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# UNVEILING OHIO'S HIDDEN COURT

by

THE HONORABLE ROBERT L. BLACK, Jr.\*

## I. INTRODUCTION

**A**N INTERMEDIATE APPELLATE court whose opinions are largely unpublished tends to be invisible. The court seems to be unproductive, and the bar is unaware of what in fact is being decided. The low profile becomes a matter of grave concern, however, when under-publication becomes suppression of precedent.

Less than 3% of the opinions<sup>1</sup> of Ohio's courts of appeals are published officially,<sup>2</sup> but these courts constitute the court of last resort for 97% of their caseload.<sup>3</sup> Over the five-year period 1976-1981, the number of terminations by

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<sup>1</sup>"Opinion[s]" as used by this article includes all written explanations of the termination of appeals, whether signed opinions or per curiam decisions.

<sup>2</sup>The following table shows the number of filings in the Ohio courts of appeals, the number and percentages of total terminations and terminations by opinion, and the number and percentages of opinions published for the years 1976 through 1980:

Year	Total Terminations*		Terminations by Opinion**		Opinions Published	
	Number	%	Number	%	Number	%
1976	7,204	87.66%	4,054	64.20%	195	4.81%
1977	7,992	92.22%	5,337	67.31%	218	4.08%
1978	7,546	97.61%	5,047	68.50%	181	3.59%
1979	7,994	98.52%	5,536	70.29%	157	2.84%
1980	8,980	95.65%	5,813	67.68%	130	2.23%

The figures in the first three columns are taken from Ohio Court's Summary, published by the Administrative Director of the Supreme Court of Ohio. The number of opinions published was derived from an actual count of cases reported in 45 Ohio App. 2d through 64 Ohio App. 2d, volumes that are printed at the fixed rate of four per year.

\*\*"Total terminations" includes all cases brought to conclusion whether by voluntary dismissal or withdrawal, involuntary dismissal, transfer to another court, signed opinion or per curiam decision.

\*\*"Terminations by opinion" includes those in which the court filed a signed opinion or a per curiam decision.

<sup>3</sup>The statistics for the year 1976 through 1980 show that merit terminations by the Ohio Supreme Court of appeals from lower courts, and terminations by opinion, transfer or dismissal in the courts of appeals were as follows:

Year	Supreme Court*	Courts of Appeals	Percentage in Courts of Appeals
1976	193	6,315	97.03%
1977	139	7,929	98.28%
1978	229	7,366	96.98%
1979	154	7,876	98.08%
1980	280	8,589	95.84%
			97.44% MEAN

opinion has increased from 4,054 to 6,441 (an increase of 58.88%), but the percentage of this output that is published officially has decreased from 4.81% to 2.05%.<sup>4</sup> By way of comparison, the percentage of published opinions in the eleven United States courts of appeals for the fiscal year ending June 30, 1979 was 38.3%<sup>5</sup>

Unreported opinions of Ohio's intermediate court are now accumulating at about 6,000 per year.<sup>6</sup> Not every opinion has great public significance because some are routine and have interest only for the litigants. Other opinions, however, develop new rules of law, modify old rules, or extend the application of old rules to new factual situations. These should be made available to the bench and bar, and to the press and the public, because they set legal policy for the appellate district. It is impossible to state with exactness what percentage of the unreported opinions are truly publishable under any reasonable standards of publication, without first making a detailed study of a representative portion of the mass of unpublished cases. One can estimate that if the United States courts of appeals have 38% of their annual product published, the precedent-setting opinions of Ohio's courts of appeals will fall within a range of 20% to 40%. Assuming that 23% of the judicial product has precedential significance, that 3% is reported, and that the courts produce 6,000 opinions annually, the suppression of precedent in Ohio accumulates at the rate of 1,200 opinions each year.

The status of an unpublished opinion in Ohio is ambiguous. The 1919 publication plan requires that "[o]pinions for the permanent publication in book form shall be furnished to the [R]eporter and to no other person."<sup>7</sup> It con-

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in question.

\*The Ohio Supreme Court terminated cases other than those coming from the courts of appeals, including appeals from the Board of Tax Appeals, Public Utilities Commission and Power Siting Commission, and cases originally filed in the Supreme Court for the high peremptory writs. These terminations are not included in the above figures.

<sup>4</sup>For a discussion of these statistics and background of Ohio's publication practice, against a background of the publication plans of twenty-seven federal and state courts of appeals, see Black, *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477 (1981) [hereinafter cited as *Hide and Seek Precedent*]. The cause of under-publication has been that the printing of courts of appeals opinions was restricted to those selected for the official reports under a longstanding agreement between the Supreme Court and the Ohio State Bar Association (OSBA). That agreement gave OSBA the exclusive right to print the advance sheets of the official reports in its weekly Report, sometimes called *OHIO BAR. Id.* at 428. The normal size of *OHIO BAR* is 96 pages. Letter from Joseph B. Miller, Executive Director of OSBA to Hon. Robert L. Black, Jr., Court of Appeals, First Appellate District (may 7, 1982). Priority was given to printing the opinions of the Supreme Court and those reports and notices that must be brought to the attention of the OSBA membership, leaving a low priority for courts of appeals opinions. OSBA, however, had no editorial or selection control over lower court opinions and had, from time to time, exhausted the supply of such opinions furnished by the Supreme Court for publication. Mr. Miller states, "The Reporter's office apparently processes the Opinions in chronological order and is running some 14 months behind the decision date." In May, 1982, those courts of appeals opinions furnished to OSBA for publication had originally been issued between August and December, 1980. In February 1982, the Supreme Court cancelled the agreement with OSBA and awarded the publishing contract to W. H. Anderson Co. 55 *OHIO BAR*, No. 75, 1016.

<sup>5</sup>Reynolds & Richman, *An Evaluation of Limited Publications in the United States Court of Appeals — The Price of Reform* (unpublished article prepared in 1981 for the Federal Judicial Center).

<sup>6</sup>*Supra* note 2.

<sup>7</sup>*OHIO REV. CODE ANN. § 2503.20 (Page 1981)*

tinues, “[A]fter August 15, 1919, all such cases must be reported in accordance with this section before they shall be recognized by and receive the official sanction of any court.”<sup>8</sup> The purpose of this “one report only — no recognition other-wise” rule was to ensure the publication of only official reports and to prevent the proliferation of unofficial reports.<sup>9</sup>

This purpose has been subverted by actual practice. Twice the ostensibly mandatory nature of the “no recognition” rule has been held to be directory only.<sup>10</sup> The Supreme Court and two courts of appeals allow citation of unreported cases under certain conditions.<sup>11</sup> The United States Supreme Court cites unpublished cases, as do all the Ohio courts, Ohio law review articles and Ohio’s law treatises.<sup>12</sup>

Ohio is divided into twelve independent appellate districts,<sup>13</sup> with no provision for one district to have precedent over another or for the coordination of opinions on the same issues. The concept is that the Supreme Court will resolve conflicts of judgment between appellate districts as certified to it by the intermediate court.<sup>14</sup>

The First District Court of Appeals has instituted an index available to the bar that allows retrieval of more than 2,500 cases beginning with those issued in 1972. Other districts also have indexed retrieval systems, and a major portion of the opinions of the twelve districts are filed in the Supreme Court Library in Columbus. But these various systems are uncoordinated and do not share a common index.

## II. THE EFFECT ON THE PROFESSION.

The result is an inefficient and unfair system. It is inefficient because the bench and bar are totally unaware of decisions relevant to current litigation and thus the system engenders appeals on points of law that have already been decided. It is unfair because only the large public offices (the attorney general, and county municipal prosecuting attorneys) and the large private law firms have the resources to collect the unpublished cases and index them for retrieval. The great majority of lawyers throughout the state are effectively denied ac-

<sup>8</sup>*Id.* At the request of the Supreme Court, West Publishing Company publishes only those opinions that are approved for publication by the Reporter. Letter from Charles D. Nelson, Editorial Counsel of West Publishing Company to the Honorable Gilbert Bettman, then Presiding Judge, Ohio Court of Appeals, First Appellate District (Sept. 22, 1980).

<sup>9</sup>Shaw, *The Legal Significance of the Unpublished Court of Appeals Opinion in Ohio*, 6 CAP. U. L. REV. 393 (1977); 1 OHIO ST. L. J. 135 (1935).

<sup>10</sup>*Gustin v. Sun Life Assur. Co.*, 154 F.2d 961 (1946); *State v. George*, 50 Ohio Appl. 2d 297, 362 N.E.2d 1223 (1975).

<sup>11</sup>OHIO SUP. CT. R. PRAC. V, § 1 (E); OHIO 1ST DIST. CT. APP. R. 6D(2); OHIO 8TH DIST. CT. APP. R. 19.

<sup>12</sup>The United States Supreme Court cited unreported cases as precedent in *Engle v. Isaacs* (1982, \_\_\_ U.S. \_\_\_, 50 U.S.L.W. 4376. Paul Richert, Law Librarian of the University of Akron School of Law, stated in a letter to Ohio law librarians (Feb. 6, 1980) that in the preceding three years Ohio law reviews cited unreported courts of appeals opinions 115 times and Ohio treatises cited unreported opinions 244 times.

<sup>13</sup>OHIO REV. CODE ANN. §§ 2501.01 - 02. (Page 1981).

<sup>14</sup>OHIO CONST. art. IV, § 2 (B) (2) (e).

cess to the larger part of Ohio's decisional law, simply because they cannot afford it.

The "one report — no recognition otherwise" rule is subject to the same criticism that has been leveled nationally at the "limited publication — no citation" rules of other jurisdictions<sup>15</sup>; that is, these rules restrict the publication of precedent and destroy the concept of stare decisis.<sup>16</sup> Excessive limitations on publication also have an adverse effect on the quality of the judicial product, because the judges tend to lose enthusiasm when their product is relegated to dusty shelves in specialized libraries, especially those cases in which the decision has potential usefulness far beyond the parties involved and the situations addressed; that is, when the judicial product has precedential value. Worst of all, the confidence of the profession and the general public will undoubtedly be shaken by accounts of clear inconsistencies between results on the same questions,<sup>17</sup> of slipshod work,<sup>18</sup> of suppressed precedent,<sup>19</sup> and of the denial of further review because the case is not sufficiently explained.<sup>20</sup>

The continuation of the 1919 publication plan's restrictions into a time of rapidly increasing litigation and many new developments in the law has backfired.

<sup>15</sup> P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 35-41 (1976); Kanner, *The Unpublished Appellate Opinions; Friend or Foe?* 48 CAL. ST. B.J. 386 (1973); Newbern & Wilson, *Rule 21: Unprecedented and the Disappearing Court*, 32 ARK. L. REV. 37 (1978); Reynolds & Richman, *The Non-Precedential Precedent — Limited Publication and No Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); Reynolds & Richman, *Limited Publications in the Fourth and Sixth Circuits, 1979 DUKE L.J.* 807; Silverman, *The Unpublished Opinion in California*, 51 CAL. ST. B.J. 33 (1976); Stern, *The Enigma of Unpublished Opinions*, 64 A.B.A.J. 1245 (1978); Note, *Unreported Decisions in United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977).

<sup>16</sup>*Supra* note 22. The doctrine of stare decisis is that each court decision is a precedent for the future and shall be the guiding principle until modified or overturned in the course of the evolution of the law. On the one hand, "[s]tare decisis serves to take the capricious element out of law and to give stability to a society." Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). "It represents an element of continuity in the law, and is rooted in the psychological need to satisfy reasonable expectations," so that people can act in reliance on known rules of conduct. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). The doctrine keeps our system from being degraded into an ad hoc rule of men. On the other hand, stare decisis is not a mechanical formula that requires the courts to follow the latest decision blindly. What qualify as binding precedent are principles that are rationally evolved, intrinsically sound and verified by experience. *People v. Hobson*, 39 N.Y.2d 479, 488, 348 N.E.2d 894, 900-01, 384 N.Y.S.2d 419, 425 (1976); *State v. Pugh*, 43 Ohio St. 98, 123, 1 N.E. 439, 454 (1885); von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 414 (1924). Its flexibility allows the courts to be guided through the tumultuous affairs of men by the polestar of justice, because it calls for a consistency in the law that will be modified or overruled only by decisions carefully made, reduced to writing and openly available.

<sup>17</sup>CARRINGTON, *supra* note 15, at 38; Newbern & Wilson, *supra* note 15, at 50-51.

<sup>18</sup>Reynolds & Richman, *Limited Publication*, *supra* note 15, at 816-21.

<sup>19</sup>Kanner, *supra* note 15; Newbern & Wilson, *supra* note 15, at 54-55; Reynolds & Richman, *Limited Publications*, *supra* note 15, at 827.

<sup>20</sup>Newbern & Wilson, *supra* note 15, at 53. There are few empirical studies of the erosion of confidence. One study reviewed a survey of counsel of record in unpublished cases and disclosed that while about half of the respondents considered nonpublication to have no effect on the confidence in the court of the bar or of the general public, a sizable minority was estimated to believe that the effect was somewhat bad to very bad. *Id.* at 43-56. This is not surprising, because any suppression of publication of court decisions runs counter to the widely accepted tenets of an open society.

## III. THE UNVEILING

## A. Discussion

The solution to the problems created by gross under-publication may be divided into two parts: (1) as to the mass of unpublished opinions accumulated in the past, resolve their status, and make them more readily available; (2) as to the future, provide for significantly increased publication of opinions, under specific standards of publication.

The status of the unpublished mass will be clarified if and when the Supreme Court adopts an appellate rule that allows either unlimited citation or conditional citation (for example, citation on the condition that the citing attorney serves a copy on the court and all other counsel, with disclosure of any disposition by higher courts of any appeal therefrom that has come to the attention of citing counsel).<sup>21</sup> The Supreme Court has constitutional authority to prescribe rules of practice and procedure which, when effective, supplant all statutes in conflict with them.<sup>22</sup> The adoption of a rule under this authority would dispose of the statutory rule of "one report only — no sanction otherwise."

That is not all that needs to be done. In addition to clarification of status, the unpublished mass must be made readily available to the bench and bar. This requires accessible copies of the unpublished opinion adequately indexed for retrieval.

The second part of the solution, relating to future publication, also has two facets: increased publication, and standards of publication.

Publication could be increased by any of several means: by allocating more funds for official publication by the appropriation of state moneys, the additional expenditures for the production of a greater number of advance sheets, and an increase of the price of the official volumes; by creating a secondary level of publication in a relatively impermanent form (paperback), with individual cases subject to transfer to the permanent official reports if determined to have precedential value; by appointing as "official publisher" any of the private law publishers (West Publishing Company on the national scene, or W. H. Anderson Company or Banks-Baldwin Law Publishing Company on the regional scene); by allowing opinions to be published "unofficially" by private publishers.<sup>23</sup>

The adoption of standards of publication, the second facet, is needed in order to separate for publication cases with precedential value from those without precedential value. Two types of "standards" are identifiable: standards ex-

<sup>21</sup>4TH CIR. R. 18(d); 10TH CIR. R. 17(c); ILL. UNIFORM AD. AND P.R. APP. CTS. 8(8). *Supra* note 11. *Also*, ABA COMM. ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.37(c) (1977); R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 58-59 (1976).

<sup>22</sup>OHIO CONST. art IV, § 5(B).

<sup>23</sup>*Hide and Seek Precedent*, *supra* note 4, at 488. Twenty states have designated West Publishing Company as official publisher and three states use only West as publisher. *Id.* note 52, at 489.

pressed in general terms (publish only opinions with "precedential value") and those with provisions specifically describing what is meant by precedential value.<sup>24</sup> The latter type is advisable because it is explicit, but with both types, provisions must be made to designate who makes the decision about publication. A variety of designations have been used.<sup>25</sup> The simplest is to give this decision to the panel of judges responsible for the opinion. The best method for a districted appellate system without coordination between districts is to create a publication committee of judges from the intermediate level to make the decisions on a statewide, hopefully consistent basis. In that event, provisions should be made to relieve the incumbents on the publication committee of some of their other duties during incumbency.

### B. *Current Activities in Ohio*

A combination of two services is now being offered for the retrieval of cases from the mass of unpublished opinions. The "Ohio Appellate Decisions on Fiche" makes available on a subscription basis from the Law Library Microform Consortium microfiche copies of all opinions issued by the twelve districts, whether published or not, beginning with 1981 opinions. This is supplemented by "Ohio Appellate Decisions Index" produced by Banks-Baldwin Law Publishing Company (actually two indices, one each for civil and criminal cases).<sup>26</sup> This combination will provide the first statewide retrieval system for Ohio's published law, and the only systematic entry into the state's unreported precedent. It will have value to the profession provided that the status of unpublished opinions is clarified by elimination of the rule of "one report only — no sanction otherwise."

For increased printing under standards of publication, a proposal has been made by the Ohio Courts of Appeals Judges Association to the Supreme Court, in the form of an amendment to the Ohio Rules of Appellate Practice,<sup>27</sup> to

<sup>24</sup>*Id.* at 490.

<sup>25</sup>*Id.* at 491.

<sup>26</sup>1982 CATALOG, LAW LIBRARY MICROFORM CONSORTIUM 44, 45, 64.

<sup>27</sup>The proposed new APPELLATE RULE 25 reads as follows:

#### 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

be adopted under the Supreme Court's constitutional authority.<sup>28</sup>

In brief, this proposal will add a new Appellate Rule 25 that allows the judges participating in the determination of an appeal to make the initial decision about publication, using specific standards of publication. If a majority favor publication, the opinion is certified to the Reporter of the Supreme Court for official publication. The Reporter determines whether the opinion, or parts thereof, will be published officially. If the opinion is not published officially, it may be made available to any other publisher for unofficial publication.

A party to an appeal, or any other person, may ask the judges participating in the decision to have an opinion published. If the court can be persuaded that the opinion meets the standards of publication, the court will follow the publication procedure. Otherwise it will not be reported, because the new rule is founded on a presumption against publication and is specifically designed to published only opinions with precedential value.

The rule provides that no opinion shall be published unless it meets one of eight standards of publications. To qualify for consideration for publication, an opinion should overrule, alter, or establish a rule of law or apply an established rule to a new set of facts. It might create or resolve a conflict of authority, address issues of significant public interest, or concern a significant legal issue about which the judges differ or which is involved in a case remanded from the Supreme Court.

The proposal also clarifies the status of unpublished opinions by allowing citation thereof if a complete copy of the opinion is attached to the brief or memorandum wherein cited, provided that disclosure is made of any known disposition of the case on appeal, and the citing lawyer certifies that all Ohio unpublished appellate opinions known to counsel on the particular point are attached.

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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 represents 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.

The proposal was based on a study of the publication plans of sixteen states and eleven circuits of the United States courts of appeals, as well as the experience of judges of the Ohio Courts of Appeals.

<sup>28</sup>*Supra* note 22.

Thus the new rule will not only permit greater publication in the future under reasonable guidelines for determining publishability, but because it allows citation of unpublished law, it will make fully operative the retrieval service offered by Ohio Appellate Decisions on Fiche and Ohio Appellate Decisions Index.

#### IV. CONCLUSION

The glaring deficiencies of the past can be corrected, and if that is accomplished, a service of immeasurable value will have been performed for the bench, the bar, and eventually the general public. The first steps have been taken, and in the interest of improved justice, Ohio's hidden court may be unveiled.