Number	%	Number	%
1976	6,315	4,054	64.20%	195	4.81%
1977	7,929	5,337	67.31%	218	4.08%
1978	7,366	5,047	68.50%	181	3.59%
1979	7,876	5,536	70.29%	157	2.84%
1980	8,589	5,813	67.68%	130	2.23%
1981	9,424	6,441	68.41%	274	4.25%
1982	8,804	5,940	67.46%	244	4.10%

The figures in the first three columns are taken from *Ohio Courts Summary*, published by the Administrative Director of the Supreme Court of Ohio. The number of published opinions was determined by actual count for the years 1981 and 1982 of cases reported in 65 Ohio Op. 2d through 10 Ohio Op. 3d. For the years 1976 to 1980, the number of published opinions is that reported by Judge Black in Black, *Unveiling Ohio's Hidden Court*, 16 AKRON L. REV. 107 (1982).

25. At least two courts held the apparently mandatory non-citation provisions of § 2503.20 to be merely directory. See *Gutin v. Sun Life Assurance Co.*, 154 F.2d 961 (1946); *State v. George*, 50 Ohio App. 2d 297, 362 N.E.2d 1223 (1975). Further, the supreme court and three district courts of appeals permitted citation of unreported cases. See OHIO SUP. CT. R. PRAC. V. § 1(E); OHIO 1ST DIST. CT. APP. R. 6(D)(2); OHIO 8TH DIST. CT. APP. R. 19; OHIO 12TH DIST. CT. APP. R. 6(F). Each rule conditions citation upon appending a copy of the unreported decision to the brief. Ohio law reviews and treatises also cite unreported opinions. See, e.g., Black, *supra* note 23, at 483 n.34.

26. See *supra* note 24.

Efforts to reform this system began with the judges of the courts of appeals. In September of 1981,<sup>27</sup> Judge Robert Black delivered a speech to the Ohio Court of Appeals Judges Association drawing attention to the deficiencies of Ohio's system for reporting courts of appeals opinions. Drawing on the national literature on the topic,<sup>28</sup> Judge Black emphasized the serious costs of limited publication: erosion of the doctrine of stare decisis, decrease in judicial responsibility and accountability, inconsistencies between the published and unpublished law, and the division of the bar into two groups, one with access to the unpublished law and the other without. Further, Judge Black argued that the situation in Ohio was worse than in many other judicial systems because such a small fraction of the opinions of the courts of appeals were published. Three percent of those opinions were published, as opposed, for example, to the thirty-eight percent figure for the United States circuit courts of appeals.<sup>29</sup> Shortly after Judge Black's speech, the Ohio Court of Appeals Judges Association formed a committee to study the problem. This committee developed a new plan for the publication of courts of appeals opinions in the form of a proposed addition to the Ohio Rules of Appellate Procedure.<sup>30</sup> Roughly contemporaneous with these developments, Judge Black, in two thoughtful law review articles,<sup>31</sup> reiterated the deficiencies in the Ohio system and made detailed proposals for reform including the adoption of the committee's proposed rule of appellate procedure.<sup>32</sup>

Perhaps in response to these criticisms, the Supreme Court of Ohio, during the 1982 summer recess, drafted a new plan for the publication of supreme court and court of appeals opinions.<sup>33</sup> Later, on September 24, 1982, the supreme court appointed an advisory committee of distinguished judges and lawyers<sup>34</sup> to advise the court on the content of the draft rule. The committee acted expeditiously; by November of 1982 it had forwarded its report to the supreme court.<sup>35</sup> That report identified several key problems with the supreme court's drafted rule and recom-

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27. Preliminary efforts to deal with the problem actually commenced in 1979. The Conference of Appellate Courts resolved to appoint a committee to review opinion reporting practices in Ohio and make recommendations for reform. The committee consisted of one judge from each appellate district and was chaired by Judge Robert E. Holmes (at the time a judge on the tenth district court of appeals). After six months of work, the committee, assisted by Professor Ronald R. Solove of Capital University Law School, prepared a report, which described the problem of opinion reporting in Ohio but recommended no solution; instead the report called for further study. The resolution of the Conference of Appellate Courts and the report authored by Professor Solove are unpublished; the relevant portions, however, are on file in the offices of the *Ohio State Law Journal*.

28. Judge Black relied heavily on the literature discussing the problem in the United States circuit courts of appeals. See *The Non-Precedential Precedent*, *supra* note 2; *The Price of Reform*, *supra* note 2.

29. See *The Price of Reform*, *supra* note 2, at 587.

30. Rule 25 appears *infra* app. B.

31. Black, *supra* note 23; Black, *supra* note 24.

32. Black, *supra* note 24, at 112-14.

33. The draft entitled Supreme Court Rules for the Publication of Opinions [hereinafter cited as Draft Rules] appears *infra* app. C.

34. Letter from Frank D. Celebrezze, Chief Justice, Supreme Court of Ohio, to members of the committee: Judge Robert L. Black, Jr., Chairman (Cincinnati); Judge Jack G. Day (Cleveland); Judge James A. Brogan (Dayton); Judge Earl E. Stephenson (Portsmouth); Judge Joseph Donofrio (Youngstown); Judge Robert H. Gorman (Cincinnati); Judge Ira G. Turpin (Canton); Judge Alice Resnick (Toledo); Judge Frank G. O'Bell (Cleveland); Eli Manos, Esq. (Cleveland); John Pinney, Esq. (Cincinnati); Dean John W. Stoepler (Toledo); Douglas Wrightsel, Esq. (Columbus); Matthew Fitzsimmons, Esq. (Columbus); John L. Mason, Esq. (Cincinnati); Coit Gilbert, Secretary (Columbus) (Sept. 24, 1982). [Hereinafter, the committee is referred to as the Advisory Committee.]

35. The Advisory Committee's report appears *infra* app. D.

mended solutions. The court, adopting some of the committee's recommendations and rejecting others, promulgated final rules in February 1983 with an effective date of March 1, 1983.<sup>36</sup>

#### IV. LEGAL STATUS OF THE SUPREME COURT RULES

It is not at all unusual for the legal status of an unreported opinion to be ambiguous; indeed, that ambiguity is responsible for much of the interest in the problem of opinion reporting.<sup>37</sup> It is, however, very unusual for the legal status of the opinion publication rules themselves to be ambiguous. Nevertheless, that is precisely the situation in Ohio. The ambiguity arises from the simultaneous existence of two seemingly binding, yet conflicting, authorities on opinion publication—the 1919 statutory plan codified in Ohio Revised Code section 2503.20<sup>38</sup> and the Supreme Court Rules for the Publication of Opinions promulgated in 1983.<sup>39</sup> The conflict between those two authorities is substantial, and embraces such central questions as who should decide whether an opinion merits publication, what criteria should control the decision, and what is the legal status of the unreported opinion.<sup>40</sup> The basic question, of course, is whether the new Supreme Court Rules supersede the statute.

The conflict between legislatively and judicially promulgated rules that purport to control the same activity can be resolved only by resort to organic law, in this case, the Ohio Constitution. As a result of the Modern Courts Amendment of 1968, article IV, section 5 of the Ohio Constitution gives the supreme court several different types of rulemaking authority.<sup>41</sup> Section 5(B) requires the court to prescribe rules of “practice and procedure” in all Ohio courts.<sup>42</sup> Proposed rules must be filed by the court with the clerks of each house of the General Assembly before January 15, and, absent a concurrent resolution of disapproval from the General Assembly, the proposed rules take effect on the following July 1. Further, rules promulgated in this fashion supersede contrary statutory law; section 5(B) expressly provides: “All laws

36. The rules appear *infra* app. A.

37. The ambiguity, of course, inheres in the question of precedential value. *See infra* section V(B)(3). Many of the arguments that support limited publication also support no citation rules, but common law courts seem uncomfortable with the notion of ignorable decisions. This tension is revealed best by a statement from the testimony of Judge Robert Sprecher of the United States Circuit Court of Appeals for the Seventh Circuit before the Hruska Commission: “I think all I am speaking about is—I am talking about a non-precedential precedent, because I am talking about aids to future production of opinions and not their use as precedents in the stare decisis sense.” *Hearings Before the Comm'n on Revision of the Fed. Court Appellate Sys.* 537 (2nd Phase 1974–1975).

38. OHIO REV. CODE ANN. § 2503.20 (Page 1981).

39. SUP. CT. R. REP. OPS.

40. Thus, the statute is silent on criteria for publication, but the Rules list eight specific criteria. The statute seemingly gives the publication decision to the judges on the panel, but the Rules repose most of that authority in the Supreme Court Reporter. Also, the statute provides for non-recognition of unreported decisions, but the Rules have much more complicated provisions. These features of the Rules are discussed in more detail at *infra* section V.

41. OHIO CONST. art. IV, § 5. The 1968 amendments are discussed in Milligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811 (1968). The rulemaking power of the Supreme Court under the amendments is treated in Parness & Manthey, *Public Process and Ohio Supreme Court Rulemaking*, 28 CLEV. ST. L. REV. 249 (1979), and Gianelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 CASE W. RES. 16 (1978).

42. OHIO CONST. art. IV, § 5(B). Procedural rules “pertain to the method of enforcing rights or obtaining redress.” *Krause v. State*, 31 Ohio St. 2d 132, 145, 285 N.E.2d 736, 744 (1972).

in conflict with such rules shall be of no further force or effect after such rules have taken effect.”<sup>43</sup>

Section 5(B) gives another type of rulemaking authority to the supreme court—the power to make rules “governing the admission to the practice of law and discipline of persons so admitted.”<sup>44</sup> Such rules of “government” differ from rules of practice and procedure in two important respects. First, rules of government are not submitted for legislative approval; second, no explicit provision permits rules of government to supersede contrary statutory law. The second distinction, however, has been eliminated by recent decisions of the supreme court holding that the court’s authority over the bar is plenary; thus, any statute inconsistent with a court-promulgated rule in that area must fail.<sup>45</sup>

Article IV, section 5(A) vests yet a third species of rulemaking power in the supreme court—the power to make rules for the “general superintendence” of all Ohio courts.<sup>46</sup> Section 5(A) does not require legislative submission, and no clause provides that a court rule supersedes conflicting statutes. The courts that have addressed the question have found the absence of such provisions in section 5(A) significant and have held, therefore, that rules of superintendence do not supersede conflicting statutory law. Rather, such rules are invalid to the extent they conflict with statutes.<sup>47</sup>

There are, in other words, several different kinds of supreme court rules and a particular rule’s power to supersede a statute depends upon the source of the supreme court’s authority to promulgate the rule. Thus, the conflict between the 1919 statute and the new rules can be resolved only by examining the source of the court’s power to promulgate the rules. It seems quite clear that they are not rules of practice and procedure under section 5(B). They do not regulate the parties’ conduct in the litigation process; moreover, they were not, as is required for rules of practice and procedure, submitted for legislative approval. The publication rules also are not rules for the government of the bar because they do not deal with admission to practice or discipline. The most likely source for the power to promulgate the Supreme Court Rules for the Reporting of Opinions, therefore, is section 5(A) of article IV. Because section 5(A) rules of superintendence appear to have no statute-superseding power,

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43. *Id.* The Supreme Court has held that rules promulgated pursuant to § 5(B) supersede contrary statutes only as long as the rules are “procedural”; on matters of substance, statutes prevail. *Boyer v. Boyer*, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976).

44. OHIO CONST. art. IV, § 5(B). That section also provides for yet another species of rulemaking power in the supreme court, the authority to regulate the record keeping for all courts of the state.

45. *See, e.g., South High Dev., Ltd. v. Weiner, Lippe & Cromley Co.*, 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983).

46. *See State v. Smith*, 47 Ohio App. 2d 317, 354 N.E.2d 699 (1976); *State v. Lacy*, 46 Ohio App. 2d 215, 348 N.E.2d 381 (1975).

47. OHIO CONST. art. IV, § 5(A).

a preliminary analysis indicates that the 1919 statutory publication plan is still the law; insofar as the rules conflict with the statute, therefore, they are invalid.

There is, however, an argument to the contrary. Several courts<sup>48</sup> and commentators<sup>49</sup> have contended that some kinds of rulemaking lie within the inherent and exclusive power of the courts. The argument, relying on the doctrine of separation of powers, suggests that there are “spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*.”<sup>50</sup> Activities of this sort can be regulated by court rule even in the absence of an explicit constitutional grant of rulemaking power; and, the argument continues, such court-promulgated rules supersede conflicting enactments even in the absence of an explicit statute-preempting clause in the Constitution.

Hypothetically assuming the validity of this argument, two important questions remain: (1) Is opinion reporting and citation an area within the exclusive jurisdiction of the judiciary? and (2) How well does the generic argument fit the specific constitutional history of Ohio? It is difficult to produce a neat summary or formula that accounts for the several categories of cases in which courts have held themselves to possess exclusive power immune from legislative interference.<sup>51</sup> Fortunately for present purposes it is sufficient to concentrate on a single category of cases—those in which courts have invalidated statutes that purport to interfere with the details of judicial administration.<sup>52</sup> After surveying the cases, one thoughtful commentary proposes the following tentative induction: “[W]hen the purpose of the rule is to provide for the establishment and maintenance of the machinery essential for the efficient administration of judicial business and it does only that, the scope of the inherent power vested in the courts is complete and supreme.”<sup>53</sup> On this standard, the Supreme Court Rules for the Reporting of Opinions produce an equivocal result. Surely rules for the reporting of opinions, particularly in the face of financial pressure

48. *Kolkman v. People*, 89 Colo. 8, 300 P. 575 (1931); *Epstein v. State*, 190 Ind. 693, 128 N.E. 353 (1920); *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950).

49. The classic form of the argument appears in Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). More recent formulations can be found in Parnass, *Correspondence: Public Process and State-Court Rulemaking*, 88 YALE L.J. 1319 (1979); Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 170 U. PA. L. REV. 1, 29 (1958); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rulemaking*, 55 MICH. L. REV. 623, 628 (1957). For cases that have used the argument, see *infra* notes 51 & 52.

50. Levin & Amsterdam, *supra* note 49, at 30.

51. One preliminary problem with such a task is that the precedents involve interpretation of significantly different constitutional clauses. Nevertheless, the cases can be grouped into tentative categories. Thus, courts have claimed plenary power over the practice of law. See, e.g., *Attorney Gen. v. Waldron*, 289 Md. 683, 426 A.2d 929 (1981); *South High Dev., Ltd., v. Weiner, Lippe & Cromley Co.*, 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983). They have held void statutes that attempted to regulate the judges' time schedules, see, e.g., *State ex rel. Kostas v. Johnson*, 224 Ind. 540, 69 N.E.2d 592 (1946); *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922), statutes that intruded too far into the actual business of case adjudication, see, e.g., *People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 291 N.E.2d 648 (1973); *Gordon v. Lowry*, 116 Neb. 359, 217 N.W. 610 (1928), and statutes that controlled judicial appointment of court support personnel. See, e.g., *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N.E. 244 (1889).

52. Thus, courts have invalidated statutes that stated requirements for an appellate brief, see *Solomito v. State*, 188 Ind. 170, 122 N.E. 578 (1919), compelled a court to write a syllabus to its opinion, see *In re Griffiths*, 118 Ind. 83, 20 N.E. 513 (1889), or compelled a court to write an opinion in every case. See *Houston v. Williams*, 13 Cal. 24 (1859).

53. See Joiner & Miller, *supra* note 49 at 630.



to reduce the number of published opinions, pass that test, but rules rationing precedential value may transgress the "it does only that" clause. In other words, rules purporting to withdraw precedential value arguably exceed a court's need to regulate mechanics and may be seen as an attempt to regulate an area sufficiently controversial to be subject to the political process through legislation. Perhaps an even stronger argument is that nonprecedent rules turn the separation of powers argument upside down; a common law court that is not bound by its own decisions has, in some sense, ceased to act purely as a court and may be exercising power that is decidedly nonjudicial.<sup>54</sup>

The constitutional history of judicial rulemaking power in Ohio suggests an additional difficulty with the inherent power/separation of powers argument. Holdings and dicta (both in opinions and syllabi) in several early supreme court cases stand for the proposition that Ohio courts have inherent rulemaking power but that even a properly promulgated court rule must yield to a conflicting statute.<sup>55</sup> In 1967, the supreme court complicated this relatively simple situation with its decision in *Cassidy v. Glossip*.<sup>56</sup> The actual holding in *Cassidy*, was that judicially and legislatively promulgated jury waiver provisions did not conflict;<sup>57</sup> dictum in the case, however, caused confusion. The key passage stated that the legislature may not "infringe upon the inherent power of the Common Pleas Court to establish reasonable rules regulating its proceedings;"<sup>58</sup> the implication of that passage is that a court rule supersedes a conflicting statute on an issue within the court's inherent authority. The opinion distinguished the earlier legislative supremacy cases by pointing out that their justification lay in a repealed article of the Constitution.<sup>59</sup> Astonishingly, however, none of this judicial supremacy language is carried over into the syllabus of *Cassidy*; rather, the syllabus simply reiterates the legislative supremacy proposition from the earlier cases: "A common pleas court has inherent power to make reasonable rules regulating the practice and procedure in such court where such rules do not conflict with the Constitution or with *any valid* statute."<sup>60</sup> The discrepancy between the dictum in the opinion and the holding in the syllabus could not be more marked.

Whatever support the dictum in *Cassidy* lends to the inherent judicial supremacy argument seems to be substantially weakened by the Modern Courts Amendment of 1968, which was adopted the year following the decision in *Cassidy*. As a result of that amendment, Section 5(B) of Article IV now provides explicitly for certain court rules (rules of practice and procedure) promulgated according to certain delineated

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54. A court deciding cases that lack precedential effect separates its dispute-settling function from its law-making function. See H. HART & A. SACKS, *THE LEGAL PROCESS* 662 (tent. ed. 1958). Thus, the court leaves behind a substantial part of its essential and inherent judicial functions.

55. See *Brown v. Mossop*, 139 Ohio St. 24, 24, 37 N.E.2d 598, 599 (1941); *Meyer v. Brinsky*, 129 Ohio St. 371, 371, 195 N.E. 702, 703 (1935); *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 278, 188 N.E. 1, 1 (1933); *Van Ingen v. Berger*, 82 Ohio St. 255, 255, 92 N.E. 433, 433 (1910).

56. 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).

57. *Id.* at 22-25.

58. *Id.* at 22.

59. *Id.* at 21-22; see OHIO CONST. art. XIV (General Assembly to appoint three commissioners to revise and simplify practice and proceedings in Ohio courts) (repealed 1953).

60. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 18, 231 N.E.2d 64, 65 (1967) (emphasis added).

procedures (legislative submission) to supersede contrary statute law.<sup>61</sup> Other court rules are not (at least, not explicitly) given such privileged status. Thus, a strong argument can be made that the drafters in 1968 made a conscious decision to divide final rulemaking authority between the court and the legislature.<sup>62</sup>

In summary, the legal status of the Supreme Court Rules for the Reporting of Opinions is unclear. They conflict in significant fashion with prior statutory law,<sup>63</sup> and a preliminary reading of the Ohio Constitution suggests that the rules cannot supersede the statute. An argument for the contrary result can be made, but it faces serious difficulties. A sensible solution to this confusion would be action by the supreme court seeking repeal or amendment of section 2503.20. Then at least the status, if not the merit, of the rules would be clear.<sup>64</sup>

## V. ANALYSIS OF THE RULES

### A. Reporting Supreme Court Opinions

Rule 1(A) of the Supreme Court Rules for the Reporting of Opinions provides that “all opinions of the Supreme Court shall be reported in the Ohio Official Reports.”<sup>65</sup> The rule merely restates what long has been the law in Ohio by constitutional mandate.<sup>66</sup> Both the rule and the constitutional provision upon which it is based make sense; because the supreme court’s caseload is mostly discretionary, the court should not be—and does not appear to be—overburdened.<sup>67</sup> Further, the supreme court is not only the ultimate authority but also the only statewide authority on questions of Ohio law; the need to report every supreme court opinion is particularly acute in a state that has a number of independent appellate courts and no inter-district stare decisis.<sup>68</sup>

Rule 1(B) and (C)<sup>69</sup> indicate that the “controlling point or points of law” of a case are stated in the syllabus of an individually authored opinion and in the text of

61. OHIO CONST. art. IV, § 5(B).

62. It is possible, of course, to read too much into legislative silence. There is also an impressive counterargument to the point made in the text. Article IV, section 5(B) gives the supreme court power to regulate admission to the bar and disqualification from practice but *does not explicitly* insulate this rulemaking power from legislative interference. Nevertheless, the supreme court has held since 1968 that its plenary power in this area is implicit and that its rules supersede contrary enactments. *South High Dev. Ltd. v. Weiner, Lippe & Cromley Co.*, 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983). This seems to indicate that the supreme court believes that it has power to create statute-superseding rules although that power is not explicitly granted in Article IV. If so, the supreme court’s inherent power to issue statute-superseding rules may have survived the Modern Courts Amendment of 1968.

63. See OHIO REV. CODE ANN. § 2503.20 (Page 1981).

64. The Advisory Committee’s solution was to repromulgate the Rules as rules of practice and procedure pursuant to Article IV, § 5(B). See ADVISORY COMMITTEE, REPORT AND RECOMMENDATION I [hereinafter cited as ADVISORY COMMITTEE REPORT].

65. SUP. CT. R. REP. OPS. 1(A).

66. OHIO CONST. art. IV, § 2(C).

67. In 1982, the court terminated 409 cases from the “Merit Docket.” It also terminated 43 cases from the “Disciplinary Docket” as well as over 1600 cases from the “Motion Docket.” The court appears to have little difficulty in remaining current; terminations typically roughly equal filings. See OHIO COURTS SUMMARY 6, 7 (1982).

68. Despite these arguments, in some states not all the opinions of the highest court are published. See, e.g., NEB. REV. STAT. § 24-208 (1979); N.M. SUP. CT. MISC. R. 7.

69. SUP. CT. R. REP. OP. 1(B), (C).

a per curiam opinion.<sup>70</sup> Once again the rules restate well-established principles of Ohio law. The syllabus rule, dating back at least to 1858,<sup>71</sup> provides that the signed majority opinion in an Ohio Supreme Court case is simply the opinion of the individual author; the entire court has approved only the syllabus, so it alone has the controlling force of law. By contrast, the court has approved the entire text of a per curiam opinion; thus, the entire text states the law.<sup>72</sup>

Whatever the merits of Ohio's unusual syllabus rule, it does not apply to courts of appeals opinions. Rule 2(F) states that "[t]he syllabus of a Court of Appeals opinion shall not be considered the controlling statement of either the point or points of law decided . . . ;"<sup>73</sup> rather it is simply a convenient researching and indexing summary for the public and the bar. The text of the opinion provides the controlling statement of the law.<sup>74</sup> The inconsistent treatment of supreme court and courts of appeals opinions and syllabi has no obvious explanation in the different functions of the two courts, and no explanation is given in the Ohio authorities. The distinction has been justly criticized for opening the way "to a greater possibility of mistake and confusion for both the practitioner and the Court in determining what is the law on a particular point."<sup>75</sup> A more trenchant criticism is simply that the distinction appears to be a rule without a reason; in an era in which courts and legislatures recognize that rules of procedure and precedent must find justification in the precarious balance between fairness and administrative efficiency, this inconsistency seems to be a pointless complexity.

### B. Reporting Court of Appeals Opinions

Controlled as it is by constitutional mandate, the supreme court's rule for the reporting of its own opinions is straightforward enough. This is not true, however, of

70. The Draft Rules had used the term "law of the case" instead of "controlling point of law." The change was recommended by the Advisory Committee. See ADVISORY COMMITTEE REPORT, *supra* note 64, at 3. The change was fortunate because "law of the case" is a technical term dealing with the effect of earlier rulings on later proceedings in a particular case. That is a limited portion of the more general question of the precedential effect of an opinion.

To the words "controlling point or points of law" the rules add the qualifier "necessarily arising from the facts of the specific case before the Court for adjudication." The resulting definition of a case's precedential effect is a very crabbed one. Normally, a court's reasoning—or justification—must be considered in determining an opinion's precedential effect.

See W. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 77–85 (1980).

71. See SUP. CT. R. PRAC. VI (Reporter's Note), 94 Ohio St. ix (1917). At various points in its history, the syllabus rule seems to have been adopted as a rule of court or simply as case law. It also seems to draw some support from OHIO REV. CODE ANN. § 2503.20 (Page 1981). A complete analysis of the syllabus practice is beyond the scope of this article. See generally J. JACOBSTEIN & R. MERSKY, FUNDAMENTALS OF LEGAL RESEARCH 16 (4th ed. 1973); Fenneberg, *The Rule of the Syllabus in Ohio*, 31 OHIO BAR REP. 1105 (1958); *Recent Cases: Rule of Court—Syllabus as the Law of the Case*, 14 U. CIN. L. REV. 573 (1940) [hereinafter cited as *Recent Cases*].

72. See *State v. Wilson*, 58 Ohio St. 2d 52, 60, 388 N.E.2d 745, 751 (1979); *Masheter v. Kebe*, 49 Ohio St. 2d 148, 150, 359 N.E.2d 74, 76 (1976); *Thackery v. Helfrich*, 123 Ohio St. 334, 336, 175 N.E. 449, 450 (1931). The syllabus rule has been recognized by the United States Supreme Court. See *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976); *Beck v. State*, 379 U.S. 89, 93 (1964); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 441–42 (1952).

73. SUP. CT. R. REP. OPS. 2(F).

74. Once again, the rule simply restates the earlier law on the question. See *Carruthers v. Kennedy*, 121 Ohio St. 8, 16, 166 N.E. 801, 803 (1929); *Parkview Hosp. v. Hospital Serv. Ass'n*, 8 Ohio App. 2d 315, 222 N.E.2d 314 (1966); *Royal Indem. Co. v. McFadden*, 65 Ohio App. 15, 29 N.E.2d 191 (1940).

75. See *Recent Cases*, *supra* note 71, at 576.

Rule 2,<sup>76</sup> which controls the reporting of decisions from the courts of appeals. The provisions of Rule 2 concerning which opinions are reported and who makes the reporting decision—the heart of any publication plan—are unusual, even bizarre, and seem to denigrate the work of the courts of appeals. Moreover, Rule 2 is poorly drafted, making a precise understanding of it difficult indeed.

### 1. *Which Opinions Should be Published?*

Among the most important questions a publication plan should address is what guidelines should control the publication decision. In Ohio's system, as in most others, guidelines come in two forms: standards that an opinion must meet if it is to be published and a presumption either in favor of or against publication.

#### a. *Standards*

All publication plans provide some standards for determining which opinions merit publication. Some are quite vague and amorphous; the plan of the United States Court of Appeals for the Third Circuit, for instance, provides simply for the publication of opinions that have "precedential or institutional value."<sup>77</sup> Other courts, such as the Sixth Circuit, have adopted several specific and detailed criteria that significantly limit the discretion of the decision maker.<sup>78</sup>

In Rule 2, the Ohio Supreme Court adopted a confusing combination of the two approaches. Rule 2(E) permits publication of an opinion if the court of appeals that heard the case certifies that the opinion meets one or more of these standards:

- (1) It establishes a new rule of law, which term as used in this rule includes common law, statutory law, procedural rules and administrative rules;
- (2) It alters, or modifies, or overrules an existing rule of law;
- (3) It applies an established rule of law to facts significantly different from those in previously published applications;
- (4) It explains, criticizes, or reviews the history of an existing rule of law;
- (5) It creates or resolves a conflict of authority, or it reverses, overrules, or otherwise addresses a published opinion of a lower court or administrative agency;
- (6) It concerns or discusses one or more factual or legal issues of significant public interest;
- (7) It concerns a significant legal issue and is accompanied by a concurring or dissenting opinion;
- (8) It concerns a significant legal issue upon the remand of a case from the United States Supreme Court or the Supreme Court of Ohio.<sup>79</sup>

These criteria are comprehensive, commendable, and easily understood.<sup>80</sup> In drafting these standards the supreme court apparently has drawn heavily upon the

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76. SUP. CT. R. REP. OPS. 2.

77. UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, STATEMENT OF THE INTERNAL OPERATING PROCEDURES, ch. 5(F)(1).

78. See 6TH CIR. R. 24(a).

79. SUP. CT. R. REP. OPS 2(E).

80. Although most of the standards are comprehensible, rule 2(E)(1) gives some pause. It is not clear how a court can create a "new rule of . . . statutory law . . .," at least in a fashion consonant with the doctrine of separation of powers. Presumably, this portion of the rule was designed to lead to publication of new interpretations of statutes.

experience of other courts and the work of the commentators.<sup>81</sup> Although it is not clear that the existence of specific, as opposed to vague, publication standards affects the rate of opinion publication,<sup>82</sup> it certainly is reasonable to assume that if the judges have a checklist of specific standards to consult, they will make publication decisions more wisely, and that fewer significant opinions will be overlooked.

Unfortunately, rule 2(E) also includes an additional and amorphous standard. To warrant publication, an opinion not only must meet one of the specific criteria, but also must satisfy the Supreme Court Reporter that it “contributes significantly to the body of Ohio case law.”<sup>83</sup> This extra requirement is puzzling,<sup>84</sup> for it is hard to understand how an opinion that satisfied one of rule 2(E)’s eight criteria could nonetheless fail to make a significant contribution to the law of Ohio.<sup>85</sup> Further, the additional requirement offers one more stumbling block to publication.

The real oddity in the structure of Rule 2 appears most forcefully, however, in the provisions of rules 2(B) and 2(C).<sup>86</sup> Rule 2(B) provides that no opinion shall be published unless the Supreme Court Reporter approves it for reporting (presumably guided by the “significant contribution” standard of rule 2(E)) and the majority of the appellate panel certifies it as meeting one of the specific 2(E) standards. Rule 2(C), however, permits the judges of a court of appeals to bypass the specific standards of rule 2(E) by adopting a local rule that provides that each of its opinions will be sent to the Supreme Court Reporter for a publication decision under the vague “significant contribution” standard. There are, in other words, two possible paths to publication for a court of appeals opinion.<sup>87</sup> On the one hand, if a court has a local rule providing that each of its opinions will be forwarded to the Supreme Court Reporter, the opinion must pass only one test, the Reporter’s determination that it “contributes significantly to the body of Ohio case law.” If, on the other hand, a court has not adopted such a rule, the opinion must satisfy the judges that it meets one of the specific standards and satisfy the reporter under the “significant contribution” standard. Thus, while the

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81. Particularly admirable are rules 2(E)(7) and (8), which call for publication of opinions that are accompanied by a separate concurring or dissenting opinion and of opinions in cases that have been remanded from the United States Supreme Court or the Supreme Court of Ohio. We recommended these provisions in a model rule in *The Price of Reform*, *supra* note 2, at 627–28. Based upon the empirical study reported in that article we also suggested publication of opinions that reverse the decision below unless: “(a) the reversal is caused by an intervening change in law or fact, or b) the reversal is a remand (without further comment) to the [trial court] of a case reversed or remanded by the Supreme Court. . . .” *Id.* at 627. Rule 2(E) does not include this provision, but the suggestion has been adopted by at least one court. See 6TH CIR. R. 24(a)(v).

82. See *The Price of Reform*, *supra* note 2, at 588–90 (no difference in publication rate for courts with specific as opposed to vague standards).

83. SUP. CT. R. REP. OPS. 2(E). Of course, it is bizarre that the Reporter should be able to overrule the judges of the panel on the question of publication. This problem is discussed fully in *infra* section V(B)(2).

84. The Advisory Committee found this extra publication standard to be a confusing excrescence. See ADVISORY COMMITTEE REPORT, *supra* note 64, at 8. It might be argued that the “significant contribution” standard is simply shorthand for the eight criteria of 2(E); on that view, the Supreme Court Reporter would be bound by the eight criteria.

85. An opinion that satisfied the eight-criteria test by interpreting federal law (or the law of another state) perhaps could be said not to contribute to Ohio case law. Nevertheless, such opinions should be published.

86. SUP. CT. R. REP. OPS. 2(B), (C).

87. Conversations with several courts of appeals judges reveal a third path, not provided for in the rules, but used in practice. Some courts, even without benefit of a local rule, send all opinions to the Supreme Court Reporter for his advice on which opinions should be reported. Typically, his recommendation is followed. The practice causes concern because those judges seem to be abdicating an important part of their law-declaring function.

specific standards of rule 2(E) are commendable, the combined effect of the “significant contribution” test of rule 2(E) and the “bypass” provision of rule 2(C) is to render the specific standards almost nugatory.

### b. *The Presumption*

The grammatical form of rule 2(B)<sup>88</sup> makes it clear that there is a presumption against publication of courts of appeals’ opinions. That presumption is regrettable. Clearly, far too few of the courts of appeals’ opinions were published before the adoption of the rules,<sup>89</sup> and the presumption in the rules very likely will perpetuate a very low figure. That would be most unfortunate. With such a low publication rate, it is certain that some valuable precedent is being suppressed. Further, a common law court, the vast majority of whose decisions are non-precedential, begins to lose its character as an Anglo-American judicial body; the rule of stare decisis becomes a mockery if so small a portion of the court’s work has precedential value. Finally, the bar and the judges themselves may begin to lose respect for what has become a “hidden court.”<sup>90</sup> Because presumptions for and against publication do appear to have an effect on the rate of publication,<sup>91</sup> an explicit presumption favoring publication of courts of appeals opinions would be a salutary addition to the Supreme Court Rules for the Publication of Opinions.

## 2. *Who Makes the Decision*

By far, the least satisfactory feature of Rule 2 is its allocation of responsibility for the publication decision. The difficulty is that the Rule does not repose complete authority over the decision in the judges who have decided the case and written the opinion. The appellate judges do have the power to *veto* publication of an opinion because no opinion can be published unless they either certify that it meets one of the eight publication standards of rule 2(E) or they have promulgated a local rule providing that each of their opinions be sent to the reporter for publication.<sup>92</sup> The court of appeals judges lack the power, however, to *assure* the publication of their opinions. Two other actors have a veto over the publication decision.

Rule 2(A) gives the supreme court substantial power to limit publication of court of appeals opinions. It provides that no opinion of the court of appeals shall be officially reported:

- (1) If the Supreme Court has the case pending for adjudication upon the merits or has ruled upon the merits, unless the Supreme Court expressly orders such opinion to be reported,
- (2) if the case is pending before the Supreme Court on a motion to certify the record or

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88. SUP. CT. R. REP. OPS. 2(B) begins “No opinion of a Court of Appeals . . . shall be reported *unless*. . .” *Id.* (emphasis added).

89. See *supra* note 24 and accompanying text.

90. The phrase is from Black, *supra* note 24, at 107.

91. See *The Price of Reform*, *supra* note 2, at 591.

92. SUP. CT. R. REP. OPS. 2(B), (C), (E).

a motion for leave to appeal, or (3) unless a period of seventy days has expired from the journalization of the judgment of the court of appeals.<sup>93</sup>

The rule is pernicious because it permits the supreme court to suppress the publication of an opinion with which it disagrees.<sup>94</sup> Certainly the supreme court must be able to reverse a court of appeals decision or affirm it for reasons that differ from those of the appellate panel. The supreme court should do so *publicly*, however, by dealing with the merits of the court of appeals' arguments, not by consigning to legal purgatory the heretical opinion. The supreme court's work is almost entirely insulated from review; only a small portion can be second-guessed by the United States Supreme Court or by the Ohio General Assembly. Thus lower court opinions often serve as the only meaningful check on the supreme court's work. In its opinion, an appellate panel can express skepticism about the trend of the supreme court's decisions in a particular area, or the panel can point out confusion in the high court's doctrine simply by attempting in good faith to apply it. Rule 2(A) provides the supreme court the temptation and ability to suppress such salutary critiques; accordingly, rule 2(A) should be eliminated.

Rules 2(B) and 2(E), which give the Supreme Court Reporter the power to veto publication of a court of appeals opinion, are even more troublesome. Even if the judges of the panel determine that the opinion meets one of the eight publication standards of rule 2(E), the opinion cannot be officially reported unless the Supreme Court Reporter determines that the opinion "contributes significantly to the body of Ohio case law."<sup>95</sup> This is a bizarre rule. The Supreme Court Reporter is not a judge but a bureaucrat, and no matter how responsible and dedicated he is,<sup>96</sup> granting him veto power over the decision to publish is a mistake of the first order.<sup>97</sup>

93. SUP. CT. R. REP. OPS. 2(a).

94. The rule resembles the practice in California which permits the Supreme Court of California to "decertify" publication of opinions of the California Courts of Appeals. See CAL. R. CT. 976. The practice has been severely criticized. See generally Gerstein, "Law By Elimination:" *Depublication in the California Supreme Court*, 67 JUDICATURE 292 (1984).

95. SUP. CT. R. REP. OPS. 2(E). The rules provide no mechanism for appealing the Reporter's decision. Nor do they provide a mechanism by which those outside the court can request publication of an opinion overlooked by the judges or the Reporter. Several courts have adopted such rules. See 7TH CIR. R. 35(d)(3); 9TH CIR. R. 21(d); WIS. STAT. ANN. § 809.23(4) (West Supp. 1984). The argument for an "outside request" provision is that it decreases the likelihood that a valuable precedential opinion will be permanently overlooked. The argument against such provisions is that they may tend to skew the law in favor of habitual litigants. Such a litigant, say a local prosecutor or a state agency, will litigate a particular issue again and again and will have a strong interest in assuring that any favorable disposition will have precedential value. His opponent, only an occasional litigant on such issues, might have considerably less incentive to push for publication of decisions favorable to him. The Advisory Committee recommended inclusion of an outside request provision, but the supreme court rejected the suggestion. See ADVISORY COMMITTEE REPORT, *supra* note 64, at 6. The current reporter had indicated that the actual practice of his office is to entertain outsiders' requests for publication. See Kobalka, *The Rules for Reporting Opinions*, 58 LAW & FACT 7, 8 (1984).

96. Every indication is that the current Reporter, Walter S. Kobalka, is a dedicated and responsible public servant. The court of appeals judges with whom we have spoken have not criticized his performance. Several judges indicate that the current Reporter in practice will report any opinion the judges select unless reporting is specifically prohibited by the rules. See, e.g., SUP. CT. R. REP. OPS. 2(A). We understand that almost all opinions submitted to the Reporter are published. Nevertheless, the possibility of censorship may deter the submission of publishable opinions. In any event, it is the *judges*—the decision-makers—who should make such an important decision, not a bureaucrat directly accountable to no one.

97. We are aware of no other opinion publication plan that gives the Reporter such broad authority. Several plans, however, do give the publication decision to a committee rather than to the panel that decided the case. See DEL. CODE

Under the Ohio rules, the decision to publish is also the decision to create precedent.<sup>98</sup> The decision to make law is one that must be made by the judges themselves. There are several reasons why that is so. First, the judges are elected officials,<sup>99</sup> ultimately responsible to the people for their decisions. The Ohio Constitution, by creating common law courts and judges, explicitly grants those judges the power to decide cases<sup>100</sup> and implicitly grants them the power to make law (until reversed or overruled by a higher court). The Supreme Court Reporter, by contrast, is appointed and serves at the pleasure of the supreme court.<sup>101</sup> The Reporter has no authority, constitutional or statutory, to make law in Ohio.

Second, no one knows the individual case better than the judges who decide it. They are best able to determine if the case satisfies the criteria of rule 2(E) and, thus, warrants publication. No matter how hard the Reporter works, he cannot study the briefs, participate in oral argument, review the record, and read the applicable law in each case. Yet those tasks are precisely the ones undertaken by the appellate panel in every case. Thus, the Reporter's decision on publication cannot be as informed as the decision of the panel.

Moreover, removing the publication decision from the judges also may remove some incentive to write opinions that do make law. Rather, the judges simply may decide to allow the courts of appeals to "become ad hoc administrative agencies without any need to be consistent from case to case in the application or declaration of the law of Ohio."<sup>102</sup>

Finally, placing the courts of appeals under the Reporter's thumb must be demoralizing. It is as if the supreme court does not believe the judges can be trusted, and that a responsible third party, the Reporter, must supervise their most important activities.

The Reporter's authority to "prepare, edit, [and] index" all officially reported opinions compounds this problem.<sup>103</sup> The extent of this authority is not clear, but the word "edit" seems to permit extensive reworking of the opinion.<sup>104</sup> Light editing to pick up typographical errors or to correct citation form is perhaps harmless, but nothing more than that should be permitted. Again, the Reporter does not know the case as well as the judges who decided it; changes or deletions that may appear trivial to the Reporter may assume major significance to those who know the problem better. Further, rule 2(B) does not require the Reporter to submit his proposed changes to the

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ANN. tit. 10 § 1961 (1974) (committee appointed by the chief justice of the Delaware Supreme Court); N.J.R. GEN. APPLICATION 1:36-2 (committee appointed by chief justice); WIS. STAT. ANN. § 809.23(2) (West Supp. 1984) (committee of judges).

98. See SUP. CT. R. REP. OPS. 2(G), discussed *infra* section V(B)(3).

99. OHIO CONST. art. IV, § 6.

100. *Id.* § 3.

101. OHIO REV. CODE ANN. § 2503.05 (Page 1981).

102. The phrase is from ADVISORY COMMITTEE REPORT, *supra* note 64, at 9.

103. SUP. CT. R. REP. OPS. 2(D)(3).

104. No provision in the rules permits the Reporter to "edit" the opinions of the supreme court. There is, however, statutory authority for such editing. See OHIO REV. CODE ANN. § 2503.22 (Page 1981). See also section IV of this Article for a discussion of whether the rules supersede contrary statutes, although the question is less important here since the Reporter serves at the pleasure of the supreme court.



author of the opinion for approval.<sup>105</sup> That omission is crucial; the author of an opinion which will bear his name should have the final say on the content of the opinion since it is *his* reputation, after all, which is at stake.<sup>106</sup>

The provisions of the rules that give editorial and veto authority to the Reporter should be deleted. Responsibility for the publication and the content of an opinion must remain with the judges who wrote it and concurred in it. Deletion of those provisions would encourage judicial accountability and enhance judicial morale.<sup>107</sup>

### 3. Precedent and Citation

#### a. Precedent: Exposition of the Rules

The most important and controversial issue for a publication plan to address is the precedential effect of unreported opinions; the question transcends judicial administration and goes to the very heart of the notion of common law adjudication. Rules 2(G)(1) and 2(G)(2) of the Supreme Court Rules for the Reporting of Opinions state the general rule: Opinions published in the Ohio Official Reports<sup>108</sup> are "controlling" authority within the appellate district until reversed or modified;<sup>109</sup> unpublished opinions or unofficially published opinions are considered "persuasive" but not controlling authority.<sup>110</sup>

105. SUP. CT. R. REP. OPS. 2(D)(1), in contrast, limits the opinion to twenty-five pages and the Reporter "may cause" longer opinions "to be reduced in length, subject to the approval of the judge writing the opinion." We emphasize that, under the current Reporter, no problems have surfaced.

106. The judges indicate that in practice the Reporter does submit his editing changes for their approval. Further, the current Reporter indicates that editing is kept to a "bare minimum." See Kobalka, *supra* note 95, at 8.

107. Other portions of the rules also demean the courts of appeals. The page limitation discussed in the preceding footnote is an example: it assumes that the judges of the courts of appeals are not capable of keeping their opinions within proper lengths. The absence of a comparable provision for the supreme court is telling. Rule 2(D)(1) also directs the judges of the courts of appeals to write "in as concise form as may be consistent with a clear presentation. . . ." Again, that is a directive that one might expect to be given to college students but not in rules published concerning an appellate court. Similarly, the requirement in rule 2(D)(2) concerning the cover sheet of the court of appeals opinions is overly bureaucratic, and it is difficult to see what use it serves. These provisions, along with the ones discussed in the text, certainly give the reader of the rules the feeling that the supreme court lacks the respect that should be accorded the intermediate appellate courts.

108. Read literally, an opinion does not have controlling authority until it is *published*. The rule does not define the status of an opinion which has been issued but not yet published, instead apparently consigning such opinions to a kind of legal limbo. Although a hyper-technical trial judge might attempt to escape the controlling effect of an as-yet-to-be-published opinion of the court of appeals by arguing that it does not bind him until it appears in the Official Reports, the better practice would seem to be to treat all opinions as controlling authority if the judges have stated that the opinion is going to be submitted for publication. (In order to facilitate such a practice by other judges, the court that issues the opinion should indicate on the opinion whether it is to be "published".) Even under this procedure, however, problems may arise if the Reporter fails to publish an opinion submitted to him; what then happens to a decision which has treated the now only persuasive authority opinion as controlling? Presumably, rules for the reopening of judgments can handle this kind of problem. This problem, once again, highlights the undesirability of intruding the Reporter into the opinion publication business.

109. SUP. CT. R. REP. OPS. 2(G)(2). Unaccountably, rule 2(G) speaks in terms of "published" and "unpublished" opinions while the rest of the rules use the words "reported" and "unreported." Very likely the two sets of terms are meant to be synonymous because the rules do not draw any distinction between "publication" and "reporting." Nevertheless, the sudden shift in terminology is distracting and potentially confusing. Conceivably, "published" could be read to mean "made known to the public in any way"; in that case, opinions included in unofficial compilations would be "published" even though not officially reported. The consistent use of the term "reported" or "officially reported" in all the rules would eliminate any possibility of confusion.

110. SUP. CT. R. REP. OPS. 2(G)(1). "Controlling authority" typically refers to the way a lower court treats case law from a higher court in the same jurisdiction; the lower court may distinguish the facts of the case at bar, but it should

There are two qualifications to this general rule. Rule 2(G)(1) provides that an unpublished opinion is controlling authority "between the parties . . . when relevant under the doctrines of the law of the case, res judicata or collateral estoppel or in a criminal proceeding involving the same defendant."<sup>111</sup> Further, unpublished opinions of one district can be cited by a court of appeals in another district in order to certify to the supreme court that a conflict exists in the law of two districts.<sup>112</sup>

*b. The Argument for Controlling Precedential Authority.*

Notwithstanding these qualifications, the general position of the Supreme Court Rules for the Publication of Opinions is that unreported opinions should not be considered controlling precedential authority.<sup>113</sup> Powerful arguments can be marshalled against that position. First, granting full precedential authority to unreported opinions will flesh out the corpus of law within the district. The average appellate district in Ohio annually produces about 500 signed and per curiam opinions, but on the average, only twenty are officially reported.<sup>114</sup> That is a terribly small figure to provide answers to recurring questions of law; giving full stare decisis effect to every opinion would help remedy the problem.

But there are far more important reasons to accord full precedential effect to unpublished opinions, for doing so enhances judicial responsibility and accountability. A fundamental premise of the common law system of adjudication is that judges are required to decide like cases in like fashion.<sup>115</sup> Without this requirement, which

not question the validity of the authority. "Persuasive authority" by contrast refers to the deference given a decision because of the force of its reasoning, the quality of its analysis or, sometimes, the prestige of its author. *See* W. REYNOLDS, *supra* note 70, at 107-09.

111. SUP. CT. R. REP. OPS. 2(G)(1). There are problems with the drafting of this exception. The inclusion of the words "between the parties" seems to limit unduly the application of the doctrines of res judicata and collateral estoppel. Read literally, it would preclude the use of an unreported opinion in any non-mutual estoppel situation and would also prohibit the use of an unreported opinion against a person in privity with a party. These results conflict in part with the Ohio law of judgments. Ohio has not followed the national trend, *see* Parklane, *Hosiery v. Shore*, 439 U.S. 322 (1979), abandoning completely the requirement of mutuality. *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983); RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1980). Mutuality is still the general rule, but Ohio courts do seem willing to abandon the doctrine in a particularly compelling case. *See* *Hicks v. De La Cruz*, 52 Ohio St. 2d 71, 369 N.E.2d 776 (1977). Moreover, Ohio law has long recognized that both res judicata and collateral estoppel apply against the privity of a party to the first action. *See* *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 443 N.E.2d 776 (1977); *Trautwein v. Sorgenfrei*, 58 Ohio St. 2d 493, 391 N.E.2d 226 (1979); 32 O. Jur. 2d *Judgments* §§ 248-72 (1975) (discussing the full range of privity situations recognized by Ohio courts). Thus, to avoid conflict with the Ohio law on res judicata and collateral estoppel, and to avoid freezing the development of the law, SUP. CT. R. REP. OPS. 2(G)(1) should be amended by deleting the words "between the parties thereto." Although many other publication plans have a "res judicata and collateral estoppel" exception none we know of include the "between the parties" qualification. *See* ARIZ. R. CIV. APP. P. 28(c); ARK. R. SUP. CT. 21(4); IND. R. APP. P. 15(A)(3); IOWA SUP. CT. R. 10(f); WIS. CIV. P. 809.23(3).

112. SUP. CT. R. REP. OPS. 2(G)(3). It is not clear how a "conflict" can arise when one opinion is unpublished and, therefore, lacks precedential value.

113. For similar rules, *see* ARIZ. R. CIV. APP. P. 28(c); ARK. R. SUP. CT. 21(4); IND. R. APP. P. 15(A)(3); IOWA SUP. CT. R. 10(f); KY. R. CIV. P. 76.28(4)(c); N.M. SUP. CT. MISC. R. 7(c); WIS. CIV. P. 809.23(3).

114. The average is computed (using the figures for 1982) by dividing the total number of terminations by opinion—5,940—by the number of districts—12; similarly the average number of published opinions is derived by dividing the total—244—by 12. *See* OHIO COURTS SUMMARY 12-13 (1982). *See* note 24, *supra*, for the statistics for earlier years.

115. An early and persistent worry among critics of limited publication/no-citation regimes is that they result in serious inconsistencies between published and unpublished law. *See, e.g.,* Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224 (1975); Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F. L. REV. 219, 253-54 (1974).

is really the essence of stare decisis, the venal judge would be free to decide cases on impermissible grounds, such as the sex, race, or political affiliation of the parties. Usually, good judges, even when unconstrained by the discipline stare decisis imposes, will avoid such abuses, but the system of precedent is founded upon a healthy skepticism about power unrestricted by the need for consistency.<sup>116</sup> The recognition that a decision will have future implications and will affect the rights of persons beside the parties to the immediate action helps judges to avoid administering ad hoc “justice” and encourages them instead to seek equal justice under law as our system demands.<sup>117</sup>

The no-precedent rule also subverts the judicial responsibility to direct conscientious effort to each case to be decided. An important part of that responsibility is the preparation of an opinion that indicates to the parties and the public the reasons for the decision.<sup>118</sup> Recent research on the United States circuit courts suggests that judges are not spending enough time and effort on their unpublished opinions to satisfy that requirement. Many unpublished opinions from those courts fail to meet even the most minimal standards of judicial performance.<sup>119</sup> The quality of opinion-writing probably would be enhanced if the judges knew that every opinion—reported or not—would be accorded precedential value. A judge probably will put more effort into an opinion if she knows that it will have effects beyond the case at bar.

A rule that withholds full precedential effect from unpublished opinions damages not only judicial responsibility but also judicial accountability. Court of appeals judges are formally accountable, of course, only to the the Supreme Court of Ohio, which can reverse or modify their decisions;<sup>120</sup> the no-precedent rules, however, diminish the likelihood of review. The supreme court, when considering review of an opinion that probably will not be published is faced simply with a “wrong result” not with “bad law.” The supreme court, therefore, is much less likely to make room on its discretionary docket to correct an error that will not be perpetuated in future cases.

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116. The current Reporter seems to regard the no-precedent rule as providing needed flexibility for the appellate judges. Kobalka, *supra* note 95, at 8. It is that very flexibility that the common law system deems so dangerous.

117. Moreover, most judges in our system do not view the system of stare decisis as an external constraint upon their power; rather they have internalized the need for consistency. Thus, judges who sit on courts where unpublished opinions have no precedential effect nevertheless often index such opinions and consult them out of the desire to remain consistent. Administrators of two district courts of appeals in Ohio report indexing of unpublished opinion. Letters to William M. Richman from Richard S. Kasay, Court Administrator, Court of Appeals of Ohio, Ninth Appellate District, and Thomas J. Rottinghaus, Court Administrator, Court of Appeals of Ohio, First Appellate District. (Copies of these letters are on file at the offices of the *Ohio State Law Journal*.) The authors both served as clerks for United States District Judges in Maryland and read and indexed the unpublished opinions of the district court as well as the United States Court of Appeals for the Fourth Circuit. See also Testimony of Judge Sprecher of the Seventh Circuit before the Hruska Commission, *Hearings Before the Comm'n on Revision of the Fed. Court Appellate Sys.*, 537-38 (2d Phase 1974-75). Thus it appears that non-precedent rules are not only ill-advised, but, at least in part, futile. Judges, by force of common law habit, tend to consult their unpublished opinions regardless of what the rules say.

118. ABA COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS 58 (1977); P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 34 (1976); K. LLEWELLYN, THE COMMON LAW TRADITION 26 (1960).

119. In the 1978-79 reporting year, for example, no discernible justification for a decision could be found in 85% of the Third Circuit's unpublished opinions, 61% of those from the District of Columbia Circuit, and 59% of those from the Fifth Circuit. Shockingly, in two of those circuits (the Third and the Fifth), a substantial majority of the unpublished opinions were shorter than fifty words in length. *The Price of Reform*, *supra* note 2, at 599-602.

120. OHIO CONST. art. IV, § 2(B)(2).

More subtly, the judges of the courts of appeals are accountable to the trial bench, the bar, scholars, and the public. No-precedent rules significantly reduce even this sort of accountability because each of these groups will have less incentive to comment critically on an opinion that is not "law."

*c. Objections and Responses*

Commentators have voiced two objections to according full precedential effect to unpublished opinions, but each of these is subject to a powerful rejoinder. The first is based on the increased cost in judicial resources. Non-publication, it is argued, saves the judges time because they do not need to spend as much effort on an opinion that simply settles the dispute between the parties and neither is widely disseminated nor becomes an important part of the corpus of the law.<sup>121</sup> Full discussions of authority, detailed recitation of the facts, prose-polishing, and proof reading all can be reduced or eliminated in an opinion that is not written for publication. A rule that accords full precedential effect, it is argued, eliminates those time savings because a precedential opinion must be drafted with the sort of care that requires so much judicial time and effort.<sup>122</sup> The short answer to this argument is that the judges must be able to spend at least the time it takes to explain the result to the parties and the public in a minimally informative opinion. That is a central part of the notion of common law adjudication; if the opinion can adequately explain the result, there is no reason why it should not be precedential.<sup>123</sup> If the judges do not have enough time to perform that crucial function, then Ohio needs more appellate judges or less mandatory appellate jurisdiction; but both of these questions are for the legislature.

The second objection to full precedential effect for unpublished opinions concerns the access of bench and bar to unpublished opinions. The system of precedent turns on the ready availability of case law to the consumers of that law. That availability, in turn, depends upon the wonderful indexing and research tools that have been developed over the decades of this century by the various law book publishers, aided in recent years by the advent of computerized research. If a court's opinions were given full precedential value but could not be retrieved in any easy fashion, the situation would be intolerable. Thus, the strength of the objection to giving full precedential value to the unpublished opinions of the courts of appeals turns on the sophistication and efficiency of the retrieval systems available for those opinions.

These systems appear to be adequate. First the opinions are available in micro-fiche from the Law Library Microform Consortium or their agent in Ohio,

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121. STANDARDS FOR THE PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL FOR APPELLATE JUSTICE (1973), reprinted in *Appellate Justice: 1975*, Materials for a National Conference San Diego, California.

122. *Id.*; Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195, 199 (1972).

123. It may be that an adequate opinion in a simple case (or a frivolous appeal) really does little but explain how routine facts are treated under a settled rule of law. Such an opinion, of course, does not add much to the jurisprudence of Ohio, but there is no reason to suppress it. It is simply precedent for what it is worth. Along with other such opinions it may indicate how the court continues to deal with a particular type of recurring problem. Or the fact that the problem recurs may indicate to the bar, the courts, or the legislature that some change in substantive or procedural law is advisable.

Banks-Baldwin Law Publishing Company.<sup>124</sup> The cost of an annual subscription, including the unpublished opinions of all appellate districts, an index of criminal cases and an index of civil cases, is \$479.00—a small price considering the economics of modern law practice.<sup>125</sup> A sophisticated reader/printer to make hard copy from the microform cards costs over a thousand dollars, but a simple reader is available for only a few hundred. Further, Banks-Baldwin operates a photocopying service and delivery system, which will deliver hard copy of any Ohio unpublished opinion anywhere in the state.<sup>126</sup> Finally, each of the nine law schools in Ohio and the majority of county bar libraries subscribe to the full unpublished opinion service from Banks-Baldwin. Thus the unpublished opinions appear to be widely available to almost every attorney in Ohio.

Indexing and retrieval of the opinions is slightly more problematic, but still manageable. Banks-Baldwin publishes one soft-bound index for civil cases and another for criminal cases. In each series, there are three quarterly issues which are consolidated with the fourth issue to form a cumulative annual volume; thus far, however, annual volumes are not consolidated into a cumulative volume covering, say, five years. The index is not as complex as the West key number system, but like West's, it offers a detailed subject-matter listing as well as a table of laws and rules construed. The Banks-Baldwin index should be sufficient to perform adequate research involving Ohio appellate decisions.<sup>127</sup>

In sum, the arguments in favor of opinions having controlling precedential value, even if unpublished, are strong. The counter-argument based upon judicial time is unacceptable. The counter-argument based upon the availability and retrievability of the opinions has more merit,<sup>128</sup> but in the end, that argument also must fail. Rule 2(G) should be amended, therefore, to give each opinion of an Ohio court of appeals controlling precedential value within that district.

#### d. Citation

Unlike the rules on precedent, the provisions of the Supreme Court Rules for the Reporting of Opinions, which govern citation of unpublished opinions are satisfactory. Rule 2(G)(3) provides that a party who cites an unpublished opinion shall attach

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124. Telephone conversation between William M. Richman and Enid Zafran, Vice-President, Editorial Department, Banks-Baldwin Law Publishing Company.

125. This figure includes the cost for the opinions on microfiche (\$300.00) and the civil and criminal indexes (\$179.00). For comparison purposes, \$479.00 would be exhausted in buying twenty volumes of any national reporter. A traditional argument in favor of no-citation rules is that permitting citation of unpublished opinions discriminates in favor of wealthy litigants who can afford to obtain and index such opinions. *See, e.g., United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974); *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972); *see also Non-Precedential Precedent, supra* note 2, at 1187. The extremely reasonable cost of the Banks-Baldwin service minimizes the force of the argument in Ohio.

126. *See OHIO APPELLATE DECISIONS INDEX—CIVIL CASES ix* (2nd quarter, 1984). The cost is fifty cents per page to subscribers to the index and one dollar per page to non-subscribers. Banks-Baldwin reports requests for about fifty opinions per week. Telephone conversation with Enid Zafran, *supra* note 121.

127. Further, LEXIS soon will have unpublished Ohio appellate decisions added to its library, thus permitting case retrieval by word-search.

128. One fact that gives a bit more color to this argument is that there is a considerable delay between the time when an opinion is issued and when it is available from and indexed by Banks-Baldwin. As of January 1, 1985, the most recent opinions in the University of Toledo Law Library were issued in the second quarter of 1984. The most recent volume of the index was the volume for the third quarter of 1984.

a copy of the opinion to his brief and indicate any relevant subsequent history of the case.<sup>129</sup> This is a sensible restriction that is included in the rules of many of the courts that permit citation of unpublished opinions.<sup>130</sup> It serves as an added convenience for the opposing party and the court, and the restriction places no serious burden on the attorney who cites the opinion. The Advisory Committee recommended an additional and burdensome restriction on the citation of unpublished opinions. The citing attorney would have to “certify that the cited opinion(s) represents all Ohio unpublished appellate opinions on the point(s) or proposition(s) for which cited that are known to counsel after diligent search . . . .”<sup>131</sup> This requirement is extreme and trenches significantly upon the adversary system by forcing one party to prepare his adversary’s case as well as his own.<sup>132</sup> The supreme court was wise not to adopt it.

## VI. CONCLUSION

Limiting the publication of appellate court opinions is a sensitive and risky project. There are at least promised gains, reduced costs of production and consumption of appellate opinions, but there also are dangers to the integrity of the appellate process. The best way to maximize the benefits and minimize the risks of limited publication is to promulgate a rigorous and sophisticated rule to govern the practice. This rule must give the appellate judges exclusive control over the publication decision and should guide their decisions with specific criteria designed to minimize the suppression of valuable legal precedents. Further, the rule should include an explicit presumption in favor of publication, which would increase the courts of appeals’ excessively low publication rate and thus help “unveil” Ohio’s “hidden courts.”<sup>133</sup> Finally, lest the system of stare decisis be seriously undermined, the rule should accord full precedential value to unpublished opinions and provide for their responsible citation. The Supreme Court Rules for the Reporting of Opinions fall far short of this prescription and should be modified accordingly.

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129. SUP. CT. R. REP. OPS. 2(G)(3).

130. STATEMENT OF INTERNAL OPERATING PROCEDURES, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT 16; 6TH CIR. R. 24(b); 10TH CIR. R. 17(c).

131. See ADVISORY COMMITTEE REPORT, *supra* note 64, at 10; Proposed Appellate Rule 25(D), *reprinted infra* app. B.

132. *Cf. Hickman v. Taylor*, 329 U.S. 495, 516, (1947) (Jackson, J., concurring) (giving the same reason for granting privilege to attorney’s “work product”).

133. See *supra* note 24.

## APPENDIX A

### FINAL RULES ADOPTED BY OHIO SUPREME COURT

Effective March 1, 1983

## SUPREME COURT RULES FOR THE REPORTING OF OPINIONS

### RULE 1. SUPREME COURT OPINIONS

(A) All opinions of the Supreme court shall be reported in the Ohio Official Reports.

(B) The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

(C) In a *per curiam* opinion of the Supreme Court, the point or points of law decided in the case are contained within the text of each *per curiam* opinion and are those necessarily arising from the facts of the specific case before the Court for adjudication.

### RULE 2. COURTS OF APPEALS OPINIONS

(A) No Court of Appeals opinion (which phrase includes *per curiam* opinion) in any case shall be reported in the Ohio Official Reports (1) if the Supreme Court has the case pending for adjudication upon the merits or has ruled upon the merits, unless the Supreme Court expressly orders such opinion to be reported, (2) if the case is pending before the Supreme Court on a motion to certify the record or a motion for leave to appeal, or (3) unless a period of seventy days has expired from the journalization of the judgment of the Court of Appeals.

(B) No opinion of a Court of Appeals or parts thereof shall be reported in the Ohio Official Reports unless (1) it is approved for official reporting by the Supreme Court Reporter; and (2) the majority of the judges of the Court of Appeals hearing the case certifies to the Supreme Court Reporter that the opinion meets any one or more of the standards for reporting specified in Section (E) of this rule.

(C) In addition to or in lieu of the provisions of Section (B)(2) of this rule, a Court of Appeals may determine by rule that each of its opinions or parts thereof, excluding orders on procedural matters, orders without opinion, brief memorandum decisions, and judgment entries under App. R. 11.1(E), may be sent to the Supreme Court Reporter for determination whether such opinion shall be reported in the Ohio Official Reports.

(D)(1) Opinions forwarded to the Supreme Court Reporter by Courts of Appeals shall be written in as concise form as may be consistent with a clear presentation of the point or points of law decided in the case and should not normally exceed twenty-five pages in length. The Supreme Court Reporter may cause opinions which

have manuscripts greater than twenty-five pages to be reduced in length, subject to the approval of the judge writing the opinion.

(2) Each opinion forwarded to the Supreme Court Reporter shall have a cover page indicating thereon the number and style of the case, the character of the proceeding, (e.g., mandamus, habeas corpus, criminal appeal from common pleas court, civil appeal from municipal court), the Court of Appeals deciding the case, the attorneys of the parties, the judgment of the court and the date said judgment was journalized. (See Form 1.)

(3) The Supreme Court Reporter shall prepare, edit, index, and cause to be officially reported all Courts of Appeals opinions properly submitted and approved for reporting in the Ohio Official Reports.

(E) An opinion of a Court of Appeals may be selected for official reporting if it is determined by the Supreme Court Reporter that the case contributes significantly to the body of Ohio case law, and that the Court of Appeals which heard the case certifies that the opinion meets one or more of the following standards for reporting:

- (1) It establishes a new rule of law, which term as used in this rule includes common law, statutory law, procedural rules and administrative rules;
- (2) It alters, or modifies, or overrules an existing rule of law;
- (3) It applies an established rule of law to facts significantly different from those in previously published applications;
- (4) It explains, criticizes, or reviews the history of an existing rule of law;
- (5) It creates or resolves a conflict of authority, or it reverses, overrules, or otherwise addresses a published opinion of a lower court or administrative agency;
- (6) It concerns or discusses one or more factual or legal issues of significant public interest;
- (7) It concerns a significant legal issue and is accompanied by a concurring or dissenting opinion;
- (8) It concerns a significant legal issue upon the remand of a case from the United States Supreme Court or the Supreme Court of Ohio.

(F) The syllabus of a Court of Appeals opinion shall not be considered the controlling statement of either the point or points of law decided, or law of the case, but rather as a summary for the convenience of the public and the Bar as a research and indexing aid. In a Court of Appeals opinion, the point or points of law decided in the case are contained within the text of the opinion, and are those necessarily arising from the facts of the specific case before the court for adjudication. Opinions submitted to the Supreme Court Reporter may be submitted with a syllabus approved by the judge writing the opinion.

(G) Unofficially published opinions and unpublished opinions of the Courts of Appeals may be cited by any court or person subject to the following restrictions, limitations, and exceptions:

- (1) An unofficially published or unpublished opinion shall not be considered controlling authority in the judicial district in which it was decided except between the parties thereto when relevant under the doctrines of the law of



the case, res judicata or collateral estoppel or in a criminal proceeding involving the same defendant;

- (2) In all other situations, each unofficially published opinion or unpublished opinion shall be considered persuasive authority on a court, including the deciding court, in the judicial district in which the opinion was rendered. Opinions reported in the Ohio Official Reports, however, shall be considered controlling authority for all purposes in the judicial district in which they were rendered unless and until each such opinion is reversed or modified by a court of competent jurisdiction;
- (3) A party who cites an unpublished opinion shall attach a copy of the opinion to his brief or memorandum and indicate any disposition by a superior appellate court of any appeal therefrom known after diligent search.

(H) Notwithstanding any provision to the contrary in Section (G), unofficially published opinions or unpublished opinions of one appellate district may be cited by the Court of Appeals of another appellate district for purposes of certifying to the Supreme Court a conflict question within the provisions of Sections 3(B)(4) and 2(B)(2)(e) of Article IV of the Ohio Constitution.

(I)(1) The acceptance or rejection for reporting of any opinion by the Supreme Court Reporter shall not be considered a statement of opinion by the Supreme Court as to the merits of the law stated therein.

(2) The refusal of the Supreme Court to accept any case for review shall not be considered a statement of opinion by the Supreme court as to the merits of the law stated within the case.

### RULE 3. OPINIONS OF COURTS

#### INFERIOR TO THE COURTS OF APPEALS

The provisions of Rule 2 shall apply to the opinions of all Ohio courts inferior to the Courts of Appeals except to the extent that the provisions would by their nature be clearly inapplicable.

### RULE 4. EFFECTIVE DATE

These rules shall be effective and applicable to all cases reported on and after March 1, 1983.

## APPENDIX B

### PROPOSED APPELLATE RULE 25

Proposed in December, 1981, by the Ohio Courts of Appeals Judge's Association

#### Circulation and Publication of Opinions

- (A) **STANDARDS OF PUBLICATION.** An opinion or decision of a court of appeals ordinarily should not be published unless it meets one or more of the following standards, which shall be interpreted so as to publish only opinions or decisions with precedential value:
- (1) It establishes a new rule of law, which term as used in the Rule includes common law, statutory law, procedural rules and administrative rules;
  - (2) It alters, or modifies, or overrules an existing rule of law;
  - (3) It applies an established rule of law to facts significantly different from those in previously published applications;
  - (4) It explains, criticizes, or reviews the history of an existing rule of law;
  - (5) It creates or resolves a conflict of authority or it reverses, overrules, or otherwise addresses a published opinion of a lower court or administrative agency;
  - (6) It concerns or discusses one or more factual or legal issues of significant public interest;
  - (7) It concerns a significant legal issue and is accompanied by a concurring or dissenting opinion;
  - (8) It concerns a significant legal issue upon the remand of a case from the United States Supreme Court or the Ohio Supreme Court.
- (B) **DECISION ON PUBLICATION.** No opinion or decision in the court of appeals shall be reported for publication unless selected or approved for publication by a majority of the judges participating in the opinion or decision, in which event it shall be certified to the Reporter of the Supreme Court for official publication. The Reporter shall determine which opinions or decisions, or parts thereof, shall be reported for official publication and the time and means thereof. After an opinion or decision has been certified to the Reporter for official publication, the opinion or decision, or parts thereof, may be made available to any other publisher for unofficial publication.
- (C) **MOTION FOR PUBLICATION.** Any litigant or other person may at any time file a motion to have any opinion or decision published, stating the reasons why it meets the standards of publication. Such motion shall be determined by the judges participating in the opinion or decision in accordance with Section (A) of this Rule.
- (D) **UNPUBLISHED OPINIONS.** Unpublished opinions and decisions, including judgment entries, may be cited but will not receive recognition unless

complete copies thereof are attached to the brief or memorandum in which the citation is made, a full disclosure is made of any disposition by the Supreme Court of any appeal therefrom that has come to the attention of the citing attorney, and counsel certifies that the attached copies represent all the Ohio unpublished appellate opinions and decisions that have come to his or her attention on the point or proposition with respect to which the citation is made.

## APPENDIX C

(Editor's Note—The editors and authors would like to thank Chief Justice Frank Celebrezze for his kind permission in allowing the *Ohio State Law Journal* to publish the previously unpublished draft rules and Advisory Committee Report, which appear in Appendices C and D respectively.)

### DRAFT RULES PROPOSED BY OHIO SUPREME COURT

Drafted During Summer Recess of 1982

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### SUPREME COURT RULES FOR THE PUBLICATION OF OPINIONS

#### RULE 1. SUPREME COURT OPINIONS

(A) All opinions of the Supreme Court shall be published in the Ohio Official Reports.

(B) The syllabus of a Supreme Court opinion states the law of the case. The points of law contained in the syllabus of each case shall be confined to the points of law necessarily arising from the facts of the specific case before the court for adjudication.

(C) In a *per curiam* opinion of the Supreme Court, the law of the case is incorporated within the text of the opinion. The points of law contained in the text of each *per curiam* opinion shall be confined to the points of law necessarily arising from the facts of the specific case before the court for adjudication.

#### RULE 2. COURTS OF APPEALS OPINIONS

(A) No Court of Appeals opinion in any case shall be published in the Ohio Official Reports if: (1) the Supreme Court has ruled upon the merits of the case, unless the Supreme Court expressly orders such opinion to be published; (2) the case is pending before the Supreme Court for adjudication on the merits; (3) the case is pending before the Supreme Court on a motion to certify the record or a motion for leave to appeal; or (4) a period of seventy days has not yet expired from the journalization of the judgment [sic] of the Court of Appeals.

(B) No opinion of a Court of Appeals shall be published in the Ohio Official Reports unless (1) it is approved for publication by the Supreme Court Reporter; and (2) the majority of the judges of the Court of Appeals hearing the case certifies to the Supreme Court Reporter that the opinion meets the standards for publication specified in Section (E) of this Rule.

(C) In addition to or in lieu of the provisions of Section (B)(2) of this Rule, a Court of Appeals may determine by rule that each of its decisions, excluding orders

on procedural matters, orders without opinion, and brief memorandum decisions, may be sent to the Supreme Court Reporter for determination whether such opinion shall be published in the Ohio Official Reports.

(D)(1) Opinions forwarded to the Supreme Court Reporter by Courts of Appeals shall be written in as concise form as may be consistent with a clear presentation [sic] of the law of the case. The Supreme Court Reporter may cause opinions which have manuscripts greater than twenty-five pages to be reduced in length;

(2) Each opinion forwarded to the Supreme Court Reporter shall have a cover page indicating thereon the number and style of the case, the character of the proceeding, the Court of Appeals deciding the case, the attorneys of the parties, the judgment of the court and the date said judgment was journalized;

(3) The Supreme Court Reporter shall prepare, edit, index, and cause to be published all Courts of Appeals opinions property [sic] submitted and approved for publication.

(E) An opinion of a Court of Appeals may be selected for publication if it is determined by the Supreme Court Reporter that the case contributes significantly to the body of Ohio case law, and that the Court of Appeals which heard the case certifies that the opinion meets one or more of the following standards for publication:

- (1) It establishes a new rule of law, which term as used in this Rule includes common law, statutory law, procedural rules and administrative rules;
- (2) It alters, or modifies, or overrules an existing rule of law;
- (3) It applies an established rule of law to facts significantly different from those in previously published applications;
- (4) It explains, criticizes, or reviews the history of an existing rule of law;
- (5) It creates or resolves a conflict of authority, or it reverses, overrules, or otherwise addresses a published opinion of a lower court or administrative agency;
- (6) It concerns or discusses one or more factual or legal issues of significant public interest;
- (7) It concerns a significant legal issue and is accompanied by a concurring or dissenting opinion;
- (8) It concerns a significant legal issue upon the remand of a case from the United State Supreme Court or the Ohio Supreme Court.

(F) The syllabus of a Court of Appeals opinion shall not be considered the law of the case. The syllabus shall be considered solely as headnotes for the convenience of the public and the Bar as a research and indexing aid. In a Court of Appeals opinion, the law of the case is incorporated within the body of the opinion. The law of the case shall be confined to the points of law necessarily arising from the facts of the specific case before the Court of Appeals for adjudication. Opinions submitted to the Supreme Court Reporter may be submitted with a syllabus approved by the judges of the Court of Appeals which heard the case.

(G) Unofficially published opinions and unpublished opinions of the Courts of

Appeals may be cited by any court or person subject to the following restrictions, limitations, and exceptions:

(1) An unofficially published or unpublished opinion shall not be considered controlling authority in the judicial district in which it was decided except between the parties thereto when relevant under the doctrines of the law of the case, *res judicata*, or collateral estoppel, or in a criminal proceeding involving the same defendant;

(2) In all other situations, each unofficially published opinion or unpublished opinion shall be considered merely persuasive authority on a court, including the deciding court, in the judicial district in which the opinion was rendered. Opinions published in the Ohio Official Reports, however, shall be considered controlling authority for all purposes in the judicial district in which they were rendered unless and until each such opinion is reversed or modified by a court of competent jurisdiction to do so;

(3) A party who cites an unpublished opinion shall attach a copy of the opinion to his brief or memorandum and indicate any disposition by a superior appellate court of any appeal therefrom known after diligent search.

(H) Notwithstanding any provision to the contrary in Section (G), unofficially published opinions or unpublished opinions of one appellate district may be cited by the Court of Appeals of another appellate district for purposes of certifying to the Supreme Court a conflict question within the provisions of Sections 3(B)(4) and 2(B)(2)(e) of Article IV of the Ohio Constitution.

(I)(1) The acceptance or rejection for publication of any opinion by the Supreme Court Reporter shall not be considered a statement of opinion by the Supreme Court as to the merits of the law stated therein.

(2) The refusal of the Supreme Court to accept any case for review shall not be considered a statement of opinion by the Supreme Court as to the merits of the law stated within the case.

(J) This Rule shall be effective and applicable to all cases decided on and after

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### RULE 3. OPINIONS OF COURTS

#### INFERIOR TO THE COURTS OF APPEALS

The provisions of Rule 2 shall apply to the opinions of all Ohio courts inferior to the Courts of Appeals except to the extent that the provisions would by their nature be clearly inapplicable.

## APPENDIX D

### THE SUPREME COURT RULES FOR THE PUBLICATION OF OPINIONS

#### REPORT AND RECOMMENDATIONS OF COMMITTEE APPOINTED

SEPTEMBER 24, 1982

November 30, 1982

#### PRELIMINARY NOTES

##### CONFLICTS WITH R.C. 2503.20

The Supreme Court Rules for the Publication of Opinions (herein, “Rules”) confirm in part and change in part the existing publication practice. The specific changes will be noted in our Specific Comments about each Section, but the Committee has an abiding concern that is common to all these changes. This is that they conflict with the provisions of R.C. 2503.20 (Appendix A). For one instance, the statute provides that the courts of appeals decide what shall be published, whereas the Rules repose the ultimate decision about publication in the Supreme Court Reporter (shortened to “Reporter”). The Rules are not currently proposed for adoption as rules of practice and procedure, the adoption of which under Section 5(B) of Article IV of the Constitution will render all laws in conflict with them of no further force or effect. The Rules are drafted as a new and separate category of Supreme Court rule, and this form will not resolve the question whether the Rules will prevail over the statute, or *vice versa*. The statute might be repealed, but we recommend that it be conclusively superseded by adoption of the Rules as rules of practice and procedure under the constitutional provision.

Section 3(C) of Article IV of the Constitution states in full: “Laws may be passed providing for the reporting of cases in the courts of appeals.” This provision is permissive in character, but it could be construed to mean that publication provisions may be adopted only by statutory enactment. The use of the constitutional procedure in Section 5(B) of Article IV of the Constitution for the adoption of rules of practice and procedure will remove any question, we believe. Because the Rules govern the status and citation of unpublished opinions and the procedures for the reporting of cases in the Official Reports, we believe they are rules of practice and procedure.

We note the difference between “report” and “publish.” An opinion may be “published” by being included in an appellate district’s distribution of opinions, a microfiche collection, a computer data base or an unofficial publication, as well as being “reported” in the Ohio Official Reports. We have attempted to keep this distinction in mind.

VOTE OF THE COMMITTEE

The Committee's recommendations are unanimous except where otherwise indicated at the conclusion of the Specific Comments on each Section.

FORMAT

On the following pages you will find our Specific Comments on each Section of the Rules, illustrated by a copy of each Section changed as recommended by the Committee.

Appendix B, the last item in this Report and Recommendations, brings all recommended changes together in one document.

SPECIFIC COMMENTS

## RULE 1(A)

(Editor's Note—Throughout this Report, italicized materials are those deleted by the committee; and capitalized materials are those added by the committee. This slight deviation from the original report was necessitated by printing capabilities.)

(A) *All opinions of the Supreme Court shall be published in the Ohio Official Reports.*  
 THE DECISIONS IN ALL CASES IN THE SUPREME COURT SHALL BE REPORTED IN THE OHIO OFFICIAL REPORTS, TOGETHER WITH THE REASONS THEREFOR.

We recommend that Rule 1(A) use the language of Section 2(C) of Article IV of the Constitution, with the addition of the phrase "in the Ohio Official Reports."

## RULE 1(B)

(B) The syllabus of a Supreme Court opinion states the *law of the case*. *The points of law contained in the syllabus of each case shall be confined to the points of law POINT OR POINTS OF LAW* necessarily arising from the facts of the specific case before the court for adjudication.

We recommend that the phrase "the law of the case" should not be used in the Rules because it is a phrase of art with a specific meaning. It stands for the proposition that an adjudication by an appellate court becomes the law *of that particular case* in all subsequent proceedings; its applicability is limited to a single case. *Barney v. Winona & St. Peter R.R.* (1886), 117 U.S. 228; *Gohman v. City of St. Bernard* (1924), 111 Ohio St. 726; 5 Ohio Jur. 3d *Appellate Review* sec. 648, sec. 718 (1978); Note, "Modifications of the Doctrine of the Law of the Case," 11 U. Cin. L. Rev. 266 (1937). The doctrine of *res judicata* applies to subsequent but different suits between the same parties or their privies, the doctrine of collateral estoppel applies to different suits with a common party, and the doctrine of *stare decisis* applies to different suits between entirely different parties. We recommend that the Rules use the phrase "the point or points of law."



The second sentence of Rule 1(B) reads more like a direction to the Justices of the Supreme Court rather than an explanation for the bench and bar. Our recommendation is designed to cure any possible misunderstanding.

#### RULE 1(C)

(C) In a *per curiam* opinion of the Supreme Court, the *law of POINT OR POINTS OF LAW DECIDED IN* the case is incorporated *within the text of the opinion*. The *points of law ARE* contained in the text of each *per curiam* opinion *shall be confined to the points of law AND ARE THOSE* necessarily arising from the facts of the specific case before the court for adjudication.

We recommend equivalent changes in Rule 1(C): delete the phrase “law of the case” in the first sentence, and combine the two sentences as recommended above for Section (B).

#### RULE 2(A)

(A) No Court of Appeals opinion (WHICH PHRASE INCLUDES PER CURIAM DECISION) in any case shall be *published* REPORTED in the Ohio Official Reports *if*: (1) IF the Supreme Court HAS THE CASE PENDING FOR ADJUDICATION ON THE MERITS OR has ruled upon the merits *of the case*, unless the Supreme Court expressly orders such opinion to be published; (2) IF the case is pending before the Supreme Court for *adjudication on the merits*; (3) *the case is pending before the Supreme Court on a motion to certify the record or a motion for leave to appeal*; or (4) (3) UNLESS a period of *seventy THIRTY* days has *not yet* expired from the journalization of the judgment of the court of appeals. , AND THE COURT OF APPEALS HAS CERTIFIED TO THE REPORTER THAT NO NOTICE OF APPEAL, NO MOTION TO CERTIFY THE RECORD, NO MOTION FOR LEAVE TO APPEAL AND NO CERTIFICATION OF CONFLICT HAS BEEN FILED.

We recommend that clauses (1), (2), (3) and (4) may advantageously be reworded and renumbered so that the prohibition against publication includes the time while the case is pending for any reason before the Supreme Court as well as the thirty-day period during which attempts can be made to bring the case to the Supreme Court.

#### RULE 2(B) AND (C)

(B) No opinion of a Court of Appeals OR PARTS THEREOF shall be *published* REPORTED in the Ohio Official Reports unless (1) it is approved for *publication* OFFICIAL REPORTING by the Supreme Court Reporter; *and* (2) *the OR A* majority of the judges of the Court of Appeals hearing the case, *certifies to the Supreme Court Reporter* PROVIDED that the opinion meets ANY ONE OR MORE OF the standards for publication specified in Section (E) of this Rule. ANY LITIGANT OR OTHER PERSON MAY AT ANY TIME FILE A MOTION TO HAVE AN OPINION OR PART THEREOF OFFICIALLY REPORTED, STATING THE REASONS WHY IT MEETS THE STANDARDS FOR PUBLICATION, WHICH MOTION SHALL BE RULED ON BY THE JUDGES HEARING THE CASE IN CONSULTATION WITH THE SUPREME COURT REPORTER. OPINIONS NOT OFFICIALLY REPORTED MAY BE SUB-

MITTED TO PUBLISHERS AND DISSEMINATORS OTHER THAN THE SUPREME COURT REPORTER EXCEPT AS PROVIDED IN SECTION (A) OF THIS RULE.(C) In addition to or in lieu of the provisions of Section (B)(2) of this Rule, a Court of Appeals may determine by rule that each of its *decisions* OPINIONS OR PARTS THEREOF, excluding orders on procedural matters, orders without opinion, *and* brief memorandum decisions, AND JUDGMENT ENTRIES UNDER APP. R. 11.1(E), may be sent to the Supreme Court Reporter for determination whether such opinion shall be *published* REPORTED in the Ohio Official Reports.

We note that these two sections introduce changes from R.C. 2503.20. That statute provides that the ultimate decision about official reporting lies with the judges of the Court of Appeals. We recommend that Section (B) be changed so that inclusion in the Official Reports can be ordered by either the Reporter or a majority of the judges hearing the case, provided that the opinion meets any one or more of the standards for publication in Section (E). In connection with this recommendation we also recommend that Section (D)(1) be changed so that it is consistent with these recommended changes to Section (B).

We make this recommendation because we believe the ultimate decision about what is published should be made by the judges whose duty it is not only to decide the case stating their reasons but also to make significant judgments of precedential value known throughout their judicial district.

We find no other publication plan among the federal or state courts of appeals that takes the decision about publication away from the judiciary and places it in an appointed administrative officer, however respected the office or responsible the incumbent. We suggest that excessive length of opinions and unnecessary publication will be controlled by the combined good sense and good will of the appellate judges and the Reporter working together.

We recommend that Sections (B) and (C) of Rule 2 refer to “opinions or parts thereof” because in certain cases, some rulings on assignment of error may not meet the standards for publication and can be omitted without changing the sense and meaning of the precedential points of law decided in the case.

We recommend that a provision be added to Section (B) permitting any litigant or other person to file a motion to have any opinion or part thereof reported officially, stating the reasons why it meets the standards for publication, the ultimate decision about publication remaining with the judges hearing the case in consultation with the Reporter. Two federal circuits and two states have these provisions, which tend to meet the criticism against the limitations of publication to the effect that precedent might be suppressed by nonpublication of significant opinions.

We recommend that a provision be added to Section (B) for the submission of cases not officially reported to publishers and disseminators other than the Reporter.

In any and all events, we recommend that Section (B) and (C) provide that the ultimate decision about publication, by whomsoever made, must be made by applying the standards for publication.

Judge Stephenson and Messrs. Fitzsimmons and Manos disagree with the foregoing, believing that Sections (B) and (C) should remain as originally written.

Judge Stephenson does not want the Reporter empowered to report cases not approved for reporting by the court.

#### RULE 2(D)(1)

(D)(1) Opinions forwarded to the Supreme Court Reporter by Courts of Appeals shall be written in as concise form as may be consistent with a clear presentation of the *law of the case* POINT OR POINTS OF LAW DECIDED IN THE CASE AND SHOULD NOT NORMALLY EXCEED TWENTY-FIVE PAGES IN LENGTH. IF THE *The* Supreme Court Reporter *may cause opinions which have manuscripts greater than twenty-five pages to be reduced in length*; ADVISES THE JUDGES DECIDING THE CASE THAT ANY OPINION SHOULD NOT BE OFFICIALLY REPORTED OR SHOULD BE CHANGED OR REDUCED, THE JUDGES SHALL GIVE CAREFUL CONSIDERATION TO HIS ADVICE.

We recommend that in the first sentence the phrase “the law of the case” be changed to “the point or points of law decided in the case.” See recommendation re Rule 1(B).

We recommend that the second sentence, which now conflicts with R.C. 2503.20, be changed to provide that if the Reporter advises the judges that any opinion should not be officially reported for any reason or should be changed or reduced, the judges shall listen carefully.

Opinions should be concise, in the first instance, but we know of no judge who is willing to surrender and turn over to another party the crucial task of reducing the length of an opinion discussing complex issues and doctrines.

#### RULE 2(D)(2)

(2) Each opinion forwarded to the Supreme Court Reporter shall have a cover page indicating thereon the number and style of the case, the character of the proceeding, (E.G., MANDAMUS, HABEAS CORPUS, CRIMINAL APPEAL FROM COMMON PLEAS, CIVIL APPEAL FROM MUNICIPAL COURT), the Court of Appeals deciding the case, the attorneys of the parties, the judgment of the court and the date said judgment was journalized. (SEE FORM 1.)

We suggest that the meaning of “the character of the proceeding” needs clarification, and we assume that the phrase refers to the classification of cases in the way cases are classified for the quarterly status reports filed by the Courts of Appeals.

We suggest the requirement of a cover page will be better understood if an official form is attached to the rule. We have drafted an example, attached as Form 1 to Appendix B.

#### RULE 2(D)(3)

(3) The Supreme Court Reporter MAY SUGGEST EDITING CHANGES TO THE JUDGES HEARING THE CASE AND shall prepare, *edit*, index, and cause to be *published* OFFICIALLY REPORTED all Courts of Appeals opinions properly submitted and approved for *publication*. THE OHIO OFFICIAL REPORTS.

While this section follows a similar sentence in R.C. 2503.20, we suggest that it be changed to complement the changes in Rule 2(D)(1) and to leave ultimate decisions about the editing changes to the judges hearing the case.

#### RULE 2(E)

(E) An opinion of a Court of Appeal may be selected for *publication* OFFICIAL REPORTING if it is *determined by the Supreme Court Reporter that the case contributes significantly to the body of Ohio case law, and that the Court of Appeals which heard the case certifies that the opinion* meets one or more of the following standards for publication:

- (1) It establishes a new rule of law, which term as used in this Rule includes common law, statutory law, procedural rules and administrative rules;
- (2) It alters, or modifies, or overrules an existing rule of law;
- (3) It applies an established rule of law to facts significantly different from those in previously published applications;
- (4) It explains, criticizes, or reviews the history of an existing rule of law;
- (5) It creates or resolves a conflict of authority, or it reverses, overrules, or otherwise addresses a published opinion of a lower court or administrative agency;
- (6) It concerns or discusses one or more factual or legal issues of significant public interest;
- (7) It concerns a significant legal issue and is accompanied by a concurring or dissenting opinion;
- (8) It concerns a significant legal issue upon the remand of a case from the United States Supreme Court or the Ohio Supreme Court.

Because Rules 2(B) and (C) set forth who makes the decision about inclusion in the Official Reports, we recommend that parts of the opening paragraph be deleted.

In any and all events, we strongly recommend that the third line must be deleted because it adds another standard of publication that may be interpreted differently than those set forth in Subsection (1) through (8) of Rule 2(E). We interpret those eight Subsections as being an explicit elaboration of what is meant by the phrase “contributes significantly to the body of Ohio case law.”

#### RULE 2(F)

(F) The *syllabus* HEADNOTE of a Court of Appeals opinion shall not be considered THE CONTROLLING STATEMENT OF EITHER THE POINT OF POINTS OF LAW DECIDED OR the law of the case., BUT RATHER A SUMMARY *The syllabus shall be considered solely as headnotes* for the convenience of the public and the bar as a research and indexing aid. *In a Court of Appeals opinion, the law of the case is incorporated within the body of the opinion. The law of the case of the specific case before the Court of Appeals for adjudication. Opinions submitted to the Supreme Court Reporter may be submitted with a syllabus approved by the judges of the Court of Appeals which heard the case.*

We believe that while the first two sentences of Rule 2(F) are significant, the balance is not. We recommend that these two sentences be combined as noted. We have changed “syllabus” to “headnote” with respect to Courts of Appeals opinions, because a headnote does not authoritatively state the points of law decided in the case, as does a Supreme Court syllabus.

## RULE 2(G)

*(G) Unofficially published opinions and unpublished opinions of the Court of Appeals may be cited by any court or person subject to the following restrictions, limitations, and exceptions:*

(1) An unofficially published or unpublished opinion shall not be considered controlling authority in the judicial district in which it was decided except between the parties thereto when relevant under the doctrines of the law of the case, res judicata or collateral estoppel or in a criminal proceeding involving the same defendant;

(2) In all other situations, each unofficially published opinion or unpublished opinion shall be considered merely persuasive authority on a court, including the deciding court, in the judicial district in which the opinion was rendered. Opinions published in the Ohio Official Reports, however, shall be considered controlling authority for all purposes in the judicial district in which they were rendered unless and until each such opinion is reversed or modified by a court of competent jurisdiction to do so;

(3) A party who cites an unpublished opinion shall attach a copy of the opinion to his brief or memorandum and indicate any disposition by a superior appellate court of any appeal therefrom known after diligent search.

(G) ALL OPINIONS OF THE COURTS OF APPEALS SHALL BE CONTROLLING AUTHORITY IN THE JUDICIAL DISTRICT IN WHICH FILED, UNLESS AND UNTIL REVERSED, OVERRULED OR MODIFIED BY A COURT OF COMPETENT JURISDICTION TO DO SO. COUNSEL CITING AN OPINION NOT REPORTED IN THE OHIO OFFICIAL REPORTS SHALL ATTACH A COMPLETE COPY TO THE BRIEF OR MEMORANDUM IN WHICH THE CITATION IS MADE AND SHALL CERTIFY THAT THE CITED OPINION(S) REPRESENTS ALL OHIO OPINIONS NOT OFFICIALLY REPORTED ON THE POINT(S) FOR WHICH CITED THAT ARE KNOWN TO COUNSEL AFTER DILIGENT SEARCH, AND THE DISCLOSURE OF ANY DISPOSITIONS OF ANY APPEAL BY A SUPERIOR APPELLATE COURT THAT ARE KNOWN TO COUNSEL AFTER DILIGENT SEARCH. (SEE FORM 2)

Section (G) is, in large part, a significant change from established law and from the provisions of R.C. 2503.20. We strongly recommend major changes, because we believe the reasons for the changes are overwhelming.

If Section (B), (E) and (G) of Rule 2 remain as drafted, then the Reporter becomes the final arbiter of what law shall be controlling authority in each of the appellate districts. The judges of the Courts of Appeals have no say about controlling authority either by way of initial decision to report officially, or by appeal from the Reporter's decision. With respect to unpublished and unofficially published opinions, the Courts of Appeals would become ad hoc administrative agencies without any need to be consistent from case to case in the application or declaration of the law of Ohio. These are undesirable results. For the sake of stability, a court of appeals must apply the law consistently in its jurisdiction and must follow the first decision made on any point of law by any panel in the appellate district, assuming the decision is consistent with the law as laid down by higher authority. The doctrine of *stare decisis* is that each court decision entering a new area is precedent for the future and must be the guiding principle until modified or overruled in the orderly course of the evolution of the law. Finally, even though an opinion is not officially reported, it will be available in formats other than printed copy, such as sets of opinions disseminated in the appellate districts, microfiche or computer data base. Inconsistencies can not be buried.

Further, the citation of opinions not reported in the Ohio Official Reports should be conditioned on the attachment of (1) a copy to the brief or memorandum in which cited and (2) a certificate by the citing attorney that states that the cited opinion(s) represents all Ohio opinions not officially reported on the point(s) for which cited that are known to him after diligent search, and that discloses any disposition of any appeal by a superior appellate court known after diligent search. We suggest a form for the certificate as Form 2 in our Appendix B.

#### RULE 2(H)

*(H) Notwithstanding any provision to the contrary in Section (G), unofficially published opinions or unpublished opinions of one appellate district may be cited by the Court of Appeals of another appellate district for purposes of certifying to the Supreme Court a conflict question within the provisions of Sections 3(B)(4) and 2(B)(2)(e) of Article IV of the Ohio Constitution.*

We suggest that this Section should be deleted, because the provisions of Sections 3(B)(4) and 2(B)(2)(e) of Article IV of the Constitution are largely self-executing, and because the entire subject is covered by Supreme Court Rule of Practice III and by R.C. 2505.072.

#### RULE 2(I)(1) AND (2)

(I)(1) The acceptance or rejection for reporting of any opinion by the Supreme Court Reporter shall not be considered a statement of opinion by the Supreme Court as to the merits of the law stated therein.

(2) The refusal of the Supreme Court to accept any case for review shall not be considered a statement of opinion by the Supreme Court as to the merits of the law stated within the case.

We believe that Section I contains useful statements. In particular, Subsection (2) will counter the perennial fallacy used by counsel, in an attempt to upgrade a lower court's decision that was not accepted by the Supreme Court for review.

If Section (H) is deleted, Section (I) must be relettered to (H).

#### RULE 2(J)

*(J) This Rule THESE RULES shall be effective and applicable to all cases decided on and after \_\_\_\_\_.*

We recommend that the provisions about effective date should apply to all three Rules and therefore should be placed after Rule 3.

We recommend the deletion of the words "and applicable to all cases decided" because this phrase suggests (1) that there are no standards for publication of opinions made before the effective date that may be considered for official reporting afterwards, and (2) that only unpublished opinions rendered after the the [sic] effective date may be cited, contrary to present practice.

## RULE 3

RULE 3. OPINIONS OF COURTS INFERIOR TO THE COURTS OF APPEALS

*The provisions of Rule 2 shall apply to the opinions of all Ohio courts inferior to the Courts of Appeals except to the extent that the provisions would by their nature be clearly inapplicable.*

(A) NO OPINION OF A COURT INFERIOR TO THE COURTS OF APPEALS SHALL BE REPORTED IN THE OHIO OFFICIAL REPORTS IF (1) THE SUPREME COURT HAS THE CASE PENDING FOR ADJUDICATION ON THE MERITS OR HAS RULED UPON THE MERITS, UNLESS THE SUPREME COURT EXPRESSLY ORDERS SUCH OPINION TO BE PUBLISHED. (2) IF A CASE IS PENDING BEFORE THE SUPREME COURT ON A MOTION TO CERTIFY THE RECORD OR A MOTION FOR LEAVE TO APPEAL.

(B) NO OPINION OF A COURT INFERIOR TO THE COURTS OF APPEALS SHALL BE REPORTED IN THE OHIO OFFICIAL REPORTS UNLESS (1) IT MEETS ANY ONE OR MORE OF THE STANDARDS FOR PUBLICATION SPECIFIED IN RULE 2(E), AND (2) IT IS APPROVED FOR OFFICIAL REPORTING BY SUPREME COURT REPORTER. THE WRITING JUDGE, ANY LITIGANT OR ANY OTHER PERSON MAY AT ANY TIME SUGGEST IN WRITING TO THE SUPREME COURT REPORTER THAT AN OPINION OR PART THEREOF SHOULD BE OFFICIALLY REPORTED, STATING THE REASONS WHY IT MEETS THE STANDARDS FOR PUBLICATION.

(C) OPINIONS OF THE INFERIOR COURT FORWARDED TO THE SUPREME COURT REPORTER SHALL BE WRITTEN IN AS CONCISE FORM AS MAY BE CONSISTENT WITH A CLEAR PRESENTATION OF THE POINT OR POINTS OF LAW DECIDED IN THE CASE AND SHOULD NOT NORMALLY EXCEED TWENTY-FIVE PAGES. THE SUPREME COURT REPORTER MAY SUGGEST EDITING CHANGES TO THE WRITING JUDGE. WHEN THE OPINION IS APPROVED FOR OFFICIAL REPORTING, THE SUPREME COURT REPORTER SHALL PREPARE, INDEX AND CAUSE IT TO BE INCLUDED IN THE OHIO OFFICIAL REPORTS.

(D) EACH OPINION OF THE INFERIOR COURTS FORWARDED TO THE SUPREME COURT REPORTER SHALL HAVE A COVER PAGE INDICATING THEREON THE NUMBER AND STYLE OF THE CASE, THE CHARACTER OF THE PROCEEDING, (E.G., MANDAMUS, HABEAS CORPUS, CRIMINAL ACTION, CIVIL ACTION), THE COURT DECIDING THE CASE, THE ATTORNEYS OF THE PARTIES, THE JUDGMENT OF THE COURT AND THE DATE THE JUDGMENT ENTRY WAS JOURNALIZED.

(E) THE HEADNOTE OF AN INFERIOR COURT'S OPINION SHALL NOT BE CONSIDERED THE CONTROLLING STATEMENT OF EITHER THE POINT OR POINTS OF LAW DECIDED OR THE LAW OF THE CASE, BUT RATHER A SUMMARY FOR THE CONVENIENCE OF THE PUBLIC AND THE BAR AS A RESEARCH AND INDEXING AID.

The Courts inferior to the Courts of Appeals are under no duty to write opinions, but it may be advisable for them to do so in certain cases. When they do, the opinion has an obviously limited authority even within the jurisdiction of the writing court. Nevertheless, there are a certain number of instances when the publication of a lower court's opinion has value and will be persuasive authority within and without its jurisdiction; for instance, when the opinion interprets a new law or a local rule or makes a factual determination that may later call for the application of the doctrine

of collateral estoppel. Publication will be advantageous in such instances for both bench and bar. At the same time, the decision to publish should be made from as broad a view as possible.

We recommend that Rule 3 be explicit and that it give to the Reporter the decision whether or not to include opinions of the lower courts in the official reports, either on his own initiative, or on suggestion of the lower court, any litigant or any other person, provided always that the opinion meets any one or more of the standards for publication. This recommendation changes the provisions of R.C. 2503.20 by adding the standards of publication.

Respectfully submitted for the Committee,  
Robert L. Black, Jr., Chairman

Honorable Jack G. Day  
Honorable Robert H. Gorman  
Honorable James A. Brogan  
Honorable Frank G. O'Bell  
Honorable Joseph Donofrio  
Honorable Earl E. Stephenson  
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Douglas Wrightsel, Esq.  
John Mason  
Matthew Fitzsimmons, Esq.  
Coit H. Gilbert, Secretary

(Editor's Note—Two appendices to the report have been deleted. The appendices contained Ohio Revised Code section 2503.20 and the Supreme Court Rules for the Reporting of Opinions.)



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