St. Mary's Law Journal

Volume 24 | Number 1 Article 2

1-1-1992

Unpublished Opinions Shall Not Be Cited as Authority: The Emerging Contours of Texas Rule of Appellate Procedure 90(I).

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"UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY": THE EMERGING CONTOURS OF TEXAS RULE OF APPELLATE PROCEDURE 90(i)

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I. INTRODUCTION

Anxieties about overpublication are not new. Three thousand years have passed since King Solomon's comment, "[o]f making many books there is no end."[1] His remark rings especially true in law. As the law advances, it leaves behind a paper trail which defines the content of the common law. Oliver Wendell Holmes had this in mind when he said, "The history of what the law has been is necessary to the knowledge of what the law is."[2] That trail continues to grow. But unlimited growth has its price. Rule 90 of the Texas Rules of Appellate Procedure (Rule 90)[3] represents an effort to extend relief to swollen law libraries. The heart of the rule, part (i), prohibits the citation of unpublished opinions "as authority."[4] Its scope is the subject of this article.

A. *Concern over Unrestricted Publication*

"Since the early 19th century," one writer begins, "American legal scholars have warned against the uncontrolled proliferation of law reports."[5] The British have been bothered for even longer. Their concerns date back at least as far as Lord Chief Justice Hale's 1671

1. *Ecclesiastes* 12:12.

2. OLIVER W. HOLMES, JR., THE COMMON LAW 37 (Little, Brown and Co. 1881). "In order to know what it is, we must know what it has been, and what it tends to become." *Id.* at 1.

3. TEX. R. APP. P. 90.

4. TEX. R. APP. P. 90(i).

5. J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 791 (1975); *see also id.* (quoting as example Bliss & White, *The Common Law*, 10 N. AM. REV. (n.s.) 411, 433 (1824)).

observation that "as the rolling of a snowball, it increaseth in bulk in every age, until it becomes utterly unmanageable."[6] By 1949, scholars questioned whether legal writers were, themselves, discussing the problem too much.[7]

In Texas, worries about judicial overproduction have persisted throughout the twentieth century.[8] An early protest appeared in the first volume of the *Texas Law Review*. The writer was presumably referring to quantity rather than quality when he described Texas decisional law as "a mountainous pile."[9] He warned of a system "fast verging upon a state of legal chaos."[10] Although the Texas Supreme Court began to use per curiam opinions more frequently around 1925,[11] perhaps as a corrective device, the flood hardly abated. Texas now has more judges and more courts than ever before[12] and history offers no reason to expect retrenchment.

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6. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 141 (1963).

7. John J. O'Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13, 14 n.3 (1949).

8. *See* A.H. McKnight, *Judge Gallagher on Appellate Procedure*, 6 TEX. L. REV. 75, 76 (1927) (reviewing article by intermediate court judge). McKnight noted:

> A question that has been considerably discussed among members of the bar is whether the opinions of the Courts of Civil Appeals should be published and, if so, to what extent and when; and to this question Judge Gallagher devotes considerable attention. He refers to the change in the law made in 1901, requiring the Courts of Civil Appeals to make and file conclusions of fact and law upon each material point assigned as error therein, and to the 1905 enactment, requiring the courts to decide all issues presented to them by proper assignments of error.

Id.

9. C.T. McCormick, *Stemming the Tide of Judicial Opinions*, 1 TEX. L. REV. 450, 450 (1923).

10. *Id.* at 451.

11. *See* Ewell H. Muse, Jr., Note, 12 TEX. L. REV. 469, 470-71 (1934) (noting use of per curiam opinions since 1925).

12. *See* Clarence Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH L. REV. 549, 550-53 (1983) (noting additions to state judiciary). Another judge has written:

> When the Texas Legislature in 1981 increased the number of intermediate appellate justices to eighty, many thought this would solve the delay problem in the Texas appellate process. Instead, at the end of the last fiscal year, Texans had nearly a thousand cases which had been pending in the fourteen courts of appeals for more than one year. The average time between the filing and disposition of a case by opinion had increased to almost a year. . . .
>
> With the number of new filings each year, and the increase in the Texas population, it does not take much imagination to discern that unless remedial measures are demanded and taken by the organized bar of this state, that this situation will deteriorate.

Jim Brady, *Reducing Appellate Delay—A "Fast Track" System*, 17 TEX. TECH L. REV. 179, 180 (1986).

B. *Concern over Restricted Publication*

The present scheme creates two classes of judicial opinions, published and unpublished. Unpublished opinions are not supposed to count for purposes of stare decisis; published opinions are. Rule 90(i) reads in full: "Unpublished opinions shall not be cited as authority by counsel or by a court." In order to understand the rule's meaning and importance, it is necessary to examine the framework for opinion production. Rule 90 regulates the issuance of opinions from the courts of appeals. Part (a) requires intermediate courts to issue a written opinion in conjunction with the decision of each case:

> The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

There is no such requirement for the supreme court[13] and "[n]o one seriously questions the advisability of publishing most decisions of the highest court of any jurisdiction."[14] Rather, publication rules are the business of intermediate courts. Because intermediate courts lack the power to screen out unimportant cases through discretionary jurisdiction, "the publication of these opinions is an area that invites regulation."[15]

Texas courts of appeals ordinarily sit in panels of three,[16] and the panel that hears the case is responsible for producing an opinion. Typically, one of the three judges is chosen as the author, although the court may issue the decision per curiam. Rule 90(b) resolves the matter by a majority vote of the same panel.[17] Also subject to majority vote is whether the opinion shall be published.[18] Although the

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13. *See* TEX. R. APP. P. 181 (stating that "the opinion of the court will be reduced to writing in such cases as the court deems of sufficient importance to be reported"). For reasons more historical than structural, the supreme court has its own set of rules. One commonly finds asymmetries between a supreme court rule and its court of appeals counterpart.

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

15. *Id.*

16. *See* TEX. R. APP. P. 79(a) (calling for three-judge panels).

17. The decision might be reposed somewhere other than the panel. *See* Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974, 976 (7th Cir. 1991) (stating that "Wisconsin has a judicial committee in charge of publication, and the decision is made by judges other than those responsible for the opinion").

18. TEX. R. APP. P. 90(b) provides:

rule literally permits a party to make a motion for nonpublication, during these days of more or less universal publication, courts usually refuse this request since the opinions are public records and are available to anyone requesting a copy.[19] Naturally, there is little precedent on point.

Two types of supreme court action can cause an unpublished opinion to become reported by operation of law.[20] First, when the supreme court refuses an application for writ of error, it effectively adopts the lower court opinion as its own.[21] A decision that receives such an imprimatur is to be published. But true refusal of a writ should not be confused with denial, refusal "n.r.e.," or other varieties of writ disposition.[22] Second, when the supreme court grants an application for writ of error, it is agreeing to take some sort of action. Analysis of supreme court activity is advanced by requiring publication of the lower court's opinion. The facts, for example, may receive more attention in the intermediate court's discussion.

A respectable rule must provide standards for separating the sheep

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DETERMINATION TO PUBLISH. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing. . . . Any party may move the appellate court to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief. The Supreme Court or the Court of Criminal Appeals may on request of any party or non-party to a court of appeals decision order a court of appeals opinion published at any time.

TEX. R. APP. P. 90(b). This is not as simple as it appears. Though the rule formally requires a majority vote for publication, that limitation may be circumvented. A holdout may write a separate opinion and order it published. When a separate opinion is published, the majority opinion must also be published. TEX. R. APP. P. 90(e). Furthermore, the decision is subject to reconsideration. Though the case may have concluded long before, the court retains plenary power to order publication unless the court of last resort has acted on a request for review. Even then, the high court itself may order belated publication. *E.g.*, Meuth v. Hartgrove, 811 S.W.2d 626 (Tex. App.—Austin 1990, writ denied) (ordered published in 34 Tex. Sup. Ct. J. 610 (June 5, 1991)).

19. *See* Alamo Motor Lines v. International Bhd. of Teamsters, 229 S.W.2d 112, 117 (Tex. Civ. App.—San Antonio 1950, no writ) (refusing request for nonpublication by losing litigant, reasoning that court could not prevent private publisher from disseminating decision).

20. *See* TEX. R. APP. P. 90(h) (providing for publication upon grant or refusal of application for writ of error or upon denial or dismissal of application for writ of error).

21. State *ex rel.* McWilliams v. Town of Oak Point, 579 S.W.2d 460, 462-63 (Tex. 1979).

22. *See generally* Ted Z. Robertson & James W. Paulsen, *Rethinking the Texas Writ of Error System*, 17 TEX. TECH L. REV. 1, 1-25 (1986) (distinguishing various writ designations).

from the goats.[23] Rule 90(d) creates a presumption against publication which is rebuttable by demonstrating that the case involves any one of four factors: (1) establishment of a new rule, alteration of an existing rule, or application of an existing rule to a novel fact situation likely to recur; (2) an issue of continuing public interest; (3) criticism of existing law; or (4) resolution of an apparent conflict of authority.[24] These are hazy boundaries. Consequently, publication rates vary widely among the fourteen courts of appeals.[25]

A nonpublication rule necessarily entails some disadvantages.[26] Complaints are common whenever opinions are subject to a "do not publish" order. One frequently finds concern that courts are deliberately burying their work product and suppressing precedent.[27] The publication decision can be decisive to the fate of a writ application. For the Texas Supreme Court to have subject matter jurisdiction, an ordinary cause must fit into one of six statutory pigeonholes.[28] The last of these, called subdivision six jurisdiction, is a catch-all category. It applies when the court of appeals has committed an error of law "of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction."[29] This is pretty elastic. A question arises. Although one can easily see how a published opinion may affect the jurisprudence of the state, and thus fall within subdivision six, how can an unpublished opinion ever do so? After all, Rule 90(i) forbids its citation as authority.

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23. *See* William L. Reynolds & William M. Richman, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313, 324 (1985) (commenting on need for standards).

24. TEX. R. APP. P. 90(d).

25. *See, e.g.*, Justice Raul A. Gonzalez, *Courts of Appeals Opinions Published/Not Published for Years Ending August 31, 1989 and August 31, 1990, in* 2 STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE W-1 (1990). For fiscal year 1990, the state-wide average was 26% publication, while the Waco court published 8% and the Beaumont court published 45%. *Id.* For fiscal year 1989, the statewide average was 28% publication, while the Waco court published 8% and the Beaumont court published 66%. *Id.*

26. *See* Robert L. Black, Jr., *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477, 477-78 (1981) (noting that although many appeals deserve publication, production of opinions is costly).

27. *See* Chief Justice Paul W. Nye, *The Unpublished Opinion Controversy (The Great Judicial Coverup), in* STATE BAR OF TEXAS, ADVANCED APPELLATE PRACTICE W-1, W-2-3 (1990) (noting that unpublished opinion does not represent subtle shift in law that cannot be applied by legal community).

28. TEX. GOV'T CODE ANN. § 22.001(a) (Vernon 1988).

29. *Id.* § 22.001(a)(6).

II. OTHER JURISDICTIONS

Enduring concerns about restricted publication are not unique to Texas. They exist in every jurisdiction that has moved to limit the production of precedent. The reasons for this relate to the nature of common law adjudication.

A. *England*

The history of English law reports is commonly divided into three periods.[30] The first is the period of the Year Books (1272-1537). These reports are not so much judicial opinions as they are pleading forms. The second period is that of the private law reports (1537-1865). A vacuum was created by the cessation of the Year Books and private reporters quickly took up the task of publishing precedents. This was a great step forward. Because some reporters, such as Coke, were also judges, it is not surprising that the quality of their work is still highly regarded today. Eventually, these compilations could be obtained contemporaneously with the court's decisions. The third period is that of the modern law reports (1865-present). These reports are the product of the legal profession itself, not of the state. That is, barristers have assumed responsibility for publishing court decisions.

The relevance of these changes in reporting cases becomes clear when one recognizes the relationship between adjudication and publication. Without law reports, stare decisis would be a meaningless doctrine. An English authority describes the link between stare decisis and opinion publication:

> The operation of the doctrine of precedent is inextricably bound up with law reporting. The rule is that any decision may be cited to a court provided that it is vouched for by a member of the Bar who was present when judgment was delivered. In addition, since judges may take judicial notice of the whole of English law, an individual judge may rely upon a precedent of which he is aware even though the decision is unreported. There is, thus, no rule that a case may only be cited or relied upon as a precedent if it is reported. Nevertheless personal recollection by judges or counsel is so impermanent and haphazard that it could not possibly form the basis of a workable system. Hence prece-

30. RONALD JACK WALKER, THE ENGLISH LEGAL SYSTEM 154-61 (6th ed. 1985); MICHAEL ZANDER, THE LAW-MAKING PROCESS 203-04 (2d ed. 1985). It has been suggested that the idea of relying on precedent originated in the personal note-taking of Judge Henry Bracton. ALFRED THOMPSON DENNING, WHAT NEXT IN THE LAW? 5-6 (1982).

> dents are almost always contained in law reports. The close nexus between law reporting and the modern doctrine of binding precedent was formulated only when an integrated system of law reporting evolved in the nineteenth century.[31]

The English policy still requires that the reporting barrister must have been present in court when judgment was announced. Under this voucher rule, one cannot simply cite a case purely on the basis of its publication.[32] But by the same token, an unreported decision may be cited if a member of the bar has vouched for it.[33]

By 1978, a burgeoning body of case law was causing difficulties.[34] Then came Lexis. This computerized data storage service arrived in Britain in 1980.[35] Lawyers were quick to use it, and the Law Lords were quick to react. Lord Diplock, a respected jurist, delivered the following remarks in which he disapproved the free citation of unreported precedents:

> My Lords, in my opinion, the time has come when your Lordships should adopt the practice of declining to allow transcripts of unreported judgments of the Civil Division of the Court of Appeal to be cited on the hearing of appeals to this House unless leave is given to do so, and that such leave should only be granted on counsel's giving an assurance that the transcript contains a statement of some principle of law, relevant to an issue in the appeal to this House, that is binding on the Court of Appeal and of which the substance, as distinct from the mere choice of phraseology, is not to be found in one of the generalized or specialized series of reports.[36]

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31. RONALD JACK WALKER, THE ENGLISH LEGAL SYSTEM 132 (6th ed. 1985) (footnote omitted).

32. ALFRED KENNETH KIRALFY, THE ENGLISH LEGAL SYSTEM 80 (7th ed. 1984); *see also* RONALD JACK WALKER, THE ENGLISH LEGAL SYSTEM 154 (stating that "even at the present day, a precedent is not citable merely because it is reported but only if it is vouched for by a barrister who was present when judgment was delivered").

33. Willson v. Greene, [1971] 1 W.L.R. 635, 638.

34. R.J.C. Munday, *New Dimensions of Precedent*, J. SOC. PUB. TEACHERS OF LAW 201 (1978).

35. MICHAEL ZANDER, THE LAW-MAKING PROCESS 217 (2d ed. 1985).

36. Roberts Petroleum, Ltd. v. Bernard Kenny, Ltd., [1983] 2 A.C. 192, 202, [1983] 1 All E.R. 564, 567-68. Lord Diplock's pronouncement was foreshadowed by his comments during the previous year when he complained of increasing americanization of English appellate practice. In *M.V. Yorke Motors v. Edwards*, [1982] 1 All E.R. 1024, he criticized a lawyer's 39-1/2 page written submission as being six times longer than the opponent's filing:

> My Lords, I have thought it right to make these observations in the instant appeal because it provides, in the case lodged by appellant, an example of the spread of the

Lord Diplock mentioned Lexis by name and noted its growing impact on the appellate process. He described two classes of law reports, general and specialized. The latter comprised the modern collections of precedents classified by subject matter, such as taxation or criminal law. He concluded that a case which failed to be included in the specialized reports must be necessarily unimportant. The four other Law Lords hearing the appeal expressly agreed.[37] This growth of specialized law reports is a phenomenon which is not confined to Britain.

B. *Federal Courts*

Several features of the English system failed to take root in the United States. An obvious example of this failure to take root is the absence of a bifurcated legal profession. American courts therefore cannot demand the endorsement of an attending barrister to legitimize a law report. But one can see vestiges of the English scheme in the United States Supreme Court's early reliance on named reporters such as Cranch, Wheaton, and Peters. These were lawyers,[38] and Texas still requires a law license of anyone who serves as official reporter for the supreme court.[39]

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tendency which I have deprecated towards preparing written cases in the style of American "appellate briefs." . . .

Id. at 1026. The infraction was aggravated by what his Lordship called a "short" oral argument: a mere one and one-half hours.

37. Three days earlier, the Master of the Rolls, Sir John Donaldson, had expressed similar sentiments in *Stanley v. International Harvester Co. of Great Britain, Ltd.*, THE TIMES, Feb. 7, 1983 (C.A. Feb. 2, 1983). For an example of the difficulties caused by reliance on mere summaries of decision, see *Computer Machinery v. Drescher*, [1983] 3 All E.R. 153, 157.

The Court of Appeals has since instituted a requirement that advocates lodge a "skeleton argument" with the court before presenting oral arguments. *See* Practice Direction, [1990] 1 W.L.R. 794, 795; Practice Direction, [1989] 1 W.L.R. 281, 284. It may well be asked what impact this will have on the distinctions between English and American appellate practice.

38. William Cranch had been a Federalist judge on the Circuit Court of the District of Columbia. Henry Wheaton became the Supreme Court's first official reporter in 1816. Wheaton served as co-counsel with Daniel Webster in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 213 (1827). Wheaton was followed by Richard Peters, whose tenure was marked by controversy. *Wheaton v. Peters*, 33 U.S.(8 Pet.) 591 (1834) was a copyright dispute over the rights to the Supreme Court's opinions. In 1834 the Supreme Court abruptly sacked Peters and replaced him with General Benjamin Howard, largely because of dubious performance in publishing opinions. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 785-86 (rev. ed. 1935) (noting pessimism pervading American legal system about publishing opinions).

39. TEX. GOV'T CODE ANN. § 22.008(a) (Vernon 1988) (stating, "The supreme court shall appoint one or more licensed attorneys to serve at the will of the court and to report the decisions of the supreme court"). But the reporter for the court of criminal appeals, on the

A more subtle distinction between American and English practice is the way in which judges do their work. Whereas the bureaucratization of judging is not the norm in Britain, American federal courts have come to rely increasingly on law clerks. One prominent federal judge has bluntly confessed that "most judicial opinions nowadays are drafted by law clerks."[40] Each United States Supreme Court Justice is entitled to have four clerks, and most do. However, only a century ago they had "virtually no assistance from law clerks."[41]

The general rule in federal courts of appeals is that unpublished opinions have no precedential effect.[42] And every federal appellate court except the Supreme Court[43] designates some of its opinions as unpublished.[44] There is, nevertheless, a wide range of views among the courts as to how they value an unpublished opinion as precedent.[45] In the Fifth Circuit, for example, an unpublished opinion is

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other hand, need not be a lawyer though whoever holds that office may be removed "for inefficiency or neglect of duty." TEX. GOV'T CODE ANN. § 22.104(a) (Vernon 1988).

40. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 190 (1990). *See generally* JOHN B. OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS 10-35 (1980) (reporting on history of law clerks in America); RICHARD A. POSNER, THE FEDERAL COURTS 102-19 (1985) (commenting on rise of law clerks).

41. William H. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A. J. 361, 362 (1973); *accord* WILLIAM H. REHNQUIST, THE SUPREME COURT 260 (1987); *see also* DAVID M. O'BRIEN, STORM CENTER 124-35 (1986) (tracing high court's use of law clerks back to Justice Horace Gray in 1882).

42. *See* RICHARDSON R. LYNN, APPELLATE LITIGATION § 2.16 at 56 (1985); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 581-82 (1981). *But see* Smith v. United States, __ U.S. __, __ n.*, 112 S. Ct. 667, 669 n.*, 116 L. Ed. 2d 758, 760 n.* (1991) (Blackmun, J., dissenting from denial of certiorari) (stating, "The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion").

43. *See* SUP. CT. R. 41 (stating that Reporter of Decisions "shall" prepare court's opinions for publication).

44. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals*, 87 MICH. L. REV. 940, 940 & n.1 (1989) (citing rules); *see also* 2 JOHN W. COOLEY, APPELLATE ADVOCACY MANUAL § 22:05 (1989 & Supp. 1991) (commenting on publication practices of federal appellate courts). Ironically, the Tenth Circuit recently supplemented its 1986 no citation rule by publishing a six year old, previously unpublished dissent to its adoption. *In re* Rules of United States Court of Appeals for the Tenth Circuit, 955 F.2d 36 (10th Cir. 1992) (Holloway, C.J., concurring and dissenting).

45. *See* George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 480 (1988).

precedent.[46] As a result, that court must sit en banc in order to resolve a conflict between published and unpublished decisions.[47]

Consensus on the matter of restricted publication has not yet been achieved. It may never be. Criticism is easy, as the costs of any such scheme are plain to see.[48]

C. *Sister States*

If federal restrictions have caused misgivings, state nonpublication plans have provoked outrage. There is a growing body of scholarship devoted to state nonpublication regimes. Understandably, the scholarship is almost uniformly hostile. One would expect legal scholars to fill law journals with articles opposing any limits on jurisprudential output. However, judges have different interests, and since they write the rules of court, one would expect those rules to reflect an approach different from those advocated in the typical law review.[49]

As of 1981, only sixteen states operated under a nonpublication regime.[50] Some are more severe than others. The most controversial is found in California.[51] The California Supreme Court has the extraordinary authority to "decertify" an intermediate court opinion which would otherwise be published. This power allows the high

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46. Atwood v. Union Carbide Corp., 847 F.2d 278, 280 n.3 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989); United States v. Don B. Hart Equity Pure Trust, 818 F.2d 1246, 1250 (5th Cir. 1987); *see* 5TH CIR. R. 47.5.3 (stating, "Unpublished opinions are precedent").

47. *E.g.*, Nicklos Drilling Co. v. Cowart, 927 F.2d 828 (5th Cir. 1991) (en banc) (overruling Kahny v. Director, Office of Workers' Compensation Programs, 729 F.2d 777 (5th Cir. 1984)).

48. *See* Pamela Fod, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 309 (1977) (distinguishing between important and unimportant cases is at odds with common law system); *see also* 7TH CIR. R. 28(e) (requiring copy of any unpublished opinion at end of brief).

49. *E.g.*, Robert L. Black, Jr., *Unveiling Ohio's Hidden Court*, 16 AKRON L. REV. 107 (1982); Robert L. Black, Jr., *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477 (1981); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986); George Rose Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 ARK. L. REV. 26 (1978).

50. Robert L. Black, Jr., *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477, 478 n.4 (1981).

51. *E.g.*, Julie Hayward Briggs, *Censoring the Law in California: Decertification Revisited*, 30 HASTINGS L.J. 1577 (1979); Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984); Robert A. Seligson & John S. Warnlof, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37 (1972). The controversy has attracted attention even in Texas. *See* Prappas v. Meyerland Comm. Impr. Ass'n, 795 S.W.2d 794, 799 & n.4 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (commenting on California practice).

court to mold the state's jurisprudence more directly than the ordinary adjudicative process would permit. The prospect of the court's relinquishing that power has been described as "not likely."[52]

Ohio's plan has been the subject of several studies.[53] Adopted in 1983, it had to deal with a peculiarity of local practice, namely that the intermediate appellate courts published only three percent of their opinions, leaving in limbo the balance of judicial work product emanating from the courts of appeals. A number of unofficial reports sprang up and unpublished opinions became a de facto part of Ohio common law. Whether the new plan has succeeded depends upon one's definition of success. Unreported decisions are now citable as "persuasive" but not "controlling" authority within the judicial district in which the opinion was rendered, except between the parties to the case.[54]

There is no need to examine each state's approach to limiting the publication of opinions. It is enough to say that certain features are common to all schemes. Assuming that an appellate court must produce an opinion at all, any limiting apparatus must deal with several issues. First, should publication be the rule or the exception? Second, what are the standards for deciding whether to publish an opinion? Third, who makes the decision, and finally, what is the status of an unpublished opinion?

III. HISTORICAL BACKGROUND OF TEXAS RULE OF APPELLATE PROCEDURE 90(i)

A. *The Winding Path of the Law*

There is something of a link between law and political change. It is therefore understandable that Texas legal history reveals marked discontinuities. As Justice Norvell put it, "[T]he common law of Texas is somewhat unique in origin and its development has not in all re-

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52. RICHARDSON R. LYNN, APPELLATE LITIGATION § 2.16, at 56 (1985).

53. *E.g.*, Robert L. Black, Jr., *Unveiling Ohio's Hidden Court*, 16 AKRON L. REV. 107 (1982); Robert L. Black, Jr., *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477 (1981); William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313 (1985); Gerald W. Shaw, *The Legal Significance of Unpublished Court of Appeals Opinions in Ohio*, 6 CAP. U. L. REV. 393 (1977).

54. OHIO SUP. CT. R. REP. OPS. 2(G)(1) & (2); *see also* William M. Reynolds & William L. Richman, *The Supreme Court Rules of the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 329 n.110 (1985) (discussing scope of Ohio rule).

spects coincided with the general course of evolution discernable throughout the other American states."[55] The tidal forces of politics inevitably reshape the law, both in its doctrines and in its institutions.

Doctrinally, after a short struggle the common law triumphed over the civil law tradition still extant in Mexico and Louisiana.[56] Even now, Texas courts look to the common law of England, as construed by sister states on January 20, 1840,[57] for the rule of decision in omitted cases.[58] It arrived "by adoption rather than by inheritance."[59] How would the personality of Texas common law differ had its arrival more closely resembled the pattern in other states? One can only speculate.[60]

Institutionally, the court system has undergone several restructurings. With each modification of the judicial architecture, the rules of precedent have also changed. One of the first major changes took place in 1891 with the establishment of an intermediate court to hear civil cases.[61] Commissions of Appeals have been twice created and twice abolished. Consequently, determining the precedential weight of their decisions can be one of the more challenging aspects of practicing law in Texas.[62] The most recent reordering occurred in 1981

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55. Southern Pac. Co. v. Porter, 160 Tex. 329, 334-35, 331 S.W.2d 42, 45 (1960); *see also* 1 JOHN SAYLES, TEXAS CIVIL PRACTICE 9 (3d ed. 1896) (stating, "Our legislature, our system of procedure, the very organization and functions of our courts, are all peculiar").

56. *See* Robert N. Jones, *A Jurisprudence Better Understood: The Adoption of the Common Law in Texas*, 53 TEX. B.J. 452, 452-53 (1990) (noting common law's displacement of civil law).

57. *Southern Pac. Co.*, 160 Tex. at 334, 331 S.W.2d at 45.

58. TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 1986) (stating, "The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state").

59. *Southern Pac. Co.*, 160 Tex. at 334, 331 S.W.2d at 45.

60. To this day one can discern strains of nineteenth century populism in the state's jurisprudence. *E.g.*, Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 362 (Tex. 1987) (Mauzy, J., concurring) (writing, "The people, speaking through the elective process, have constituted a new majority of this court which has not only the power but the duty to correct the incorrect conclusion arrived at by the then-majority in 1985 on this question").

61. *See* A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY 27-29 (Karl T. Gruben & James E. Hambleton, eds., 2d ed. 1987) (surveying growth in state's judicature).

62. For example, Justice Greenhill explained a minor wrinkle in the writ histories of the 1917 term:

> In 1917 when the Supreme Court was far behind on its docket, the Legislature authorized the court to appoint three justices of the Court of Civil Appeals to act on such application for writ of error as were referred to them. (Articles 1748-1754.) But the statute provided that the refusal or dismissal of such "referred" applications "shall not be re-

when the courts of civil appeals assumed jurisdiction in noncapital criminal cases. What had been a burden for the Texas Court of Criminal Appeals became a burden for fourteen intermediate tribunals.[63] Though the legislature has enlarged the intermediate court bench, caseloads continue to grow and as a result the number of opinions continues to grow. Today, the need for a nonpublication scheme is even more acute.[64]

Intermediate appellate courts became early accomplices in the production of unpublished opinions. With the passage of time, these decisions are of more interest when considered in a historical rather than legal context. However, it is worth pausing to consider their fate.

B. *Before the 1941 Rules*

The history of Texas law reports has been fairly well examined.[65] The evolution of publication practices is somewhat more obscure. When West Publishing began the first volume of the Southwestern Reports, commencing with cases decided in August 1886, a class of unpublished opinions already existed. Posey stepped into the gap with the first of two volumes of hitherto unreported cases.[66] Others

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garded as a precedent or authority." This procedure was used by the Supreme Court from April 1917, through the end of its term in June 1918. When the Commission of Appeals was established and began its deliberations in October 1918, the practice was discontinued. But a writ marked "Refused" during the 1917-1918 period may or may not be an authority, depending on whether it was "referred." A list containing many of the referred cases is set out in 108 Tex. 591-648.

Justice Joe Greenhill, *Uniform Citations for Briefs with Observations on the Meanings of the Stamps or Markings Used in Denying Writs of Error, in* STATE BAR OF TEXAS, APPELLATE PROCEDURE IN TEXAS, § A.1[3], at A-13-14 (1964). Similarly, McCormick has noted the pointlessness of publishing certain decisions by the Commission of Appeals where the Supreme Court declined to adopt the opinions. A statute in effect at that time provided that those opinions were to have no precedential force whatsoever. *See* C.T. McCormick, *Stemming the Tide of Judicial Opinions*, 1 TEX. L. REV. 450, 453 (1923).

63. *See* Clarence Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH L. REV. 549, 553-54 (1983) (discussing increased caseload for 14 courts of appeals).

64. *See* Jim Brady, *Reducing Appellate Delay—A "Fast Track" System*, 17 TEX. TECH L. REV. 179, 180 (1986) (noting increasing numbers and delay).

65. *E.g.*, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY (Karl T. Gruben & James E. Hambleton, eds., 2d ed. 1987); James Hambleton & Jim Paulsen, *The "Official" Texas Court Reports: The Rest of the Story*, 49 TEX. B.J. 842 (1986); Jim Paulsen & James Hambleton, *Confederates and Carpetbaggers: The Precedential Value of Decisions from the Civil War and Reconstruction Era*, 51 TEX. B.J. 916 (1988); Jim Paulsen & James Hambleton, *The "Official" Texas Court Reports: Birth, Death and Resurrection*, 49 TEX. B.J. 82 (1986).

66. 1 S.A. POSEY, TEXAS UNREPORTED CASES (1886).

followed suit.[67] The courts' regard for these cases remains unclear.

There is no doubt that judges occasionally encountered unpublished opinions. For example, in an 1892 opinion, the supreme court noted that the trial court had felt bound by the unpublished opinion of *Wallace v. City of Dallas* in 1884, "a case to which we do not now have access."[68] Likewise, an 1894 supreme court case refers to the lower court's opinion as one which "seems not to have been officially published."[69] It appears that judges themselves controlled the determination of whether to publish.[70] Their method of determination is not certain.

C. *After the 1941 Rules*

Although Texas appellate rules had no separate identity until 1986, many of them existed earlier as rules of civil procedure. When it came to opinion protocol, the mainstay of the 1941 rules was Rule 452:

> Opinions of the Courts of Civil Appeals shall be as brief as practicable, and shall avoid as far as possible lengthy quotations from other decisions or texts; and where the issues involved have been clearly settled by authority or elementary principles of law, the court shall write only brief memorandum opinions. Opinions shall be ordered not published when they present no question or application of any rule of law of interest or importance to the jurisprudence of the State.[71]

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67. *E.g.*, 1 EDMUND SAMSON GREEN, DIGEST OF THE DECISIONS OF THE APPELLATE COURTS OF THE STATE OF TEXAS (1904). The Preface begins with an ambitious claim: "This is a complete digest of all the decisions, civil and criminal, of the appellate courts of Texas from the earliest times to the decisions reported in volume 75 of the Southwestern Reporter." *Id.* at iii.

68. Cooper v. City of Dallas, 83 Tex. 239, 241, 18 S.W. 565, 565 (1892). Although the *Wallace* decision surfaced in Posey's Unreported Cases, its presence there did not lead to acceptance as legitimate. *See* City of Wichita Falls v. Mauldin, 39 S.W.2d 859, 862 (Tex. Comm'n App. 1931, judgm't adopted) (stating that *Wallace* was "not regarded as authority by the Supreme Court of this state").

69. Compton v. Marshall, 88 Tex. 50, 50, 27 S.W. 121, 121 (1894).

70. *See, e.g.*, Huff v. Crawford, 88 Tex. 368, 368, 31 S.W. 614, 614 (1895) (supplemental opinion "ordered" published); Stevens' Ex'rs v. Lee, 70 Tex. 279, 279, 8 S.W. 40, 41 (1888) (appeal of retrial where original reversal announced in unpublished opinions). Another case cites a dissent that had appeared in Southwestern Reporter but not in the official law reports. Bell v. Faulkner, 84 Tex. 187, 191, 19 S.W. 480, 481 (1892) (separate statement of Henry, J.) (referring to Davis v. State, 75 Tex. 420, 433, 12 S.W. 957, 962 (1889) (Henry, J., dissenting)).

71. TEX. R. CIV. P. 452 (Vernon 1941) (repealed 1986). For contemporaneous commentary, see Clyde Emery, *Overload of Law Books: How Can We Reduce It?*, 5 TEX. B.J. 77, 78 (1942) (discussing dearth of published material); Clyde Emery, *Opinion-Writing Reform is Be-*

An amendment was made in 1943 to provide for automatic publication whenever the supreme court should order a writ either granted or unqualifiedly refused. That feature did not survive the next revision in 1982. In the 1982 revision, more properly called a replacement, the automatic publication provision gave way to a discretionary power. Consequently, the supreme court could order publication in a case it had granted or refused writ, although it rarely did so.

In 1986, Rule 452 was redesignated as Appellate Rule 90. The automatic publication clause was restored in the 1990 amendment process. The texts of Rule 452(f) and Rule 90(i) are precisely the same: "Unpublished opinions shall not be cited as authority by counsel or by a court." Because Rule 452(f) had no predecessor, it has taken a decade to discover its contours.

IV. APPELLATE RULE 90(i)

Implicit in the concept of an unpublished opinion is a restriction on its availability as precedent. It makes no sense to suppress a decision which is to have meaning for purposes of stare decisis. The Fifth Circuit's contrary practice must be seen as anomalous. A noncitation rule follows as a logical consequence of a nonpublication rule. It is generally said, therefore, that unreported cases carry no weight.[72] But the scope of such a rule is far from self-evident. In what forums does the rule apply? What does it mean to cite a case "as authority?" When is a case not a case? These issues are explored below.

A. *"Unpublished . . ."*

Despite Rule 90's insistence that each opinion carry the notation "publish" or "do not publish," life is not so simple.

1. Ordered Published but Not Yet Reported

There is an inevitable time lag between the official issuance of an opinion and the date of its appearance in the advance sheets. The

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gun, 5 TEX. B.J. 79, 79-80 (1942) (noting trend toward reducing number of reported opinions); Towne Young, *Our Courts of Civil Appeals*, 3 TEX. B.J. 101, 111 (1940) (suggesting methods whereby appeals process may be improved).

72. Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983); Wheeler v. Aldama-Luebbert, 707 S.W.2d 213, 216 (Tex. App.—Houston [1st Dist.] 1986, no writ); Nava v. Steubing, 700 S.W.2d 668, 672 (Tex. App.—San Antonio 1985, no writ); Mid-Continent Supply Co. v. Clements, 676 S.W.2d 144, 145 (Tex. App.—Tyler 1984, writ dism'd w.o.j.).

primary reason for delay is the need to await disposition of any motions for rehearing. This does not normally pose a problem. Any member of the public may procure a copy of the slip opinion from the court clerk and a commercial service reproduces each week's slip opinions designated for publication by the fourteen courts of appeals.

Criminal practitioners should exercise caution. There is authority for the proposition that a decision is "not final and not part of the jurisprudence of this State" if a motion for rehearing is pending.[73] That statement of law is quite wrong. It is traceable to a 1978 criminal case, *Komurke v. State*.[74] Komurke's trial took place during an interlude between original issuance of an opinion in *Bishoff v. State* and its replacement by a different opinion on rehearing.[75]

On appeal, Komurke challenged his conviction as a violation of ex post facto prohibitions, pointing to the withdrawal of the original opinion in *Bishoff*. The court of criminal appeals rejected his claim with the unfortunate words, "the opinion on original submission was never final and never was a part of the jurisprudence of this State."[76] Over time, this holding has mutated into a more general formulation. Whether the mutation will spread and whether it will infect civil cases cannot be predicted. Civil jurisprudence may have been adequately inoculated by a supreme court holding that trial court judgments are "final" for purposes of preclusion despite the taking of an appeal.[77]

Given the newly restored provision for automatic publication in certain instances, what does one do with an opinion that ought to be published by operation of law, yet has not been? Suppose, for example, that a court of appeals disposes of a case with an unpublished

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73. Canida v. State, 823 S.W.2d 382, 383 n.2 (Tex. App.—Texarkana 1992, no pet.); Henderson v. State, 822 S.W.2d 171, 173 (Tex. App.—Houston [1st Dist.] 1991, no pet.); Vasquez v. State, 814 S.W.2d 773, 776 n.1 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd); Brown v. State, 807 S.W.2d 615, 616 (Tex. App.—Houston [14th Dist.] 1991, no pet.); *see* Yeager v. State, 727 S.W.2d 280, 281 n.1 (Tex. Crim. App. 1987) (cautioning against reliance on "non-final" decisions).

74. 562 S.W.2d 230 (Tex. Crim. App. 1978).

75. Bishoff v. State, 531 S.W.2d 346 (Tex. Crim. App. 1976).

76. *Komurke*, 562 S.W.2d at 235.

77. Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 6 (Tex. 1986). Pre-*Smithwick* authority held that a decision is not "final" for purposes of creating conflict jurisdiction until it is no longer subject to modification on rehearing. Barber v. Intercoast Jobbers & Brokers, 417 S.W.2d 154, 156-157 (Tex. 1967). Whether that rule survived *Smithwick* is unclear. The question is no longer significant, however, because the supreme court now has more or less plenary discretion to grant appellate review, even in the absence of a conflict. TEX. GOV'T CODE ANN. § 22.001(a) (6) (Vernon 1988).

decision but the supreme court grants the writ and summarily reverses. Rule 90 indicates that the unpublished decision is to be released "forthwith" by the clerk of the intermediate court. It remains to be seen whether court clerks are quick to abide by this requirement.[78] May a lawyer cite the formerly unpublished decision as a matter of right, as soon as the supreme court issues its decision?[79] We do not know. Though one might well ask why counsel would want to cite a reversed case at all, the possibility exists that the supreme court might have reversed only a part of the case and left intact another portion.

2. Ordered Published but Removed to Federal Court

Delayed removal to the federal system is uncommon but not unknown. It typically occurs because some particular federal interest becomes implicated. Predictably, examples of this have involved financial institutions. In *Crain v. San Jacinto Savings Ass'n*,[80] the court of appeals ordered its opinion published and the supreme court granted review. Although the high court heard oral arguments, it had not issued a decision when the case was removed to federal court.

In *MBank Abilene v. LeMaire*,[81] federal authorities took over the appellant bank. The case became removable and it departed from the state court after issuance of an original opinion, ordered published, but before the motions for rehearing were decided. The better view would appear to be that the case has the dignity of published status. One presumes the federal proceeding will eventually end. The fact that the court which issued the *MBank* opinion is directly tied into a computer data service, unlike a typical state court of appeals, exacerbates the problem. Thus, the opinion, though readily available, is not in the ordinary law books because the state court never ruled on the motions for rehearing. Rule 90 does not discuss the effect of "publication" in a data bank. Nor does it discuss the more general issue of publication in secondary sources.

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78. Mandamus relief might be available in theory. *See* Mapco, Inc. v. Forrest, 795 S.W.2d 700, 702 (Tex. 1990, orig. proceeding) (filing mandamus against clerk of court of appeals).

79. *E.g.*, Tricentrol Oil Trading, Inc. v. Annesley, 809 S.W.2d 218 (Tex. 1991), *rev'g*, No. A14-89-811-CV, 1990 WL 113747 (Tex. App.—Houston [14th Dist.] Aug. 9, 1990).

80. 781 S.W.2d 638 (Tex. App.—Houston [14th Dist.] 1989, writ granted).

81. No. C14-86-834-CV, 1989 WL 30995 (Tex. App.—Houston [14th Dist.] Apr. 6, 1989).

3. Published Where? Secondary Authority

West Publishing Company is not the only publication service. Specialized reports also have wide circulation. The lone court to discuss the problems created by specialized reporting services has construed Rule 90(i) as permitting citation to an Oklahoma intermediate court opinion published only in a secondary service, the U.C.C. Reporter.[82] This outcome is sensible. Specialization is a growing trend within the bar[83] and it is natural that practitioners would rely on specialized authorities. One cannot settle the issue simply by looking to the text of the rule.

There are many arguments in favor of recognizing secondary authority. First, society should encourage litigants to seek specialized counsel because the quality of representation will improve. Second, since both sides to a dispute can have such representation, no one will be blind-sided by an undiscovered opinion because each lawyer will have access to the relevant reporting service. Third, market forces will regulate the segregation between important and unimportant court decisions. If a case fails to catch the eye of an expert editor, it must not deserve dissemination.

Arguments against secondary authority are obvious. First, the appellate rules empower judges, not private practitioners, to decide what is published. It would evade Rule 90 to let anyone with a printing press make the ultimate decision whether an opinion should be published. Second, while judges are neutral arbiters who will distinguish the wheat from the chaff more accurately, the so-called specialists have an incentive to see every opinion reported. Third, not all law libraries are identical. Generalists regularly litigate against specialists. It is common for only one of the lawyers to subscribe to a special service, and few courts subscribe to many of them.

An interesting aspect of the specialization phenomenon is its appearance within the government. Not only are there specialized government litigators, but also specialized courts, even at the appellate level. The United States Court of Appeals for the District of Columbia Circuit is the nation's leading expositor of administrative law.

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82. Allegheny Int'l Credit Corp. v. Segal, 735 S.W.2d 552, 554 n.3 (Tex. App.—Dallas 1987, no writ).

83. *See* J. Myron Jacobstein, *Some Reflections on the Control and Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 795-96 (1975) (noting effect of specialization on legal publishing industry).

What the District of Columbia Circuit does for federal administrative law, the Austin Court of Appeals does for Texas administrative law. This is significant because the lawyers and agencies subject to oversight by a particular tribunal are likely to study even the Austin Court of Appeals' unpublished decisions. Life in a regulatory state could not be otherwise. For example, the Tax Division of the Justice Department collects unpublished district court decisions in tax cases. After refusing to make that material public, the Department was hit by the inevitable lawsuit under the Freedom of Information Act. The Department lost.[84] A recent study suggests the presence of a similar phenomenon in United States Attorneys' offices around the country.[85]

4. Published but Withdrawn

According to the general rule, withdrawn opinions have no value.[86] Only rarely does it matter. Withdrawal of an opinion is ordinarily used to correct a minor error: perhaps a spelling mistake; omission of some peripheral fact; or an incorrect citation. The court will issue a second opinion announcing the withdrawal and replacement of the first. One must usually apply considerable scrutiny to find the alterations.

There are exceptions. A mootness problem, for example, may go unnoticed until after decision, in which case the court will have to withdraw the opinion already having tipped its hand as to which side was most persuasive. Something like this occurred in *E.F. Hutton & Co. v. Youngblood*,[87] where the supreme court wrote an important opinion explaining whether a securities law violation is covered by the Deceptive Trade Practices Act.[88] That opinion was later withdrawn.[89] When the issue resurfaced in another case, one of the litigants predictably cited the supreme court's retracted opinion as authority. Less predictably, the court of appeals refused to follow the

84. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989).

85. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989).

86. Park v. Essa Tex. Corp., 158 Tex. 269, 273 n.2, 311 S.W.2d 228, 231 n.2 (1958); Kansas City So. Ry. Co. v. Flowers, 336 S.W.2d 235, 239-40 (Tex. Civ. App.—Texarkana 1960, writ ref'd n.r.e.).

87. 30 Tex. Sup. Ct. J. 508 (June 24, 1987), *withdrawn*, 741 S.W.2d 363 (Tex. 1987).

88. *Id.*

89. *Id.*

retracted opinion's holding and the supreme court denied review.[90] In its opinion, the court of appeals cited Rule 90(i) for the proposition that an unpublished opinion is of no precedential value.[91]

No rule formally authorizes a court to withdraw an opinion. The power to do so may be justified as implied by the rule that demands production of an opinion in every case, or as a tacit component of the rehearing process.[92] More intriguing is the supreme court's power to order withdrawal of a court of appeals' opinion. Plainly, the Texas Supreme Court cannot "decertify" a lower court opinion as can the California Supreme Court. When a court of appeals orders an opinion published, that does not prevent the parties from seeking supreme court review. If the litigants settle the case while the writ application is pending, the customary course is for them to file a joint motion to dismiss. In that event, the supreme court grants the motion and dismisses the writ. The lower court's opinion survives, forever to be cited as "writ dism'd by agr."

Yet, suppose part of the settlement agreement called not only for vacating the intermediate court's judgment but also its opinion. This occurred when the Tyler court issued an opinion in the mandamus proceeding styled *Cherokee Steel Fabricators, Inc. v. Khoury*,[93] and the losing party sought high court review in *Matthews v. Twelfth Court of Appeals*.[94] The case was settled, and to effectuate the settlement the supreme court ordered the appellate court's judgment and opinion "set aside." By what right? The supreme court's summary

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90. Frizzell v. Cook, 790 S.W.2d 41, 43 (Tex. App.—San Antonio 1990, writ denied).

91. *Id.*

92. *See* Terrazas v. Ramirez, 35 Tex. Sup. Ct. J. 308, 315 (Jan. 15, 1992) (Mauzy, J., dissenting) (stating that "this court typically corrects its error on rehearing by withdrawing its original opinion and substituting a new one").

93. 733 S.W.2d 563 (Tex. App.—Tyler 1987, orig. proceeding).

94. 742 S.W.2d 275 (Tex. 1987, orig. proceeding). The preferred citation form for this opinion is open to debate. Chapter 8 of the latest edition of the Greenbook promulgates a rule for citing mandamus cases. *See* TEXAS RULES OF FORM 18 (7th ed. 1990). In response to the so-called mandamus explosion, the Greenbook calls for supreme court mandamus decisions to be cited with the irrelevant phrase "orig. proceeding" as part of the parenthetical. *Id.* But the "orig. proceeding" tag has meaning only at the court of appeals level. To omit "orig. proceeding" from an intermediate court case would leave the reader unaware of the case's writ history and unable to assign the case a precedential value. Supreme court cases do not have writ histories. Supreme court opinions are neither more nor less binding merely because they arise in a mandamus context. It makes no difference. All supreme court cases are intrinsically authoritative for the propositions they declare. For this reason, the Greenbook requirement of "orig. proceeding" should be abandoned at the next revision.

order nowhere justifies the command to "set aside" a lower court's opinion. This is particularly odd in view of the high court's failure to make a similar disposition of other causes that settled, causes decided in the same period of time.[95] And what does it mean? The Tyler court's opinion was, and still is, available in the printed volumes of the reporter.

Perhaps the court was guilty only of inadvertence. It was surely guilty of that in a recent instance where the United States Supreme Court found federal preemption and reversed a holding that had created a new exception to the employment-at-will doctrine.[96] On remand from the United States Supreme Court, the Texas Supreme Court stated that its prior opinion, long since published and bound,[97] was "withdrawn."

5. Federalism Problems

When a Texas court must determine the law of another jurisdiction, there is always the possibility that the other court system evaluates case law differently from Texas. This problem is particularly acute in states governed by the Fifth Circuit, since that court has a local rule that unpublished opinions are binding precedent. Rule 90(i) does not address this question.

It would seem appropriate to give an unreported decision whatever dignity it would have in the court that rendered the decision. That is certainly true where the unpublished case originated in a state court and a federal court is being asked to follow the decision as a matter of that state's law. As one court curtly stated, "A noncase for Wisconsin's own purposes is a non-case in federal courts under *Erie*."[98] Like-

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95. *E.g.*, Hughes Drilling Fluids, Inc. v. Eubanks, 742 S.W.2d 275 (Tex. 1987) (ordering only judgments of courts below "set aside"); Lampson v. South Park Indep. School Dist., 742 S.W.2d 275 (Tex. 1987) (same); M & E Food Mart, Inc. # 2 v. Williamson, 742 S.W.2d 276 (Tex. 1987) (same); Barber v. Peoples Sav. & Loan Ass'n, 742 S.W.2d 276 (Tex. 1987) (effectuating settlement without making any mention of judgment or opinion below). In *Texas Oil & Gas Corp. v. Hagen*, 760 S.W.2d 960 (Tex. 1988), the supreme court set aside the judgment but not the opinion of the Texarkana Court of Appeals. Yet it has been suggested that the Texarkana court's opinion "is probably of no precedential value." Bado Equip. Co. v. Bethlehem Steel Corp., 814 S.W.2d 464, 476 n.1 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.).

96. Ingersoll-Rand Co. v. McClendon, __ U.S. __, __, 111 S. Ct. 478, 486, 112 L. Ed. 2d 474, 488 (1990), *rev'g*, 779 S.W.2d 69 (Tex. 1989).

97. McClendon v. Ingersoll-Rand Co., 807 S.W.2d 577, 577 (Tex. 1991).

98. Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974, 976 (7th Cir. 1991); *accord* Russell v. Atlas Van Lines, 411 F. Supp. 111, 113 (E.D. Okla. 1976).

wise, where a state statute denies precedential effect to intermediate court decisions because intermediate courts are too inferior, a federal court owes no *Erie* allegiance to them either.[99]

In Texas the issue has rarely been discussed. One resourceful advocate tried to rely on an unpublished federal district court opinion from the Fifth Circuit where unpublished opinions are precedent. The Dallas Court of Appeals disapproved. In a bit of circular reasoning, the court observed: "Appellant has presented no authority for the proposition that the unpublished *Sanchez* opinion has any precedential value."[100] Absence of discussion, though, does not mean the question never arises. Take-or-pay litigation is the most fertile setting because unpublished district court orders compose the bulk of take-or-pay "law."[101] In that context, one writer reasoned that even a state trial court decision would be considered authoritative in a federal diversity setting,[102] but the better view is to the contrary. The federal courts have receded from the wooden approach which briefly held sway[103] and the orthodox rule is now that an unreported state court case is not dispositive in federal court.[104]

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99. Graham v. White-Phillips Co., Inc., 296 U.S. 27, 31 (1935). Federal habeas corpus cases exhibit the interplay between state and federal law. In *Cole v. Young*, 817 F.2d 412 (7th Cir. 1987), the dispute was over a pair of opinions from the state court of appeals, one published and the other unpublished. Those two opinions appeared to disagree on whether "great bodily harm" was an element of the offense. A majority of the panel effectively held that one of the cases was "wrong" as a matter of state law. *Id.* at 428.

100. *Ex Parte* Rogers, 804 S.W.2d 945, 949 n.4 (Tex. App.—Dallas 1990, orig. proceeding).

101. J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 Sw. L.J. 677, 691 (1989).

102. *Id.* at 710-11.

103. *E.g.*, Gustin v. Sun Life Assur. Co., 154 F.2d 961, 962-63 (6th Cir.) (ignoring state practice and adhering to unpublished opinion of Ohio court of appeals), *cert. denied*, 328 U.S. 866 (1946).

104. King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 161 (1948) (holding that it would be incongruous to bind federal courts to decisions which would not be binding on state court); *see also* Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 457 (1967) (rejecting more mechanical view taken by three dissenting justices); CHARLES A. WRIGHT, FEDERAL COURTS § 58 (4th ed. 1983) (explaining task of determining what is state's law).

B. *". . . opinions . . ."*

1. An Opinion Is Not a Judgment

There is a difference between an opinion and a judgment.[105] An opinion gives reasons; it says why. A judgment gives orders; it says what. A commercial publisher prints opinions. It does not print judgments, for no one would want to read them if it did.

The distinction is worth observing. It is a distinction once ignored by the Texas Comptroller, unlikely to be ignored again.[106] In an unpublished opinion, the Austin Court of Appeals invalidated one of the Comptroller's rules as unconstitutional.[107] The Comptroller chose to continue operating by the rule, reasoning that the unreported case was not binding precedent.[108] When a second taxpayer brought a successful suit, the Comptroller appealed.[109] The Austin court was not amused. First, it affirmed the judgment for the taxpayer, explaining that the rule against citing an unpublished opinion did not nullify the judgment previously rendered.[110] Then the court held the appeal frivolous and assessed a $10,000 fine pursuant to Texas Rule of Appellate Procedure 84.[111]

What caused the Comptroller's predicament was a confusion between the doctrine of stare decisis and the doctrine of preclusion. Stare decisis has a universal binding effect, but preclusion operates only on particular parties. The rule against citing unpublished opinions is a stare decisis rule, not a preclusion rule. Judgments are no less effective merely because they come with an unpublished opinion. Indeed, for principles of preclusion to apply, there is no need for any opinion at all.[112]

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105. *See* Rogers v. Hill, 289 U.S. 582, 587 (1933) (holding that court's decision of case is its judgment thereon, and opinion is statement of reasons on which judgment rests).

106. Bullock v. Sage Energy Co., 728 S.W.2d 465, 468 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

107. *Id.* at 466 n.1.

108. *Id.* at 468.

109. *Id.* at 466.

110. *Bullock*, 728 S.W.2d at 469.

111. *Id.*

112. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480 (1982) (state court judgment conclusive even without opinion); Harris Trust & Sav. Bank v. Ellis, 810 F.2d 700, 705 (7th Cir. 1987) (preclusion given to unreasoned "perfunctory" finding); RESTATEMENT (SECOND) OF JUDGMENTS § 27 & cmt. d (1982).

2. An Opinion Is Not a Mandate

The mandate is the official communication of the superior court to the court upon whose judgment it is acting. It transmits the contents of the judgment.[113]

3. There Can Be More Than One Opinion

In theory, Rule 90 contemplates only one opinion. In practice it is not unusual to encounter more. Because contemporary civil procedure favors the liberal joinder of claims, a routine appeal may involve dozens of issues. If the court announces only one new rule of law, with twenty familiar rules recited, must the entire opinion be published? Or if the nugget of new law is embedded in a mountain of evidence, must all the facts be detailed in the published portion? Rule 90 fails to provide an answer. The courts have taken that silence to mean that opinion-splitting is acceptable.[114] The practice has not been abused, and any supreme court disapproval is more likely to surface in the rule-making process than in the course of litigation.

4. Per Curiam Opinions

Per curiam opinions are still opinions. They are therefore subject to Rule 90. Part (b) gives a majority of the courts of appeals not only the power to decide about publication but also the power to decide whether the opinion shall be signed or issued per curiam. The distinction should be one without a difference. Oddly, however, until recently the supreme court prohibited separate opinions when a per curiam was issued.[115] No rule required that practice. Courts of ap-

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113. TEX. R. APP. P. 86.

114. *E.g.*, Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983) (noting that unpublished portion of opinion was of no precedential value and should not be cited); Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 & n.6 (Tex. App.—Texarkana 1992, n.w.h.) (separating published from unpublished parts with double brackets); American Speedreading Academy, Inc. v. Holst, 496 S.W.2d 133, 136 (Tex. Civ. App.—Beaumont 1973, no writ) (ordering appendix unpublished). Federal courts do the same. *E.g.*, Dhaliwal v. Woods Div., Hesston Corp., 930 F.2d 547, 548 (7th Cir. 1991).

115. *See* Greathouse v. Charter Nat'l Bank—Southwest, 35 Tex. Sup. Ct. J. 1017, 1021 (July 1, 1992) (containing signed majority opinion, signed concurrence, and hitherto unknown unsigned "per curiam concurring opinion"); Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 43 n.1 (Tex. 1989) (Gonzalez, J., dissenting) (noting that supreme court had not allowed dissents in per curiam opinions). One Justice reports that this custom has been abandoned. Eugene A. Cook, *Texas Supreme Court Practice*, *in* 2 STATE BAR OF TEXAS, ADVANCED CIVIL APPELLATE PRACTICE V-7 (1991).

peals have not followed suit.[116]

One is entitled to wonder why the supreme court observed that arbitrary practice. The benefits are obscure and the detriments are plain. It is evident from federal case law that a per curiam opinion is the most efficient way to announce the judgment of a deeply divided court. Thus, the Pentagon Papers case accomplished the seemingly impossible feat of producing ten opinions from a nine member court: one brief per curiam accompanied by a separate opinion from each Justice.[117] That phenomenon may be rare at the high court level but it is frequently found in three-judge panels.[118] Allowing separate opinions along with a per curiam would eliminate any confusion over the scope of the holding. Where is the holding of the court in *Mays v. Fifth Court of Appeals*?[119] It is surely not confined to Justice Ray's lead opinion. Rather, it must reside in Justice Spears' "concurring" opinion because four other justices joined in it.[120] What is one to do with the three opinions emanating from the El Paso Court of Appeals in *Olney Savings & Loan Ass'n v. Farmers' Market of Odessa, Inc.*?[121] What is the holding? Use of a per curiam with separate opinions would eliminate the confusion or at least reduce it to the level necessarily involved in the interpretation of words.

C. *". . . shall not . . ."*

What is the sanction for citing an unpublished opinion? Rule 90 does not say. Texas Rule of Appellate Procedure 74, which regulates the filing of briefs, provides that a court may require a rebriefing but only for a flagrant violation of "this" rule. The question has not come up with great frequency.[122]

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116. *See, e.g.*, Cohen v. Strake, 743 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding) (including dissenting opinions with per curiam opinion).

117. New York Times Co. v. United States, 403 U.S. 713 (1971).

118. *E.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam with three separate opinions), *cert. denied*, 470 U.S. 1003 (1985).

119. 755 S.W.2d 78 (Tex. 1988).

120. *Id.* at 80.

121. 764 S.W.2d 869 (Tex. App.—El Paso 1989, writ denied). *Olney* has been read as having no holding at all on the basis that no rule of law commanded a majority. Georgetown Assocs., Ltd. v. Home Fed. Sav. & Loan Ass'n, 795 S.W.2d 252, 254-55 (Tex. App.—Houston [14th Dist.] 1990, writ dism'd w.o.j.).

122. In the two supreme court cases that turn on TEX. R. APP. P. 74(p), there is no citation to a single prior decision. Weaver v. Southwest Nat'l Bank, 813 S.W.2d 481 (Tex. 1991); Inpetco, Inc. v. Texas Am. Bank/Houston, N.A., 729 S.W.2d 300 (Tex. 1987).

1. Do Nothing

An appellate court might simply ignore the violation. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*,[123] one side cited unpublished authorities in the trial court though there was no indication that the trial court paid any attention. The court of appeals assumed the trial judge ignored the offending materials and affirmed the judgment.

2. Impose Sanctions

Unless Rule 90 inspires an adherence more scrupulous than is true of the typical court rule, it will eventually be violated often enough to precipitate case law on sanctions. That point cannot be far away. The Austin Court of Appeals recently served notice on the bar that it is on the lookout for violators.[124]

3. Find Only an Ethics Violation

In a sense, the rule that a party not mention unpublished opinions is the converse of the ethical requirement that a party must mention adverse precedent.[125] If suppression of unfavorable authority is unethical, is it also unethical to cite a favorable non-precedent? It is certainly unethical to commit an intentional violation of any procedural rule.[126]

D. *". . . be cited as authority . . ."*

This phrase makes up the core of the rule. Yet its meaning is not self-evident. Followers of the United States Supreme Court would

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123. 666 S.W.2d 604, 610 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 469 U.S. 1127 (1985).

124. Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 501 & n.3 (Tex. App.—Austin 1991, no writ).

125. SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) Rule 3.03(a)(4) & cmt. 3 (1990) (located in the pocket part for Volume 3 of the Texas Government Code in title 2, subtitle G. app., following § 83.006 of the Government Code) (requiring disclosure of unfavorable authority). *See generally* J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L.J. 677, 704-13 (1989) (discussing adverse precedent rule).

126. *See* SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Rules of Disciplinary Procedure) Rule 3.04 cmt. 3 (1990) (stating that "lawyer in good conscience should not engage in even a single intentional violation of those rules, however, and a lawyer may be subject to judicial sanctions for doing so"); *see also id.* Rule 3.04(c)(1) (stating that lawyer shall not "habitually violate an established rule of procedure or of evidence").

know the name but not the holding of *United States v. Detroit Timber and Lumber Co.*[127] That case is cited in or along with literally every opinion issued by the Supreme Court. It is the "headnote" case, which the reporter of decisions cites in a starred footnote for the proposition that the syllabus constitutes no part of the court's opinion.

1. Where? On Appeal Only or in All Courts? May Counsel Cite an Unpublished Decision to a Trial Judge?

The terms of Rule 90(i) do not seem to apply. Rule 90 is after all a rule of appellate procedure and the appellate rules apply only to "appeals."[128] Furthermore, because Rule 90 is found among the provisions that govern proceedings in the courts of appeals, one might infer an intent not to regulate matters in the courts of last resort. On the other hand, Rule 90(i) is written in fairly blunt language. The better view would appear to interpret the rule as applying at all levels. That is to say, Rule 90 is less concerned with policing counsel's behavior than with defining what a precedent shall be. It appears among the intermediate court rules because of (a) virtually universal publication by the courts of last resort, and (b) virtually universal nonpublication by trial courts. Texas courts have not yet spoken to this issue, as they will surely do within a few years.[129]

2. The Meaning of Citation "as authority"

Not every citation is a citation as authority. For example, Rule 90(i) does not forbid reference to an unpublished opinion purely for the factual background it contains.[130] A court's judgment can have two basic types of effect: (1) to resolve the dispute, and (2) to advance

127. 200 U.S. 321, 337 (1906) (holding that headnotes are written by reporter and are not work of court).

128. TEX. R. APP. P. 1(a). TEX. R. APP. P. 60(a) authorizes dismissal of an appeal for failure to comply with "any order of the court." The supreme court has construed this use of the word "court" to mean appellate courts only, and not trial courts. O'Connor v. Sam Houston Medical Hosp., Inc., 807 S.W.2d 574, 576 (Tex. 1991).

129. One court hinted its disapproval of citing an unpublished case in the trial courts. Medical Protective Co. v. Glanz, 721 S.W.2d 382, 385 n.1 (Tex. App.—Corpus Christi 1986, writ ref'd). The precedential value of *Glanz* is unclear. The supreme court gave the case an outright refusal of the writ, which is the equivalent of adopting the opinion as that of the supreme court. But *Glanz* is not just one opinion. It is three. Each judge wrote separately. Only the lead opinion touched on the citation question, and merely in passing.

130. *See* Weldon v. Hill, 678 S.W.2d 268, 271-72 & n.1 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (distinguishing citation as authority from citation for other purposes).

the law generally.[131] The former variety involves declaring the law between the parties. This furnishes the basis for preclusion doctrines like res judicata, collateral estoppel, and law of the case. The latter variety involves the doctrine of stare decisis. It is in this context that lawyers commonly speak of a decision's binding force.

The text fails to differentiate between binding authority and persuasive authority. A decision is said to be binding when it must be either followed or distinguished. Persuasive authority need not be so respected. An intermediate appellate court opinion is binding on that court but merely persuasive in coordinate courts of appeals. Thus, circuit conflicts may arise. It might be argued that since a decision of one court of appeals is only persuasive authority in the other courts of appeals, a litigant ought to be able to cite the case. This would be taking unwarranted liberties, however, to interpolate the word "binding" into the rule. Rule 90(i) would have a narrow sweep indeed if it only applied to the use of an unpublished opinion in the forum where it originated. No, the point of the rule is precisely to stop such practices.

E. . . . *"by counsel or a court."*

Compliance is not universal. One court relied on an unpublished opinion not as authority, but merely to "explain" the resolution of the instant case.[132] Another paid respectful homage to Rule 90 before violating it[133] just the same. And yet another Texas court deferred to the sister states' own internal treatment of their unpublished opinions before deciding whether to consider the cited unpublished opinion.[134]

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131. *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 941 (1989). *But see id.* at 947-53 (disputing this simple dichotomy). *See also* George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 481-83 (1988).

132. Hare v. State, 713 S.W.2d 396, 397 (Tex. App.—El Paso 1986, pet. ref'd).

133. Gonzales v. State, 672 S.W.2d 618, 620 (Tex. App.—Amarillo 1984, no pet.). For a borderline case, see Jones v. State, 774 S.W.2d 7, 17 n.1 (Tex. App.—Dallas 1989, pet. granted) (Baker, J., dissenting).

134. National Cty. Mut. Fire Ins. Co. v. Johnson, 829 S.W.2d 322, 326 n.5, 327 n.6 (Tex. App.—Austin 1992, writ granted). The court deferred to Ohio's rule which states that unpublished opinions shall not be considered controlling or persuasive outside the judicial district that rendered the opinion, and refused to consider their unreported case. *Id.* at 326 n.5. Similarly, the court followed Tennessee's rule, which allows citation of unpublished opinions provided a copy of the opinion is furnished to the court and to adversary counsel, and considered an unreported opinion from Tennessee. *Id.* at 327 n.6.

For obvious reasons, judges have less incentive than lawyers to break Rule 90,[135] but it is primarily judicial violations that will be preserved in legal libraries. Law review articles are, of course, exempt from Rule 90.[136]

V. CONCLUSION

Rule 90 strikes a balance between two competing interests. First, it limits the production of precedent by allowing for unpublished opinions. In so doing, it slows the growth of law libraries and reduces the availability of those decisions. Second, it bans reliance on unpublished opinions. This prohibition levels the playing field which would otherwise tilt in favor of the well-financed. If Rule 90 misses its mark, it has at least good company in other jurisdictions. Texas courts are not the first to face the problem of restricted publication.

What the future holds cannot be said with certainty. Technology may provide a "solution" by making even unpublished opinions readily accessible to all. But because an adversary system generates pressure to find all relevant authorities, the cure could be worse than the disease. Likewise, changes in the appellate process, discretionary jurisdiction for courts of appeals, or abolition of the opinion requirement might be more effective than Rule 90(i). The acceptability of such changes would depend on one's answer to two questions: what is justice, and how much justice is enough? Those issues are substantive, not procedural.

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135. Trial court proceedings are not exempt from violations. *See* Robinson v. Bowen, 867 F.2d 600, 600 (10th Cir. 1989) (finding that trial court improperly relied on unreported case, but affirming judgment on independent grounds); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604, 610 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (presuming trial court ignored citation to unpublished authority), *cert. denied*, 469 U.S. 1127 (1985).

136. *See, e.g.*, Christopher Griesel, Note, 18 TEX. TECH L. REV. 1017, 1040 n.196 (1987). The article contains an excellent discussion of a lower court's refusal to follow controlling precedent. However, the court of appeals ordered its opinion not to be published and the supreme court denied review. Oxoco Exploration & Prod. Inc. v. Arrowhead Drilling Corp., No. A14-86-181-CV, 1986 WL 13431 (Tex. App.—Houston [14th Dist.] Nov. 20, 1986, writ ref'd n.r.e.).