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## Wisconsin's Citation Rule: Unpublished Should Not Mean Uncitable

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# **WISCONSIN’S CITATION RULE: UNPUBLISHED SHOULD NOT MEAN UNCITABLE**

*Wisconsin’s citation rule stands tall, yet unsupported. It injures Wisconsin practitioners, their clients, and judges in all three levels of Wisconsin’s judicial branch. With little tolerance, Wisconsin Statutes section 809.23(3) precludes the citation of (1) unpublished opinions issued before July 1, 2009, and (2) unauthored, unpublished opinions thereafter. You may be surprised to learn that that means approximately half of Wisconsin Court of Appeals opinions issued each year are uncitable—so, too, are significantly more than half of the opinions it issued before July 1, 2009. Without change, the Wisconsin Court of Appeals will continue to mis-categorize its opinions; Wisconsin’s case law will remain deplete of important, citable opinions; practitioners will fail to adequately represent their clients or will compromise their ethics in doing so; and judges may encounter moral dilemmas when practitioners present them with uncitable opinions—posing challenges in cases where analyses could be straightforward through logical or legal reasoning. That’s a problem.*

*To date, four petitions to the Wisconsin Supreme Court have sought to address these problems. The first three proved unsuccessful. The fourth, in 2008, persuaded the Wisconsin Supreme Court to lift its general prohibition on citing unpublished opinions, creating Wisconsin’s citation rule as it stands today. Timing was everything. The Wisconsin Supreme Court found comfort in adhering to the recently adopted federal citation rule. Policy supporting the federal rule, however, was largely inapplicable to Wisconsin—if even applicable to the federal circuits. Considering that, and the trends with citation of other questionable sources, the Wisconsin Supreme Court should reconsider its problematic citation rule. The most recent amendment lifted the corner of the Band-Aid—it’s time to rip it off. The wounds are healed. The concern for infection is gone. Indeed, the Band-Aid may have been applied prematurely, protecting what now purports to have been an illusion. But regardless, it has been left on all too long.*

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## I. INTRODUCTION

After one year of legal writing courses, many law students look to unpublished opinions with skepticism. From my experience, many practitioners share this skepticism. How much weight, or value, can an unpublished opinion have? In Wisconsin, and several jurisdictions across the nation, these students and practitioners miss a critical question: Is the opinion citable to begin with? Too often, the answer is no.

That answer triggered my interest. I first encountered it when a summer colleague expressed frustration with locating a citable opinion—citable in Wisconsin, that is—for an outcome-determinative issue. I quickly searched some key terms and pointed to various on-point opinions that Westlaw had marked “Unpublished Disposition.” Surely my colleague’s frustration could not be a reality. Albeit for specially crafted problem-sets, my experience as a first-year law student had been locating dozens of citable opinions. But when a quick read of Wisconsin Statutes section 809.23(3)<sup>1</sup> so humbled me, I began to ponder its consequences: How does Wisconsin Statutes section 809.23(3)

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1. Wisconsin Statutes section 809.23(3) governs the citation of unpublished opinions in Wisconsin. This Comment will interchangeably refer to it as Wisconsin’s citation rule or Wisconsin Statutes section 809.23(3).

impact judicial integrity, burden practitioners and judges, and contribute to an incomplete body of Wisconsin case law?

My own frustrations with Wisconsin's citation rule prompted further inquiry. After I, too, began finding valuable, yet uncitable, opinions, I sought justifications for the seemingly conspicuous rule. Except for the literature surrounding the several petitions to amend it, few have addressed Wisconsin's citation rule. And were it not for an inevitably successful Google search, I would have believed no scholarly article addressed it. With that, I emphasize Erik Gustafson's persuasive article, *Bringing Unpublished Opinions Into the 21st Century*.<sup>2</sup>

To complement Gustafson's article, this Comment explores Wisconsin's citation rule through the lens of the federal and neighboring states' rules. This Comment seeks to persuade the Wisconsin Supreme Court to reconsider—and if persuaded, amend—Wisconsin's citation rule. Part II of this Comment discusses the origin and policy rationales supporting Wisconsin's citation rule. Part III of this Comment discusses the history of the federal citation rule, and why it—and the concerns supporting the rule's prospective application—should not have influenced the Wisconsin Supreme Court when it considered an amendment to Wisconsin Statutes section 809.23(3). In doing so, Part III explores some modern trends with citing questionable sources and analyzes the number of judicial opinions across several jurisdictions. Part IV addresses the potential concerns and overarching benefits of adopting Minnesota's citation rule, and provides an illustration of Minnesota's citation rule, as applied to Wisconsin case law. Finally, drawing from these discussions, Part V offers a proposed amendment to Wisconsin Statutes section 809.23(3). If adopted, this proposed amendment would permit citation of all unpublished opinions issued by the Wisconsin Court of Appeals, regardless of an opinion's date or author. Such amendment would substantially enhance the available body of case law in Wisconsin and permit practitioners and judges to make informed arguments and decisions, respectively, for any given circumstance.

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2. Erik M. Gustafson, *Bringing Unpublished Opinions Into the 21st Century*, WIS. DEF. COUNS., [https://www.wdc-online.org/index.php?option=com\\_content&view=article&id=151:bringing-unpublished-opinions-into-the-21st-century&catid=20:site-content](https://www.wdc-online.org/index.php?option=com_content&view=article&id=151:bringing-unpublished-opinions-into-the-21st-century&catid=20:site-content) [https://perma.cc/ZT9N-MX79]. Gustafson's article proposed an amendment to Wisconsin's citation rule, focusing on advancements in technology, publication criteria, and the different federal and state court rules. *See id.*

## II. THE HISTORY OF WISCONSIN'S CITATION RULE

### A. *The Current Function*

The history, and questionable support, of Wisconsin's citation rule is best understood by considering its current function. Today, Wisconsin's citation rule creates two "classes" of unpublished opinions: (1) those issued before July 1, 2009, which are mostly uncitable, and (2) those issued thereafter, which may or may not be citable.<sup>3</sup> Comprising the former, Wisconsin Statutes section 809.23(3)(a) provides, "[a]n unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case."<sup>4</sup> Comprising the latter, Wisconsin Statutes section 809.23(3)(b) modifies paragraph (a)'s general prohibition, permitting citation if the "unpublished opinion [is] issued on or after July 1, 2009" and "is authored by a member of a three-judge panel or by a single judge under s. 752.31 (2)."<sup>5</sup> Put differently, if in the first class—unpublished opinions issued before July 1, 2009—the opinion cannot be cited *to any court in Wisconsin*, except for claim preclusion, issue preclusion, or the law of the case.<sup>6</sup> If in the second class—unpublished opinions issued on or after July 1, 2009—the opinion may be cited for persuasive authority, if a member of a three-judge panel, or a single judge under Wisconsin Statutes section 752.31(2), authored the opinion.<sup>7</sup>

Judicially imposed consequences for practitioners who violate Wisconsin's citation rule purport strong justifications behind it—at least in theory. Wading

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3. See WIS. STAT. § 809.23(3) (2021–22).

4. *Id.* § 809.23(3)(a). Claim preclusion "provides that a final judgment on the merits bars parties from relitigating any claim that arises out of the same relevant facts, transactions or occurrences." *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 233, 601 N.W.2d 627 (1999). "Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action." *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550–51, 525 N.W.2d 723 (1995) (explaining issue preclusion is narrower than claim preclusion and requires a court to conduct a fundamental fairness analyses). Law of the case "addresses the effect of an appellate court's ruling on a legal issue on subsequent proceedings in the circuit court or later appeals in the same action." *Berg v. Gen. Cas. Ins. Co. of Wis.*, No. 2010AP1695, 2011 WL 5865538, at \*6 (Wis. Ct. App. Nov. 23, 2011).

5. WIS. STAT. § 809.23(3) (2021–22).

6. *Id.* § 809.23(3)(a).

7. *Id.* § 809.23(3)(b). Cases that fall under Wisconsin Statutes section 752.31(2) include ordinance violations, municipal citations, traffic violations, nonmoving violations, small claims actions, misdemeanors, contempt orders, and other similar cases.

too deep into the pool of zealous advocacy,<sup>8</sup> some practitioners have cited unpublished opinions contrary to Wisconsin Statutes section 809.23(3).<sup>9</sup> Many courts have admonished practitioners, while some have imposed fines.<sup>10</sup> That considered, Wisconsin's citation rule must have some persuasive policy supporting it—in theory. Opponents to citing unpublished opinions have provided different justifications over time.

### B. *The Original Justifications*

The original justifications comprise outdated concerns. The Wisconsin Supreme Court adopted the original citation rule in 1978, the birth year of the Wisconsin Court of Appeals.<sup>11</sup> Different than Wisconsin's current citation rule, unpublished opinions were citable only for “res judicata, collateral estoppel, or the law of the case,” irrespective of the date or author.<sup>12</sup> Wisconsin's original citation rule found its justifications in a nationwide trend: “The trend toward nonpublication of opinions [was] nationwide and result[ed] from the explosion of appellate court opinions being written and published.”<sup>13</sup> The Wisconsin Judicial Council Committee (Judicial Council) offered four additional policy considerations:

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8. See Wis. Sup. Ct. R. 20 Pmb1. (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

9. See, e.g., *Tamminen v. Aetna Cas. & Sur. Co.*, 109 Wis. 2d 536, 563–64, 327 N.W.2d 55 (1982) (discussing the importance of Wisconsin’s citation rule and imposing \$50 fine); *Oneida Cnty. v. Sunflower Prop II, LLC*, 2020 WI App 22, ¶ 9 n.6, 392 Wis. 2d 293, 944 N.W.2d 52 (admonishing counsel that unpublished per curiam opinions may not be cited); *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶ 12 n.3, 305 Wis. 2d 658, 741 N.W.2d 256 (admonishing counsel that improper citations may be subject to sanction); *Allen v. Woelfel Fam. Revocable Tr.*, No. 2012AP2415, 2013 WL 1953782, at \*5 (Wis. Ct. App. May 14, 2013) (“The circuit court previously admonished Allen for citing the same two unpublished opinions, calling the citations ‘irresponsible and disrespectful.’ Under these circumstances, we deem it appropriate to, and do, sanction Allen’s attorneys and direct that they each pay \$100 to the clerk of this court within thirty days of the release of this opinion.”).

10. See cases cited *supra* note 9.

11. See Wis. Sup. Ct. Order, 83 Wis. 2d xiii (1978); WIS. STAT. § 809.23 (1977–78); see also *History of the Courts*, WIS. CT. SYS., <https://www.wicourts.gov/courts/history/index.htm> [<https://perma.cc/HGS5-AZZ5>] (Feb. 13, 2022) (“In June 1978, the Legislature implemented the constitutional amendments by enacting Chapter 449, Laws of 1977, to provide a court system composed of circuit courts, a court of appeals, and municipal courts with revised authority.”).

12. WIS. STAT. § 809.23 (1977–78), as amended by Wis. Sup. Ct. Order 01-04, 2001 WI 135 (replacing “res judicata” with “claim preclusion” and “collateral estoppel” with “issue preclusion”).

13. WIS. STAT. § 809.23 Judicial Council committee’s note to 1978 amendment (2021–22); see also *Tamminen*, 109 Wis. 2d at 563 (“As the Judicial Council’s comments to the rule reveal, the noncitation rule is essential to the reduction of the overwhelming number of published opinions and is a necessary adjunct to economical appellate court administration.”).

- (1) The type of opinion written for the benefit of the parties is different from an opinion written for publication and often should not be published without substantial revision;
- (2) If unpublished opinions could be cited, services that publish only unpublished opinions would soon develop forcing the treatment of unpublished opinions in the same manner as published opinions thereby defeating the purpose of nonpublication;
- (3) Permitting the citation of unpublished opinions gives an advantage to a person who knows about the case over one who does not; [and]
- (4) An unpublished opinion is not new authority but only a repeated application of a settled rule of law for which there is ample published authority.<sup>14</sup>

These policy considerations were widely eliminated during the following years, especially with the use and improvement of legal databases.<sup>15</sup> Gustafson discussed each petition to amend Wisconsin's citation rule, beginning in the 1990s and ending with the most recent in 2008.<sup>16</sup>

### C. *The Wisconsin Supreme Court's 2009 Amendment*

Pertinent to this Comment's focus is the most recent petition to amend Wisconsin's citation rule. In 2008, shortly after the U.S. Supreme Court implemented the federal citation rule, the Judicial Council petitioned the

14. WIS. STAT. § 809.23 Judicial Council committee's note to 1978 amendment (2021–22).

15. First, the Wisconsin Court of Appeals has routinely miscategorized opinions; the Wisconsin Supreme Court itself recognized the issue. *See Deutsche Bank Nat'l Tr. Co. v. Wuensch*, 2018 WI 35, ¶ 26 n.13, 380 Wis. 2d 727, 911 N.W.2d 1. Second, both published and unpublished opinions appear in the most common research services, like Lexis and Westlaw. Bruce D. Greenberg, *A Legal Fiction: The "Unpublished" Appellate Division Opinion*, LITE DEPALMA GREENBERG & AFANADOR (Aug. 18, 2016), <https://www.litedepalma.com/a-legal-fiction-the-unpublished-appellate-division-opinion> [<https://perma.cc/WAST-AHXL>]. Wisconsin would not impact services that abide to outdated practices, considering the federal citation rule, which permits the citation of unpublished opinions issued on or after January 1, 2007. *See* FED. R. APP. P. 32.1. With the volume of federal circuit court opinions, it is doubtful Wisconsin courts would have an impact. Third, Wisconsin's citation rule prevents any unfair advantage for one who knows about the case, requiring counsel who cites an unpublished opinion to serve a copy of the opinion to the opposing party. *See* WIS. STAT. § 809.23(3)(c) (2021–22). Fourth, the argument regarding repeated settled law is not supported for the same reason as the Judicial Council's first consideration. *See Deutsche Bank Nat'l Tr. Co.*, 2018 WI 35, ¶ 26 n.13.

16. *See* Gustafson, *supra* note 2.

Wisconsin Supreme Court to amend its citation rule.<sup>17</sup> In stark contrast with its 1978 comment,<sup>18</sup> the Judicial Council urged the Wisconsin Supreme Court to permit citation of all unpublished opinions, regardless of their issue date.<sup>19</sup> It also urged the Wisconsin Supreme Court to permit citation regardless of an opinion's author, which would have permitted citation to per curiam opinions, summary dispositions, and the like.<sup>20</sup> The changes the Judicial Council urged are precisely those that this Comment, again, requests the Wisconsin Supreme Court to reconsider. Although taking a step in the right direction, the Wisconsin Supreme Court refrained from adopting the entirety of the Judicial Council's recommendations, leaving uncitable unpublished opinions issued before July 1, 2009, along with unauthored, unpublished opinions on or after July 1, 2009.<sup>21</sup> It limited citation of unpublished opinions with a prospective application provision and an author requirement.

The Wisconsin Supreme Court did not enumerate—that is, in writing—any policy rationales for setting a bright-line cut-off date.<sup>22</sup> Nor did it enumerate policies underlying its restriction on unauthored, unpublished opinions.<sup>23</sup> As such, its underlying policies are left to speculation. From the justices' questions posed during the 2008 hearing, a listener will hear repetitious mentions of previously addressed concerns, such as the accessibility and volume of opinions.<sup>24</sup> But the court did adopt and enumerate one justification posed by the

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17. See Wis. Jud. Council, Rule Petition 08-02, In re Proposed Amendments to Wisconsin Statute § (Rule 809.23(3)), at 1 (Jan. 25, 2008), <https://www.wicourts.gov/supreme/docs/0802petition.pdf> [<https://perma.cc/CAD7-NBLX>] [hereinafter 2008 Petition]. The federal rule became effective on December 1, 2006, and addressed permissible citations to unpublished opinions. See FED. R. APP. P. 32.1. The drafters sought to establish uniformity among the varying federal circuits. FED. R. APP. P. 32.1 advisory committee's note to 2006 amendment.

18. See WIS. STAT. § 809.23 Judicial Council committee's note to 1978 amendment (2021–22); see also *supra* text accompanying notes 13–14.

19. See 2008 Petition, *supra* note 17, at 1.

20. See Public Hearing at 4:50–5:15, In re Proposed Amendments to Wis. Stat. § (Rule) 809.23, 2009 WI 2 (No. 08-02), <https://www.wicourts.gov/scrules/archive/0802.htm> [<https://perma.cc/2AMR-QAF9>] (clarifying the Judicial Council's error in its supporting petition, and reiterating its request to allow citation to all unpublished opinions); WIS. STAT. § 809.23(3) (2021–22).

21. See Wis. Sup. Ct. Order 08-02, 2009 WI 2.

22. See *id.* (“Upon consideration of matters presented at the public hearing and submissions made in response to the proposed amendment, the court adopted the petition, with modifications, on a 6 to 1 vote. . . . [T]he court voted the effective date of the amendments adopted herein will be July 1, 2009.”).

23. See *id.*

24. See Public Hearing, *supra* note 20.



Judicial Council. Without explanation, the court seemingly found persuasive that its amendment positioned Wisconsin's citation rule closer to its federal counterpart.<sup>25</sup>

Wisconsin was not the only jurisdiction, however, to condemn citation of unpublished opinions in the early 2000s. By 2004, the states and federal circuits greatly differed, some allowing citation of unpublished opinions as precedent, some as persuasive authority, and some strictly prohibiting citation.<sup>26</sup> This trend, as seen in Wisconsin, changed after 2006. In large part, the turn occurred after the U.S. Supreme Court submitted Federal Rule of Appellate Procedure 32.1 (Rule 32.1 or federal citation rule) to Congress, which prompted many states to amend their citation rules.<sup>27</sup> Rule 32.1—a new rule<sup>28</sup>—precluded the federal circuit courts<sup>29</sup> from prohibiting the “citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like,” and that were issued on or after January 1, 2007.<sup>30</sup> And while implementing a prospective application provision, which seemingly influenced the Wisconsin Supreme Court, Rule 32.1 preceded Wisconsin's

25. See Wis. Sup. Ct. Order 08-02, 2009 WI 2 (quoting 2008 Petition, *supra* note 19) (“This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007.”).

26. See Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349, 349 (2004) (explaining the citation rule of each federal and state court).

27. See Letter from John G. Roberts, Jr., C.J., U.S. Sup. Ct., to Judge Dennis Hastert, Speaker, House Reps. (Apr. 12, 2006), <https://www.supremecourt.gov/orders/courtorders/frap06p.pdf> [<https://perma.cc/ZR4L-3JHU>]; FED. R. APP. P. 32.1; see also Wis. Jud. Council, Rule Petition 08-02 Attachment B, In re Proposed Amendments to Wisconsin Statute § (Rule 809.23(3)), at 1–10 (Jan. 25, 2008), <https://www.wicourts.gov/supreme/docs/0802petitionsupplement.pdf> [<https://perma.cc/34XA-YMLV>] (indicating Alaska amended to allow certain citations in December 2007; Hawaii permitted as amended to July 2008; Kentucky amended to January 2007; Louisiana approved citation of unpublished opinions in 2006 if the opinion was posted on the courts internet website; Maryland permitted citation as amended in 2007; Massachusetts permitted as of February 2008; Vermont amended as of 2008).

28. See FED. R. APP. P. 32.1 advisory committee's note to 2006 amendment (“Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions.”).

29. See *Current Rules of Practice & Procedure*, U.S. CTS., <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure#:~:text=The%20Federal%20Rules%20of%20Appellate,and%20effective%20July%201%2C%201968> [<https://perma.cc/4MCM-S829>] (“The Federal Rules of Appellate Procedure . . . govern procedure in the United States courts of appeals.”).

30. See FED. R. APP. P. 32.1(a).

amendment by one and a half years, allowing citation of more unpublished opinions than its Wisconsin counterpart.<sup>31</sup>

### III. WISCONSIN'S MISPLACED ADHERENCE TO THE FEDERAL CITATION RULE

Neither the Advisory Committee on Appellate Rules (Appellate Advisory Committee), the Standing Committee on Rules of Practice and Procedure (Standing Committee), nor the Judicial Conference of the United States (Judicial Conference) contemplated concerns to support the Wisconsin Supreme Court's adherence to the federal rule. Nor did other critics of unpublished opinions.

#### A. *The Questionable Prospective Application Provision*

Rule 32.1's history is important. After nearly fifteen years of debate over unpublished opinions<sup>32</sup>—and 513 written comments during the 2003 to 2004 rulemaking procedures<sup>33</sup>—the Appellate Advisory Committee initiated a research plan to be conducted by the Administrative Office of the U.S. Courts (AO) and the Federal Judicial Center (FJC).<sup>34</sup> The AO and FJC conducted these studies<sup>35</sup> at a time when the proposed rule would have permitted the citation of *all* unpublished federal circuit opinions, *regardless of their issue date*.<sup>36</sup> That's right, the prospective application of Rule 32.1, which created the bright-line

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31. Compare FED. R. APP. P. 32.1(a)(ii), with WIS. STAT. § 809.23(3)(b) (2021–22).

32. See Partick J. Schlitz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 28 (2005). Indeed, Schlitz, who had served as a Reporter to the Advisory Committee since 1997, stated the issue of unpublished opinions began in 1991, when the Advisory Committee's study agenda expressed concerns regarding unpublished opinions. *Id.* at 25, 28.

33. See Stephen R. Barnett, *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 *WASH. & LEE L. REV.* 1491, 1494 (2005). To be transparent, of the 513 comments, “approximately 90% (462) opposed the rule.” *Id.* at 1500. Yet the Ninth Circuit, alone—a circuit that strictly forbade citation of unpublished opinions—was responsible for approximately 75% of the comments. *Id.*

34. *Id.* at 1495.

35. The FJC study involved “surveys to all 257 circuit judges (active and senior) and to attorneys who has appeared in a random sample of fully-briefed federal appellate cases.” See Schlitz, *supra* note 32, at 59. For the full 314-page report, see ROBERT TIMOTHY REAGAN, *FED. JUD. CTR., CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS* (2005), [https://www.uscourts.gov/sites/default/files/citatio3\\_1.pdf](https://www.uscourts.gov/sites/default/files/citatio3_1.pdf) [<https://perma.cc/F29A-YFQS>]. The AO's study analyzed the nine circuits that did not forbid citation of unpublished opinions, examining three years of data regarding case disposition times and one-line orders. See Schlitz, *supra* note 32, at 64.

36. Barnett, *supra* note 33, at 1496–97.

2007 cut-off date, had not yet been introduced in the proposed rule's language.<sup>37</sup>

And the studies were “decisive in [their] conclusions.”<sup>38</sup> Members of the Appellate Advisory Committee agreed the studies “failed to support the main contentions” against citation of unpublished opinions: results showed it would not increase drafting time for judges; it would not create more work for judges; it would not result in more “one-line orders” from judges;<sup>39</sup> and it would not create more work for attorneys.<sup>40</sup> The Appellate Advisory Committee and Standing Committee were convinced. The Appellate Advisory Committee approved the proposed rule in April 2005, and the Standing Committee unanimously approved it in June 2005.<sup>41</sup> So when did the prospective application find its way into the proposed rule?

It appeared in a last-minute amendment—a questionable one, at that.<sup>42</sup> The Judicial Conference, during its September 2005 meeting, approved the rule with one condition: “the rule would apply ‘only to judicial dispositions entered on or after January 1, 2007.’”<sup>43</sup> This condition sharply contrasted the Standing Committee's recommendation to the Judicial Conference—a recommendation with findings, based on the AO and FJC studies, that limiting the citation of unpublished opinions (1) had no policy justifications, (2) created adverse effects on public confidence toward the judicial system, (3) burdened practitioners due to inconsistent enforcement, and (4) harmed the

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37. *Id.* at 1496.

38. *Id.*

39. *See* Schlitz, *supra* note 32, at 64.

40. *See* Barnett, *supra* note 33, at 1548–49.

41. *Id.* at 1496.

42. *See* Wis. Jud. Council, Rule Petition 08-02, Attachment A, In re Proposed Amendments to Wisconsin Statute § (Rule 809.23(3)), at 25 (Jan. 25, 2008), <https://www.wicourts.gov/supreme/docs/0802petitionssupport.pdf> [<https://perma.cc/NG2P-8MW5>] (arguing the change was due to the request of one “chief judge of one of the restrictive circuits”). The Judicial Conference did not invent the prospective-application idea. During the 2004 hearings before the Appellate Advisory Committee, for example, numerous scholars argued for a prospective application provision, reasoning, almost unanimously, “[t]hat’s what a number of jurisdictions have done in moving to citability.” ADMIN. OFFS. U.S. CTS., ADVISORY COMMITTEE ON APPELLATE RULES 112, 122–23, 213 (2004), <http://www.nonpublication.com/aphearing.htm> [<https://perma.cc/8WHU-6QXD>] [hereinafter Advisory Committee Transcript].

43. Barnett, *supra* note 33, at 1497 (footnote omitted).

administration of justice.<sup>44</sup> It seems likely the Judicial Conference included the prospective application provision, at least in part, as an effort to compromise with the circuits that had previously precluded the citation of unpublished opinions.<sup>45</sup> The Judicial Conference stated the last-minute amendment came “after discussion.”<sup>46</sup>

Unfortunately, the Judicial Conference’s discussion doomed Rule 32.1’s purpose. The stated purpose of Rule 32.1—uniformity among federal circuits<sup>47</sup>—was, indeed, frustrated by the Judicial Conference’s last-minute insertion of the prospective application provision.<sup>48</sup> While Rule 32.1 set what seemed to be a bright-line standard that unified the federal circuits, the circuits retained authority to establish individual standards for unpublished opinions issued before 2007, continuing the divide among circuits.<sup>49</sup>

Similarly, but for distinct reasons, uniformity did not justify a prospective application of Wisconsin’s citation rule. When the Wisconsin Court of Appeals

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44. COMM. ON RULES PRAC. & PROC., JUD. CONF. U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 15–16 (2005), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST09-2005.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST09-2005.pdf) [https://perma.cc/2FVS-YVQ3].

45. At the time, four circuits—“the Second, Seventh, Ninth, and Federal”—had complete bans on citation of unpublished opinions; six circuits—“the First, Fourth, Sixth, Eighth, Tenth, and Eleventh”—discouraged citation but for few circumstances; and three circuits—“the Third, Fifth, and D.C.”—freely permitted citation of unpublished opinions. Schlitz, *supra* note 32, at 28.

46. JUD. CONF. U.S., REPORT OF THE PROCEEDINGS ON THE JUDICIAL CONFERENCE OF THE UNITED STATES 36 (2005), <https://www.uscourts.gov/sites/default/files/2005-09.pdf> [https://perma.cc/WJQ8-YY9A].

47. David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. APP. PRAC. & PROCESS 19, 20 (2010) (“It was intended to create uniformity regarding citation of unpublished opinions in the federal circuits.”); FED. R. APP. P. 32.1 advisory committee’s note to 2006 amendment (“Rule 32.1(a) is intended to replace these inconsistent standards with one uniform rule.”).

48. Cleveland, *supra* note 47, at 20.

49. *Id.* at 48 (“The citability of unpublished opinions issued before January 1, 2007, remains in flux; local rules vary from completely permissive to completely restrictive to unclear. This undercuts the uniformity that the new federal rule was supposed to bring to the federal justice system regarding the use of unpublished opinions.”). In addition, Rule 32.1 failed to create uniformity among circuits because it did not specify the precedential value of unpublished opinions. *See* Schlitz, *supra* note 32, at 1504 n.68. Although the comments to Rule 32.1 suggest federal circuits cannot prohibit citation for persuasive value, Rule 32.1 failed to address that “circuits have differed even more dramatically in the effects they have given to unpublished opinions as between ‘persuasive’ and ‘presidential’ value.” *Id.* In other words, circuits can still assign different precedential weight to unpublished opinions—Rule 32.1 merely prevents circuits from precluding the citation.

was created, so, too, were new Rules of Appellate Procedure.<sup>50</sup> From the start—and until the 2008 amendment—“[a]n unpublished opinion [was] of no precedential value and for [that] reason [could] not be cited in any court of” Wisconsin.<sup>51</sup> Unlike in the split federal circuits, unpublished opinions of the Wisconsin Court of Appeals had always been uncitable in Wisconsin courts—uniformity was not a concern.

### *B. Concerns During Rule 32.1's Rulemaking Process*

But to be sure, the Wisconsin Supreme Court has shared the concerns raised by other critics during the rulemaking procedures of Rule 32.1. At the outset of this analysis, it is again important to note that the Wisconsin Supreme Court did not enumerate reasons for selecting a prospective application or explicitly state that Rule 32.1 guided its decision.<sup>52</sup> However, the justices' questions and commentary during the 2008 public hearing<sup>53</sup> and 2012 administrative conference meeting<sup>54</sup> indicate that some concerns raised during Rule 32.1's rulemaking procedures may have persuaded the Wisconsin Supreme Court.

The Wisconsin justices' two overarching concerns were reliability and the volume of opinions. For example, during the 2008 hearing, one justice pointed to a single per curiam opinion where the Wisconsin Court of Appeals had got the law wrong, and requested the Judicial Council explain the outcome should that per curiam opinion have been citable.<sup>55</sup> In response to the Judicial Council's argument to permit citation of per curiam opinions, Justice Roggensack expressed concern that the volume of cases might become overwhelming, especially for criminal and family law practitioners.<sup>56</sup> Current Chief Justice Annette Ziegler raised concern with the volume of criminal dispositions, arguing the volume may create the potential for ineffective assistance of counsel claims where criminal practitioners could be held

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50. Earl H. Hazeltine, *Jurisdiction of the Wisconsin Court of Appeals*, 69 MARQ. L. REV. 545, 545 (1986).

51. See Wis. Sup. Ct. Order 08-02, 2009 WI 2.

52. See *id.*

53. See generally Public Hearing, *supra* note 20.

54. See generally Open Administrative Conference, In re Proposed Amendments to Wis. Stat. § (Rule) 809.23, 2009 WI 2 (No. 08-02) (Wis. 2012) (on file with author) (regarding citation to unpublished opinions).

55. See Public Hearing, *supra* note 20, at 25:00–26:30.

56. See *id.* at 5:45–6:35 (discussing the criminal and family bars' concerns regarding the volume of opinions).

responsible for not locating relevant unpublished opinions.<sup>57</sup> And during the 2012 Administrative Conference, Justice Ann Walsh Bradley—the sole dissenter to the 2009 amendment<sup>58</sup>—expressed concerns regarding one-judge opinions as persuasive authority in traffic cases, largely due to the sheer volume of traffic cases heard.<sup>59</sup> The justices did not pioneer these concerns.

Scholars opposing Rule 32.1 also discussed reliability and volume.<sup>60</sup> During the 2004 Federal Advisory Committee hearing, Judge Myron H. Bright—the only Eighth Circuit Judge to serve forty-eight years<sup>61</sup>—testified to his concerns with the citation of unpublished opinions, focusing on the number of judicial opinions issued each year.<sup>62</sup> More specifically, “to allow all opinions to be cited puts into the inventory of cases each year about 20,000 of the 27,000 cases decided by the appellate courts. About 80 percent of the cases . . . are nonpublished opinions.”<sup>63</sup> Judge Bright discussed increased difficulty with research considering these numbers; explained that, to him, “unpublished” simply meant judges did not have time to carefully write the opinion to worry about precedent, inferring unpublished opinions were full of errors; and emphasized the time difference that judges spend on unpublished opinions compared to published opinions, suggesting the proposed federal rule would consume judicial resources.<sup>64</sup> Simply put, Judge Bright’s concerns boiled down to (1) the reliability of unpublished opinions, and (2) the volume of opinions—

57. *See id.* at 16:30–18:30.

58. *See* Wis. Sup. Ct. Order 08-02, 2009 WI 2, ¶ 1 (A.W. Bradley, J., dissenting) (“I respectfully dissent for the reasons previously stated.”).

59. *See* Rule Hearing, *supra* note 54, 30:00–35:00.

60. Echoing Patrick J. Schlitz, “I will not litter this [discussion] with dozens of footnotes citing hundreds of comments.” *See* Schlitz, *supra* note 32, at 30 n.41. Instead, after carefully listening to concerns addressed during the Wisconsin Supreme Court’s public hearing, I determined Judge Bright’s testimony, during the federal rulemaking procedure of Rule 32, shared similar underpinnings to the Wisconsin Supreme Court’s concerns—reliability and volume. As such, I use Judge Bright’s testimony, considering the Wisconsin Supreme Court’s concerns, to demonstrate why the federal concerns should not have persuaded the Wisconsin Supreme Court to adopt a prospective application provision.

61. *The Honorable Myron H. Bright U.S. Court of Appeals for the Eighth Circuit 1919-2016*, HIST. SOC’Y U.S. CTS. EIGHTH CIR., <https://www.lb8.uscourts.gov/pubsandservices/histsociety/coa8.bright.html> [https://perma.cc/3PL8-7PSK].

62. *See* Advisory Committee Transcript, *supra* note 42.

63. *Id.* at 11.

64. *Id.* at 11–12.

his belief that “there’s too much law out there.”<sup>65</sup> These concerns should not have supported the Wisconsin Supreme Court’s adherence.

i. Reliability

To Judge Bright’s first concern, rationales for precluding the citation of unpublished opinions cannot fall on the reliability of the opinion’s contents. Justice Samuel Alito, when chair of the Appellate Advisory Committee, stated it best: “[I]t is difficult to justify a system that permits parties to bring to a court’s attention virtually every written or spoken word in existence *except* those contained in the court’s own non-precedential opinions.”<sup>66</sup>

Emphasizing Justice Alito’s statement, scholars have recently discussed citation of questionable internet sources. For example, Wikipedia, a popular online encyclopedia that is “written and maintained by a community of volunteers,”<sup>67</sup> contains millions of articles that anyone can edit.<sup>68</sup> Although Wikipedia may not be cited with the same frequency as case law or other common sources, such as Black’s Law Dictionary, practitioners and courts alike have cited to Wikipedia articles with some regularity, beginning around 2004.<sup>69</sup> Indeed, one study conducted by Professor Lee Peoples<sup>70</sup> examined citations to Wikipedia in “the Westlaw database ALLCASES” from 2004 to 2008, discovering that 401 judicial opinions cited to at least one Wikipedia article.<sup>71</sup> Not surprisingly, today,<sup>72</sup> a similar Westlaw search generates 1,269 opinions.<sup>73</sup> Relevant to practitioners’ use of Wikipedia, the same search,

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65. *Id.* at 6–20.

66. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on App. Rules, to Judge Anthony J. Scirica, Chair, Standing Comm. on Rules of Prac. & Proc. 26 (May 22, 2003), [https://www.uscourts.gov/sites/default/files/fr\\_import/API2-2002.pdf](https://www.uscourts.gov/sites/default/files/fr_import/API2-2002.pdf) [<https://perma.cc/G6QM-7WXU>] [hereinafter Alito Memo].

67. WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia> [<https://perma.cc/BD88-G7P8>].

68. Jodi L. Wilson, *Proceed with Extreme Caution: Citation to Wikipedia in Light of Contributor Demographics and Content Policies*, 16 VAND. J. ENT. & TECH. L. 857, 859 (2014).

69. *See id.* at 862–63.

70. Professor Peoples researches legal issues at the intersection of law and technology. *Lee F. Peoples*, OKLA. CITY UNIV. SCH. L., <https://law.okcu.edu/people/lee-f-peoples/> [<https://perma.cc/SND4-FMG2>].

71. Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 6 (2009) (“I searched the Westlaw database ALLCASES for the terms ‘wiki OR Wikipedia.’”).

72. I conducted the same search performed by Professor Peoples on January 4, 2023.

73. *See* Westlaw Search of “Wiki” or “Wikipedia,” WESTLAW, [www.westlaw.com](http://www.westlaw.com) (login; then choose “All States” and “All Federal” from jurisdiction dropdown menu; then enter “‘Wiki’ or

selecting “Briefs” under Westlaw’s “Content types,” populates 1,900 briefs<sup>74</sup>—and that merely reflects the briefs uploaded in Westlaw. To be sure, my argument is not that citations to Wikipedia are inherently bad, nor that the information is always inaccurate.

My argument is that Wikipedia, itself, recognizes that “Wikipedia is not a reliable source.”<sup>75</sup> Yet courts—even courts that opposed the citation of unpublished opinions during the federal rulemaking procedures—have relied on Wikipedia as if it were persuasive, or even precedential.<sup>76</sup> Courts have explored Wikipedia to support their reasoning, to define legislative facts or general facts that assist the court with questions of law, policy, and discretion, and to value parties’ arguments.<sup>77</sup> That considered, the reliability of unpublished opinions should not preclude citation.

This principle holds especially true in Wisconsin. Wisconsin’s unpublished opinions issued before the 2009 amendment are distinct from the federal circuits’ unpublished opinions issued before Rule 32.1. Judge Bright, relying on his years of experience serving in nearly every circuit,<sup>78</sup> testified that “unpublished” meant judges did not have time to write the opinion or to worry about precedent.<sup>79</sup> In essence, unpublished opinions from federal circuits could not be trusted because circuit judges knew a particular opinion would be unpublished, and thus disregarded its importance. The pre-amendment

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“Wikipedia” into the search bar; then click the search icon). Worth noting, the scope of my research is more limited than that of Professor Peoples. With limited resources, I could not “examine[] each case and organize[] the results.” See Peoples, *supra* note 71.

74. See Westlaw Search of “Wiki” or “Wikipedia,” WESTLAW, www.westlaw.com (follow instructions in Westlaw Search, *supra* note 73; then select “Content types”; then select “Briefs”).

75. Wikipedia: *Wikipedia is Not a Reliable Source*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Wikipedia:Wikipedia\\_is\\_not\\_a\\_reliable\\_source](https://en.wikipedia.org/wiki/Wikipedia:Wikipedia_is_not_a_reliable_source) [<https://perma.cc/9FJF-MNDJ>] (“As a user-generated source, it can be edited by anyone at any time, and any information it contains at a particular time could be vandalism, a work in progress, or simply incorrect.”).

76. See Peoples, *supra* note 71, at 8 (providing an example of how the Seventh Circuit used Wikipedia to support its interpretation of a controversial definition). For the case that Professor Peoples discussed, see *Rickher v. Home Depot, Inc.*, 535 F.3d 661 (7th Cir. 2008). It is odd to think that the Seventh Circuit, which opposed citation of unpublished opinions before Rule 32.1, would resort to a source that deemed itself unreliable. See Schlitz, *supra* note 32, at 27–28 (noting the Seventh Circuit was a restrictive circuit).

77. Peoples, *supra* note 71, at 7.

78. See Advisory Committee Transcript, *supra* note 42, at 6 (“I’ve served frequently not only in my own circuit, which is the Eighth, but I’ve served with the Second, the Third, the Sixth, the Ninth, and the Eleventh Circuits and somewhat less consistently with the Fifth, the Seventh and the Tenth Circuits.”).

79. *Id.* at 9–10.



Wisconsin Court of Appeals, on the other hand, often did not know whether the opinion being drafted would be published or unpublished.<sup>80</sup> As such, reliability concerns that may have supported Rule 32.1's prospective application did not—and still do not—support the Wisconsin Supreme Court's adherence to the federal concerns.<sup>81</sup>

## ii. Volume

The same is true for volume. Judge Bright's concern that "too much law" creates issues with accessibility is also prevalent with the citation of Wikipedia articles.<sup>82</sup> For instance, Professor Peoples identified issues with locating originally cited Wikipedia articles due to the citation format, the URL when inserted into Westlaw and LexisNexis, and—most concerning—the ever-changing nature of the information on Wikipedia.<sup>83</sup> And Wikipedia is not the only example of a regularly cited source that poses an issue with accessibility.

In fact, most law students, practitioners, and judges who have undertaken an extensive research project understand that finding the website for a cited URL can be challenging, despite modern technology, like Perma.cc links.<sup>84</sup> For instance, only 30% of law review citations to internet sources in 1997 were still accessible in 2002.<sup>85</sup> And over a six-year period, one study showed that 46% of internet sources cited by federal appellate courts were inaccessible.<sup>86</sup> Again, like citations to Wikipedia, these statistics are not intended to suggest that

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80. See Public Hearing, *supra* note 20, at 1:10:45.

81. During the 2008 hearing, Justice Roggensack argued a similar point. Justice Roggensack stated she was unwilling to concede that orders, per curiam opinions, or anything produced by the Wisconsin Court of Appeals was not carefully considered. See Public Hearing, *supra* note 20, at 1:14:30–1:15:15. In her question that followed, which surely brought laughter among the audience, Justice Roggensack asked, "Don't you agree with me." See *id.*

82. Advisory Committee Transcript, *supra* note 42, at 11; Peoples, *supra* note 71 (identifying issues with citations to Wikipedia articles, such as changing URLs and information, that make it difficult to ensure reliability and accessibility of the original information).

83. Peoples, *supra* note 71, at 37–38.

84. See *id.* at 37 ("Several previous studies have documented 'link riot,' the inaccessibility or disappearance of internet sources cited in judicial opinions and law review articles."); Perma.cc: Archiving URLs for Law Review Citations: About Perma, UCLA SCH. L.: HUGH & HAZEL DARLING L. LIBR., <https://libguides.law.ucla.edu/perma> [<https://perma.cc/4V6H-E8UQ>] (listing four articles that explain the importance of perma links in the legal industry).

85. Mary Rumsey, *Runaway Train: Problems of Permanence, Accessibility, and Stability in the Use of Web Sources in Law Review Citations*, 94 L. LIBR. J. 27, 35 (2002).

86. Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROC. 417, 449 (2002).

courts should prohibit all internet citations, but rather to illustrate that accessibility concerns due to volume are not unique to unpublished opinions.

Considering the unfathomable number of citable resources now available,<sup>87</sup> and proof of courts relying on sources deemed unreliable,<sup>88</sup> I argue that the volume of opinions that would have become available for citation did not support the Wisconsin citation rule's 2009 cut-off date—I find it difficult to refute Justice Alito's logical sentiment.<sup>89</sup> Understanding that others have raised reasons to disagree,<sup>90</sup> some of which are questionable in Wisconsin,<sup>91</sup> it is worthwhile to consider the numbers.

A comparison of judicial opinions issued by various jurisdictions demonstrates the volume concerns that may have supported Rule 32.1's prospective application did not support Wisconsin's adherence. Because each state and each federal circuit maintains unique caseloads and judicial compositions, policy concerns regarding "too much law"<sup>92</sup> should not be uniform. Indeed, it may be true that the Appellate Advisory Committee considered this: "[Rule 32.1] says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another

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87. See Schlitz, *supra* note 32, at 77 ("Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearean sonnets, and advertising jingles.").

88. See *supra* text accompanying note 76.

89. See Alito Memo, *supra* note 66.

90. One argument regarding the volume of opinions that would become available without a prospective application provision concerns an unpublished opinion's precedential value due to its author. See Schlitz, *supra* note 32, at 41. Those opposing citability argue that parties citing to an unpublished opinion are asking the current court to accept or reject a prior court's reasoning, which, in fairness, the court would tend to accept. *Id.* Opponents argue other sources lack that effect. *Id.*

91. I agree an author has much to do with the precedential value a court might assign to any given source—I disagree, however, that the authors of sources other than judicial opinions cannot have a similar effect. As a Marquette Law student, I learned the rules of evidence from Professor Daniel D. Blinka. As have judges across Wisconsin, whether in his classroom, during Judicial Council meetings, or by request for his assistance. A Westlaw search shows how trusted Professor Blinka is in both the Wisconsin Supreme Court and the Wisconsin Court of Appeals—he is cited in over 200 Wisconsin cases. See Westlaw Search of "Blinka" and "Evidence," WESTLAW, www.westlaw.com (login; then choose "Wisconsin" from jurisdiction dropdown menu; then enter "'Blinka' and 'Evidence'" into the search bar; then click the search icon). When Professor Blinka is cited to a court, the court is asked to either accept, or reject, a scholar that Wisconsin courts have continuously relied upon. This demonstrates that authors of sources other than sources that are judicial opinions may have the same effect on courts as do unpublished opinions.

92. See Advisory Committee Transcript, *supra* note 42, at 11.

court. Rule 32.1 addresses only the *citation* of federal judicial dispositions.”<sup>93</sup> Although the Wisconsin Supreme Court reviewed the number of Wisconsin judicial terminations,<sup>94</sup> the sheer numbers it contemplated may have improperly influenced its adherence to Rule 32.1’s prospective application.<sup>95</sup> Let’s compare the numbers.

The federal circuit courts comprise a significantly larger caseload and body of case law than does Wisconsin. In the years surrounding Rule 32.1’s adoption, for example, the federal circuits terminated 67,699 cases in 2006,<sup>96</sup> and 61,462 in 2007.<sup>97</sup> As for terminations “on the merits,” or “cases in which the parties submitted briefs and the court rendered a decision after considering the facts and the law,”<sup>98</sup> the federal circuits terminated 34,407 in 2006,<sup>99</sup> and 31,340 in 2007.<sup>100</sup> Termination statistics from more recent years reflect similar numbers—but, with Rule 32.1 in place, are largely citable. During twelve-month increments ending in June 2017 through June 2021—five years of data—the federal circuits terminated 251,701 cases, with an average of 50,340 cases per twelve-month period.<sup>101</sup> During that period, 156,884 terminations were “on the merits,” with an average of 31,368 each year.<sup>102</sup> Although only the latter category of these examples—terminations “on the merits”—become published opinions, unpublished opinions, or summary dispositions from the federal circuits,<sup>103</sup> it is clear practitioners and judges have a large source of

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93. See FED. R. APP. P. 32.1 advisory committee’s note to 2006 amendment.

94. See Advisory Committee Transcript, *supra* note 42.

95. See Public Hearing, *supra* note 20, at 10:00–14:05 (discussing the number of terminations in 2007, specifically concerned with the number of summary disposition orders, non-opinions, and memorandum opinions that would become available).

96. U.S. CTS., TABLE B-1. U.S. COURTS OF APPEALS—APPEALS COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2006 at 8, [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/B01Dec06.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/B01Dec06.pdf) [<https://perma.cc/7G35-5HA6>].

97. U.S. CTS., TABLE B-1. U.S. COURTS OF APPEALS—APPEALS COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2007 at 8, [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/B01Dec07.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/B01Dec07.pdf) [<https://perma.cc/HFL2-CRHM>].

98. See Schlitz, *supra* note 32, at 26.

99. See *supra* text accompanying note 96.

100. See *supra* text accompanying note 97.

101. See U.S. CTS., U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE, [https://www.uscourts.gov/sites/default/files/fcms\\_na\\_appprofile0630.2022\\_0.pdf](https://www.uscourts.gov/sites/default/files/fcms_na_appprofile0630.2022_0.pdf) [<https://perma.cc/VRA4-7S74>].

102. See *id.*

103. Schlitz, *supra* note 32, at 26–27.

federal case law on which to rely—or to have to sort through.<sup>104</sup> And that is not considering opinions by more than 670 district court judges nationwide,<sup>105</sup> which are generally citable for persuasive value.<sup>106</sup>

With the number of citable opinions that would have become available, absent Rule 32.1's prospective application provision, Judge Bright's concern of too much law may have been supported. For instance, 84% of the 34,580 terminations on the merits during the twelve-month period ending September 20, 2006, were unpublished.<sup>107</sup> Meaning, without Rule 32.1's prospective application, over 27,000 federal circuit court opinions would have become available for citation.<sup>108</sup> In the twelve-month period ending September 20, 2005, again, over 80% of terminations on the merits were unpublished, leaving more than 23,000 federal circuit opinions that would have become available for citation.<sup>109</sup> Without Rule 32.1's prospective application, practitioners and judges in circuits that had previously restricted citation of unpublished opinions would have experienced a significant influx in citable law.

The Wisconsin Court of Appeals's termination data dwindles in comparison. During the 2008 hearing, one justice asked the Judicial Council to respond to data from 2007.<sup>110</sup> The justice expressed concern with the 3,029 terminations that would have become available for citation under the Judicial

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104. See FED. R. APP. P. 32.1.

105. *Introduction To The Federal Court System*, U.S. DEP'T JUST.: OFFS. U.S. ATT'YS, <https://www.justice.gov/usao/justice-101/federal-courts> [<https://perma.cc/MS39-STNK>].

106. District court decisions have precedential force, but “[a] single district court decision . . . has little precedential effect and it is not binding on . . . other district judges in the same district.” Matthew L. Schafer, *Federal Law, Federal Courts, and Binding Persuasive Authority*, GEO. U. L. CTR., <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Matthew-Schafer-FederalLawFederalCourtsandBindingandPersuasiveAuthority.pdf> [<https://perma.cc/R8U9-NTW6>].

107. JAMES C. DUFF, ADMIN. OFF. U.S. CTS., 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 52 (2006), [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/completejudicialbusiness.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/completejudicialbusiness.pdf) [<https://perma.cc/28ZG-USXE>].

108. See *id.* (showing 7,277 written and signed unpublished opinions, and 20,763 written, reasoned, and unsigned unpublished opinions).

109. See U.S. CTS., TABLE S-3. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2005, [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/s3\\_1.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/s3_1.pdf) [<https://perma.cc/L3YN-7396>] (showing 5,211 written and signed unpublished opinions, and 18,254 written, reasoned, and unsigned unpublished opinions).

110. See Public Hearing, *supra* note 20, at 9:54–14:10.

Council's proposal.<sup>111</sup> But that number is truly insignificant. Even assuming the Wisconsin Court of Appeals terminated 4,000 cases each year from 1978, when it was created,<sup>112</sup> until the 2008 hearing (4,000 x 30 = 120,000), the terminations in the federal circuits would have exceeded that number in just two years—67,699 cases in 2006,<sup>113</sup> and 61,462 in 2007.<sup>114</sup> The federal circuits produce substantially more case law. And Wisconsin's amendment did not preclude citation to federal circuit court opinions, federal district court opinions, or Wisconsin circuit court opinions, whether published or unpublished.<sup>115</sup> In context, therefore, 3,000 opinions, or even 120,000 opinions, would not create a volume issue.

This comparison demonstrates that the volume of case law, as Judge Bright argued to oppose the citation of unpublished opinions,<sup>116</sup> was not as concerning to Wisconsin as it was to the federal courts. Additionally, the numbers raise doubt that Wisconsin experienced an unmanageable explosion of appellate opinions justifying its original citation rule.<sup>117</sup> After all, Wisconsin's original citation rule was enacted the same year that the Wisconsin Court of Appeals was created to "alleviate the Wisconsin Supreme Court's rising number of appellate cases."<sup>118</sup> The numbers show the Wisconsin Supreme Court may have been hasty in adopting the federal rule's prospective application, especially if its decision turned on the volume of opinions.

It may also be true that the Wisconsin Supreme Court decided the issue at what now appears to be bad timing.<sup>119</sup> That is, Wisconsin's Court of Appeals

111. *See id.* (noting that of the 3,029 terminations in 2007, 1,182 were decided by opinion, and 202 were published).

112. *History of the Courts*, *supra* note 11.

113. *See supra* text accompanying note 96.

114. *See supra* text accompanying note 97.

115. *See* *Brandt v. Lab. & Indus. Rev. Comm'n*, 160 Wis. 2d 353, 677–78, 466 N.W.2d 673 (Ct. App. 1991) ("We conclude that the statutory scenario of chapter 809 concerns appellate procedure generally and that Rule 809.23(3), *read in context*, concerns only court of appeals decisions.").

116. *See* WIS. STAT. § 809.23 Judicial Council committee's note to 1978 amendment (2021–22) (explaining the original policy rationales Wisconsin set forth, including their reasoning based on the explosion of appellate cases).

117. *See supra* text accompanying note 13.

118. *Wisconsin Court of Appeals*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Wisconsin\\_Court\\_of\\_Appeals#:~:text=The%20Court%20of%20Appeals%20was,Court%3B%20unpublished%20opinions%20are%20not](https://en.wikipedia.org/wiki/Wisconsin_Court_of_Appeals#:~:text=The%20Court%20of%20Appeals%20was,Court%3B%20unpublished%20opinions%20are%20not) [https://perma.cc/3V28-94BE].

119. Bad timing was similarly a factor when the court denied a petition to amend Wisconsin Statutes section 809.23(3) in 2003. *See* Wis. Sup. Ct. Order 02-02, 2003 WI 84, ¶ 19 ("There has been

experienced a high number of appellate cases in the years preceding the 2009 amendment, terminating over 1,000 cases by opinion each year from 2003 to 2008.<sup>120</sup> But the increasing numbers seen before 2008 did not persist. From 2015 to 2021, the Wisconsin Court of Appeals terminated less than 1,000 cases by opinion each year.<sup>121</sup> Indeed, the greatest number of terminations by opinion

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a steady upward trend in the court of appeals' annual case filings—1,915 in 1979, 3,342 in 2002.”). The court reasoned that, “[e]ven if [it] were to assume that intermediate appellate caseloads would stay relatively constant, the number of unpublished opinions w[ould] obviously multiply and the body of citable unpublished caselaw w[ould] inexorably expand.” *Id.*

120. See WIS. CT. APPEALS, 2003 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1–3 (2004) <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=30> [<https://perma.cc/Z8P9-SEZ3>] (noting 3,452 terminations, with 1,213 terminations by opinion); WIS. CT. APPEALS, 2004 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 2–3 (2005), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=29> [<https://perma.cc/UR64-A5TD>] (noting 3,215 terminations, with 1,048 terminations by opinion); WIS. CT. APPEALS, 2005 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1–3 (2006), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=25252> [<https://perma.cc/TP7D-59Z7>] (noting 3,241 terminations, with 1,176 terminations by opinion); WIS. CT. APPEALS, 2006 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1–3 (2007), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=31804> [<https://perma.cc/HS7P-NMRZ>] (noting 3,132 terminations, with 1,251 terminations by opinion); WIS. CT. OF APPEALS, 2007 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1–3 (2008), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=32394> [<https://perma.cc/9EVS-NE93>] (noting 3,029 terminations, with 1,182 terminations by opinion); WIS. CT. APPEALS, 2008 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 2–3 (2009), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=35593> [<https://perma.cc/XEL2-GYEC>] (noting 3,078 terminations, with 1,119 terminations by opinion). For the Wisconsin Court of Appeals Annual Report statistics from 2001 through 2022, see *Court of Appeals Statistics*, WIS. CT. SYS., <https://www.wicourts.gov/other/appeals/statistical.jsp> [<https://perma.cc/8AWZ-C2QB>]. The court’s number of terminations by opinion has been used to demonstrate pressure on judges responsible for writing them. See Wis. Sup. Ct. Order 02-02, 2003 WI 84, ¶¶ 26–30 (Sykes, J., concurring) (comparing terminations by opinion, summary dispositions, memorandum opinions, and other means of termination, to demonstrate that the court lacks resources “to write an opinion suitable for citation in every case.”).

121. See WIS. CT. APPEALS, 2015 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1–3 (2016), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=163017> [<https://perma.cc/FQL3-EPG3>] (noting 2,783 total terminations and 938 terminations by opinion); WIS. CT. APPEALS, 2016 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1–3 (2017), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=185117> [<https://perma.cc/9SB6-G2F5>] (noting 2,421 total terminations and 883 terminations by opinion); WIS. CT. APPEALS, 2017 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1–3 (2018), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=209245> [<https://perma.cc/75H2-LJH5>] (noting 2,451 total terminations and 883 terminations by opinion); WIS.

in any given year during this span occurred in 2015, with 938 terminations.<sup>122</sup> In hindsight, volume did not support Wisconsin's prospective application, but quite the opposite. Due to the high percentage of unpublished opinions during the years preceding the amendment,<sup>123</sup> and the large quantity of unpublished per curiam opinions issued thereafter,<sup>124</sup> Wisconsin practitioners and judges cannot cite to an unproportionally large number of Wisconsin Court of Appeals opinions.

### iii. Wisconsin's Neighbors

On the other hand, Wisconsin's neighboring state, Illinois, may have had reason to limit the number of citable opinions due to the "avalanche of opinions

CT. APPEALS, 2018 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1-3 (2019), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=239772> [<https://perma.cc/CR2Q-N6UH>] (noting 2,480 total terminations and 803 terminations by opinion); WIS. CT. APPEALS, 2019 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 1-3 (2020), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=289144> [<https://perma.cc/7AT6-8LS5>] (noting 2,252 total terminations and 741 terminations by opinion); WIS. CT. APPEALS, 2020 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 2-4 (2021), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=391847> [<https://perma.cc/TU54-UTMR>] (noting 2,110 total terminations and 648 terminations by opinion); WIS. CT. APPEALS, 2021 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS 2-4 (2022), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=522182> [<https://perma.cc/EPS3-FZ6B>] (noting 2,206 total terminations and 707 terminations by opinion).

122. WIS. CT. APPEALS, 2015 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121.

123. In 2008, the Wisconsin Court of Appeals published only 17% of all 1,038 opinions. WIS. CT. APPEALS, 2008 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120. In 2007, the court published only 18% of all 1,109 opinions. WIS. CT. APPEALS, 2007 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120. In 2006, the court published 23% of all 1,118 opinions. WIS. CT. APPEALS, 2006 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120. In 2005, the court published 22% of all 1,057 opinions. WIS. CT. APPEALS, 2005 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120. In 2004, the court published 24% of all 943 opinions. WIS. CT. APPEALS, 2004 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120. In 2003, the court published 23% of all 1,067 opinions. WIS. CT. APPEALS, 2003 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120.

124. See CITATION OF UNPUBLISHED OPS. COMM., FINAL REPORT TO WISCONSIN SUPREME COURT, at 10 (2012), <https://www.wicourts.gov/publications/reports/docs/unpublishedopinionsfinal.pdf> [<https://perma.cc/4XF3-W47Y>] (finding that, between July 1, 2008 and June 30, 2009, 523 per curiam opinions were unpublished, and between July 1, 2010 and June 30, 2011, 577 per curiam opinions were unpublished).

from Appellate Courts.”<sup>125</sup> Even during the years that the Wisconsin Court of Appeals began to issue fewer opinions, which was correlated with fewer total terminations,<sup>126</sup> the Illinois Court of Appeals disposed<sup>127</sup> of significantly more cases.<sup>128</sup> In Illinois, a rule permitting citation to all opinions would allow citation to nearly, if not more than, twice the number of opinions than in Wisconsin.

The volume of cases in Illinois also demonstrates the flip side of the coin: not the case law that would become immediately available for citation without

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125. Timothy A. Slating, *Illinois Supreme Court Amends Rule 23 to Allow Citation of Unpublished Appellate Court Rulings*, ILL. STATE BAR ASS'N (Nov. 20, 2020), <https://www.isba.org/barnews/2020/11/illinois-supremecourtamendsrule23toa> [<https://perma.cc/VZE2-EFSE>].

126. In 2021, when the Wisconsin Court of Appeals issued 707 opinions, it terminated 2,206 cases. WIS. CT. APPEALS, 2021 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121. In 2020, when the court issued 648 opinions, it had 2,110 terminations. WIS. CT. APPEALS, 2020 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121. In 2019, when the court issued 741 opinions, it terminated a total of 2,252 cases. WIS. CT. APPEALS, 2019 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121. In 2018, when the court issued 803 opinions, it terminated 2,480 cases. WIS. CT. APPEALS, 2018 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121.

127. Illinois's use of the term “disposed” is analogous to Wisconsin's use of the term “termination.” In Illinois, prior to its recent amendment, a disposition included opinions, written orders—unpublished opinions—and summary orders. *See* ADMIN. OFF. ILL. CTS., ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 187 (2021), <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/54868468-989e-45f4-8bb8-c3882ed3b175/2021%20Annual%20Report%20Statistical%20Summary.pdf> [<https://perma.cc/T56M-36G4>]. In Wisconsin, termination means either opinions, summary disposition, memo opinion, or other—dismissals and stipulations. *See, e.g.*, WIS. CT. APPEALS, 2018 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121.

128. In 2021, Illinois Appellate Courts disposed of 2,288 civil cases, and 2,825 criminal cases. ADMIN. OFF. ILL. CTS., ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY (2021), *supra* note 127, at 188. In 2020, Illinois Appellate Courts disposed of 2,608 civil cases, and 2,841 criminal cases. ADMIN. OFF. ILL. CTS., ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 184 (2020), <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/de4253a6-147f-4643-a201-0e29ce403179/2020%20Annual%20Report%20Statistical%20Summary.pdf> [<https://perma.cc/3PQ7-KT9T>]. In 2019, Illinois Appellate Courts disposed of 3,219 civil cases and 2,884 criminal cases. ADMIN. OFF. ILL. CTS., ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 172 (2019), [https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/9ce1588a-09e6-419e-93de-dcc585cf2e4a/2019\\_Statistical\\_Summary.pdf](https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/9ce1588a-09e6-419e-93de-dcc585cf2e4a/2019_Statistical_Summary.pdf) [<https://perma.cc/7X5F-BRMT>]. In 2018, Illinois Appellate Courts disposed of 3,378 civil cases and 2,787 criminal cases. ADMIN. OFF. ILL. CTS., ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 153 (2018), [https://www.illinoiscourts.gov/Resources/22ab251b-c8d1-4c48-938d-c9f4da84b957/2018\\_Statistical\\_Summary-Amended.pdf](https://www.illinoiscourts.gov/Resources/22ab251b-c8d1-4c48-938d-c9f4da84b957/2018_Statistical_Summary-Amended.pdf) [<https://perma.cc/WSX4-9BX2>].



a prospective application provision, but the citable opinions issued year after year that contribute to the volume of law. This is especially interesting considering Illinois's recent amendment. Recognizing its citation rule's outdated rationales, the Illinois Supreme Court amended its citation rule to permit citation of unpublished orders issued on or after January 1, 2021.<sup>129</sup> Although it included a prospective application provision, the Appellate Court of Illinois regularly disposes of more than twice the number of cases each year than the Wisconsin Court of Appeals does.<sup>130</sup> If that trend continues, Illinois's body of citable unpublished opinions will quickly outnumber Wisconsin's.<sup>131</sup>

Minnesota, another Wisconsin neighbor, has a uniquely similar appellate caseload to that of Wisconsin. For example, in 2019, Minnesota's Court of Appeals disposed of 2,108 cases,<sup>132</sup> comparable to Wisconsin's 2,252 terminations.<sup>133</sup> In 2018, the Minnesota Court of Appeals disposed of 1,964 cases,<sup>134</sup> slightly fewer than 2,480 terminations by the Wisconsin Court of Appeals.<sup>135</sup> Minnesota, however, has handled unpublished opinions differently than the federal circuits, Illinois, and Wisconsin. It has long permitted the citation of unpublished opinions.<sup>136</sup>

With an uproar over the "explosion," "avalanche," or other terms used to describe increased appellate caseloads between 1978 and the early 2000s, one would expect similar discussions in Minnesota's literature. Indeed, the Minnesota Court of Appeals likely issued more citable opinions than the

129. *Illinois Supreme Court Amendment to Rule 23 – A Necessary Change*, CHI. COUNCIL LAWS., <https://chicagocouncil.org/illinois-supreme-court-amendment-to-rule-23/#:~:text=Rule%2023%20originally%20allowed%20reviewing,be%20cited%20for%20persuasive%20purposes> [https://perma.cc/8AQE-T46W].

130. *Compare supra* note 126, with *supra* note 128.

131. See ADMIN. OFF. ILL. CTS., ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY (2021), *supra* note 127, at 188.

132. MINN. JUD. BRANCH, 2019 ANNUAL REPORT TO THE COMMUNITY 41 (2020), <https://mncourts.gov/mncourtsgov/media/PublicationReports/MJB-Annual-report-2019.pdf> [https://perma.cc/H457-U834].

133. WIS. CT. APPEALS, 2019 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121.

134. MINN. JUD. BRANCH, 2018 ANNUAL REPORT TO THE COMMUNITY 49 (2019), <https://mncourts.gov/mncourtsgov/media/PublicationReports/2018%20Annual%20Report/2018-MJB-Annual-Report-to-the-Community.pdf> [https://perma.cc/2VL4-54YA].

135. WIS. CT. APPEALS, 2018 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121.

136. Jenny Mockenhaupt, *Assessing the Nonpublication Practice of the Minnesota Court of Appeals*, 19 WM. MITCHELL L. REV. 787, 800 (1993) ("In Minnesota, unpublished decisions are cited not only by attorneys but by the court of appeals itself.").

Wisconsin Court of Appeals during the years preceding the Wisconsin Supreme Court's 2009 amendment.<sup>137</sup> And the Wisconsin Supreme Court appeared concerned with the volume of law available.<sup>138</sup> The existing literature, however, fails to identify issues with volume in Minnesota.<sup>139</sup> In fact, while supporting the citation of unpublished opinions, David L. Lillehaug, former Associate Justice of the Minnesota Supreme Court,<sup>140</sup> posited there was not enough law: “[T]he Court of Appeals should try to issue more precedential opinions.”<sup>141</sup> Volume continues to be an ill-suited argument against the citation of unpublished opinions.

### C. *Open the Floodgates—Little Water Remains*

To conclude this Part, Rule 32.1's rulemaking procedures elicited concerns that the citation of unpublished opinions would open the door to unreliable

137. The Minnesota Court of Appeals disposed of 2,186 cases in 2003, MINN. JUD. BRANCH, 2003 ANNUAL REPORT 15 (2004), [https://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/mjb\\_annual\\_report\\_2003.pdf](https://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/mjb_annual_report_2003.pdf) [<https://perma.cc/Z6LZ-5JLB>]; 2,121 cases in 2004, MINN. JUD. BRANCH, 2004 ANNUAL REPORT 22 (2005), [https://mncourts.gov/mncourtsgov/media/assets/documents/reports/MJB\\_annual-report\\_2004\\_web.pdf](https://mncourts.gov/mncourtsgov/media/assets/documents/reports/MJB_annual-report_2004_web.pdf) [<https://perma.cc/NWJ3-59KM>]; and 2,170 cases in 2005, MINN. JUD. BRANCH, 2005 ANNUAL REPORT 19 (2006), [https://mncourts.gov/mncourtsgov/media/assets/documents/reports/2005\\_Annual\\_Report-screen.pdf](https://mncourts.gov/mncourtsgov/media/assets/documents/reports/2005_Annual_Report-screen.pdf) [<https://perma.cc/B7WK-EN6H>]. The Wisconsin Court of Appeals terminated more cases during these years—3,452 in 2003, WIS. CT. APPEALS, 2003 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120; 3,215 in 2004, WIS. CT. APPEALS, 2004 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120; and 3,241 in 2005, WIS. CT. APPEALS, 2005 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 120. However, Minnesota likely had a higher volume of citable case law because Minnesota did not preclude the citation of unpublished opinions.

138. *See* Public Hearing, *supra* note 20, at 5:45–6:35, 10:00–14:05; *see also* Open Administrative Conference, *supra* note 54.

139. *See e.g.*, Jeff Markowitz & Stephen Warner, ‘Published’ and ‘Unpublished’ Revisited, BENCH & BAR MINN. 14, 17 (2020) (explaining the confusion between precedential and non-precedential and between legal authority and precedential legal authority); Mockenhaupt, *supra* note 136, at 788 (arguing Minnesota’s publication rule created two major issues because not everyone could afford Westlaw and Lexis and unpublished opinions were not binding on the court). It is important to note that Mockenhaupt’s article pre-dates the wide use of—and reliance on—legal databases, such as Westlaw and Lexis. The issues Mockenhaupt identifies focus on access to computerized research systems, in 1993—a much different time. *See id.*

140. David L. Lillehaug, *Associate Justice 2013-2020*, MINN. STATE LAW LIBR., <https://mncourts.libguides.com/lillehaug> [<https://perma.cc/J43T-HRPT>].

141. David L. Lillehaug & Nathan J. Ebnert, *A Fresh Look at the Problem of Unpublished Opinions*, 73 BENCH & BAR MINN. 16, 19 (2016) (“Likely an initial target of doubling the percentage of decisions as precedential would not materially affect the management of a large case load.”).

sources and too much law. Wisconsin's Supreme Court shared those concerns and implemented a burdensome prospective application provision. As seen with citations to internet sources, like Wikipedia, courts have given practitioners discretion when citing sources—with the exception of unpublished opinions—and have taken upon themselves the responsibility to assess the sources' credibility.<sup>142</sup> If courts are to allow the citation of “every written or spoken work in existence,”<sup>143</sup> including millions of articles “written and maintained by a community of volunteers”<sup>144</sup> from a source that deems itself unreliable,<sup>145</sup> courts cannot rationally preclude the citation of unpublished court opinions. After all, judicial opinions do not pose concerns like Wikipedia articles, where “[a]nyone with internet access can write and make changes.”<sup>146</sup>

And regarding volume, the explosion of appellate opinions that affected many jurisdictions did not affect Wisconsin in the same manner. The distinctions and similarities between Wisconsin, the federal system, Illinois, and Minnesota demonstrate that uniformity across all jurisdictions is not practicable. Wisconsin's citation rule should accommodate for the volume of Wisconsin case law. With a tested model, and a similar appellate caseload, Minnesota offers Wisconsin's Supreme Court a viable, more workable alternative for regulating the citation of unpublished opinions.

Rest assured, the flood gates hold little water. After 2009, when the Wisconsin Supreme Court amended its citation rule, practitioners still seldomly cited unpublished opinions.<sup>147</sup> And if a desirable opinion is uncitable,

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142. See, e.g., *Doe 1 v. Mich. Dep't of Corr.*, No. 13-14356, 2014 WL 2207136, at \*7 n.3 (E.D. Mich. May 28, 2014) (“Federal courts across the nation have continually recognized that Wikipedia's reliability is doubtful, given that by its own statement, ‘Anyone with Internet access can write and make changes to Wikipedia articles.’”) (citation omitted); *Palisades Collection, L.L.C. v. Graubard*, No. A-1338-07T3, 2009 WL 1025176, at \*3 (N.J. Super. Ct. App. Div. Apr. 17, 2009) (acknowledging that a court's acceptance of an article from Wikipedia was “contrary to the principle that judicial notice must be based upon sources whose accuracy cannot be reasonably questioned.”); *Bing Shun Li v. Holder*, 400 F. App'x 854, 857–58 (5th Cir. 2010) (“[T]he [Immigration Judge]'s erroneous reliance on Wikipedia does not warrant reversal here.”); *Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 808 (Utah Ct. App. 2012) (“While Wikipedia is gaining acceptance among judicial writers, Professor Peoples notes that reliance on Wikipedia has occasionally been held to be erroneous.”).

143. Alito Memo, *supra* note 66, at 26.

144. See WIKIPEDIA, *supra* note 67.

145. See WIKIPEDIA, *supra* note 75.

146. See *Mich. Dep't of Corr.*, 2014 WL 2207136, at \*7 n.3.

147. See CITATION OF UNPUBLISHED OPS. COMM., *supra* note 124, at 10 (reviewing all briefs during February, March, and April of 2010, and February March, and April of 2011, and finding that only fifteen briefs to the Court of Appeals cited to an unpublished opinion).

practitioners have resorted to loopholes, such as “plagiarizing” uncitable opinions, without ever citing them.<sup>148</sup> Or, practitioners cite to a different court that has quoted the uncitable opinion.<sup>149</sup> Or, practitioners cite to something other than the opinion, like a law review article that discussed the opinion—or, for instance, this Comment, and the uncitable, unpublished opinion that I addressed in my previous footnote. Others cite to uncitable opinions and deal with the consequences, which, as I’ve been told by numerous practitioners and judges, often is merely a reminder that the opinion should not have been cited.<sup>150</sup> It is evident that the concerns supporting Wisconsin’s citation rule—if they can be said to still support the rule—are being circumvented.

#### IV. MINNESOTA’S APPROACH AS A WISCONSIN ALTERNATIVE

This Part explains Minnesota’s citation rules, highlights key language to consider should the Wisconsin Supreme Court amend its citation rule, and illustrates how Minnesota’s approach could benefit Wisconsin judges and practitioners.

Since 1992, Minnesota law has permitted the citation of unpublished opinions, requiring only that a copy be provided to parties in advance.<sup>151</sup>

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148. Seriously, a practitioner before the Wisconsin Supreme Court opposed the citation of unpublished opinions arguing that practitioners can simply plagiarize the court’s reasoning, whereas the proposed citation rule would make those opinions precedent. *See* Public Hearing, *supra* note 20, at 1:32:29.

149. For instance, in *Crumble v. Johnson*, No. 2018AP1892, 2019 WL 2588323 (Wis. Ct. App. June 25, 2019) (per curiam), which is not citable under Wisconsin’s citation rule, the court established a new rule. Generally, unjust enrichment requires the plaintiff to prove “a benefit conferred upon the defendant by the plaintiff.” *Id.* at \*14. The *Crumble* court, however, ruled that previous Wisconsin court cases “support[ed] the proposition that a court may find unjust enrichment when a benefit is provided to the defendant by a third party.” *Id.* The court in *Columbia River Technologies I, LLC v. Blackhawk Group LLC*, 2019 WL 4850168, at \*2–3 (W.D. Wis. Oct. 1, 2019), which is citable under Wisconsin’s citation rule, cited *Crumble* and its rule. Now, a practitioner can merely cite to *Columbia River*, instead of citing *Crumble*.

150. *See, e.g.,* *Hubbard v. McGauley*, No. 2022AP116, 2022 WL 16846651, at \*4 n.3 (Wis. Ct. App. Nov. 10, 2022) (“We remind counsel that summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3), and also that only unpublished, authored cases issued on or after July 1, 2009, may be cited, and then only as persuasive authority.”).

151. *See* David F. Herr & Mary R. Vasaly, *Appellate Practice in Minnesota: A Decade of Experience with the Court of Appeals*, 19 WM. MITCHELL L. REV. 613, 655 (1993) (citing MINN. STAT. § 480A.08(3)(b) (1992)) (“Minnesota law allows an unpublished opinion to be used if a copy of the opinion is provided to the court and all other parties at least forty-eight hours before the hearing or if a copy is attached to the applicable brief.”).

Following a series of amendments in 2020, two slightly-modified statutes apply.<sup>152</sup> First, Minnesota Statute section 480A.08(3)(b) provides that “[a] statement of the decision without a written opinion must not be officially published and must not be cited as precedent, except as law of the case, *res judicata*, or collateral estoppel.”<sup>153</sup> Second, Minnesota Rules of Civil Appellate Procedure section 136.01(1)(c) provides that “[n]onprecedential opinions and order opinions are not binding authority except as law of the case, *res judicata* or collateral estoppel, but nonprecedential opinions may be cited as persuasive authority.”<sup>154</sup> Minnesota’s Special Rules of Practice for the Minnesota Court of Appeals explains these succinctly: “Opinions designated as nonprecedential, opinions previously designated as unpublished, and order opinions may be cited for persuasive value.”<sup>155</sup>

In some ways, Minnesota’s citation rule mirrors Wisconsin’s—e.g., unpublished opinions are not binding authority. Their differences, however, create nuances for the Wisconsin Supreme Court to consider should it amend Wisconsin’s citation rule.

#### A. *Establishing the Weight of Authority*

First, Wisconsin’s citation rule includes two words that change how a court may interpret an unpublished opinion’s weight of authority: “An unpublished opinion may not be cited in any court of this state as *precedent* or *authority*.”<sup>156</sup> The difference is subtle but important. “Precedent,” as used in both rules, has been defined as “mandatory authority within the jurisdiction where the precedent was issued.”<sup>157</sup> Practitioners may not cite unpublished opinions as mandatory authority in either Minnesota or Wisconsin. On the other hand, “authority” has been defined to mean “[i]tems that may bind a court or *influence*

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152. See Markowitz & Warner, *supra* note 139, at 16. For clarity, neither 2020 amendment altered Minnesota’s long-standing recognition of unpublished opinions as persuasive authority; instead, the amendments allowed litigants to recommend whether the opinion from their case should be published—a practice that Wisconsin Statutes section 809.23(4) already permits—and recategorized the following terms: (1) “decisions” are now “opinions,” (2) “unpublished” opinions are now “nonprecedential” opinions, and (3) “published” opinions are now “precedential” opinions. *Id.*

153. MINN. STAT. § 480A.08(3)(b) (2022).

154. MINN. R. CIV. APP. P. § 136.01(1)(c).

155. MINN. APP. P. SPECIAL R. PRAC. 4.

156. See WIS. STAT. § 809.23(3)(a) (2021–22) (emphasis added).

157. *Basic Legal Research*, N. ILL. UNIV. COLL. LAW: DAVID C. SHAPIRO MEM’L LAW LIBR., <https://libguides.niu.edu/c.php?g=425200&p=2904391> [<https://perma.cc/4GAF-678P>] (“A judicial decision that creates a rule that other courts must follow when deciding later cases that are similar or identical to the case that created the rule.”).

a court.”<sup>158</sup> Because Wisconsin’s statute also prohibits the citation of unpublished opinions as authority—e.g., persuasive authority—the two classes of uncitable opinions—those unpublished before July 1, 2009, and those unpublished and unauthored thereafter—also cannot be cited to influence a court.<sup>159</sup>

Should Wisconsin’s Supreme Court amend its citation rule, it must consider the meaning of “precedent or authority” under Wisconsin Statutes section 809.23(3)(a).<sup>160</sup> In *Higginbotham*, the Wisconsin Supreme Court accepted a single definition for “precedent or authority”: “the practice of a party citing a prior judicial decision involving a similar question of law for the purpose of persuading the court to accept a particular legal position or to adopt a particular rule or principle of law.”<sup>161</sup> Oddly, that definition seems to embrace the term “persuasive value,” which is found under Wisconsin Statutes section 809.23(3)(b).<sup>162</sup> Yet, as the court has often held when interpreting statutes, “different words have different meanings.”<sup>163</sup>

The Minnesota Court of Appeals, in *Donnelly Bros. Construction Co. v. State Auto Property & Casualty Insurance Co.*, demonstrated that citation rules must clearly establish the weight of unpublished opinions—how practitioners and judges may use them.<sup>164</sup> There, a trial court had found an expert created only a metaphysical doubt about when damage occurred.<sup>165</sup> Dismissing the testimony, the trial court cited an unpublished opinion that reasoned a material fact issue did not exist when an expert could not determine a material issue with a reasonable degree of scientific certainty.<sup>166</sup> On appeal, the appellant argued the trial court improperly used an unpublished opinion as precedent, claiming the trial court relied “on an unpublished decision . . . as the sole basis for dismissing the testimony of appellant’s expert.”<sup>167</sup> The *Donnelly* court agreed unpublished opinions were not precedent: a previous Minnesota court found

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158. *Id.* (emphasis added).

159. *See* WIS. STAT. § 809.23(3)(b) (2021–22).

160. *See id.* § 809.23(3)(a).

161. *State v. Higginbotham*, 162 Wis. 2d 978, 997, 471 N.W.2d 24 (1991).

162. *See* WIS. STAT. § 809.23(3)(b) (2021–22).

163. *See* *Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, ¶ 17, 359 Wis. 2d 385, 856 N.W.2d 874.

164. *See* *Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651, 659 (Minn. Ct. App. 2009).

165. *Id.* at 659.

166. *Id.*

167. *Id.*

error “‘both as a matter of law and as a matter of practice’ by relying on an unpublished opinion,”<sup>168</sup> and another “stress[ed] that unpublished opinions of the court of appeals [were] not precedential.”<sup>169</sup> The *Donnelly* court, however, acknowledged that the term “precedent” did not mean “persuasive.”<sup>170</sup> The trial court did not use the unpublished opinion to “summarily dismiss the testimony,” but rather found the unpublished opinion persuasive, as applied to its findings.<sup>171</sup>

A notable concern for the Wisconsin Supreme Court is whether the difference between precedent and persuasive value will result in practitioners’ abuse or reliance on unpublished opinions, as argued in *Donnelly*.<sup>172</sup> Controlling such abuse, however, falls on two actors: (1) the practitioner, who decides whether to cite the opinion, and (2) the presiding judge, who determines the weight to give the persuasive authority—i.e., is the judge persuaded by the reasoning used in the unpublished opinion. For example, in *Donnelly*, the court considered the unpublished opinion, was persuaded by its reasoning, and applied that reasoning to its factual findings.<sup>173</sup> It was not bound by the unpublished opinion; it was merely persuaded.

Minnesota’s rule benefits practitioners and judges. It assists attorneys faced with absent citable-case-law—a need in Wisconsin due to the excess of uncitable opinions<sup>174</sup>—and it allows judges to make informed decisions. The *Donnelly* case demonstrated that regardless of practitioners’ overreliance or abuse, which already occurs in Wisconsin,<sup>175</sup> the citation of unpublished opinions will ultimately succumb to the sound discretion of trial and appellate court judges.<sup>176</sup> And to be clear, this exercise in discretion will not interfere

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168. *Id.*

169. *Id.* (citing MINN. STAT. § 480A.08, subd. 3(c) (2006); then citing *Vlahos v. R & I Const.*, 676 N.W.2d 672, 681 n.3 (Minn. 2004)).

170. *Id.* (citing *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993)).

171. *Id.*

172. *Id.* at 659.

173. *Id.*

174. *See supra* text accompanying notes 123–124.

175. *See supra* text accompanying notes 147–48.

176. *See Donnelly Bros. Constr. Co.*, 759 N.W.2d at 659.

with judges' normal, every-day practice.<sup>177</sup> After all, judges already exercise this discretion for unpublished cases issued on or after July 1, 2009.<sup>178</sup>

### B. Wisconsin's Problematic Author Requirement

Wisconsin's author requirement is the second significant difference between Minnesota and Wisconsin. The Minnesota Court of Appeals can issue three types of "opinions," which "state the nature of the case and the reasons for the decision": precedential opinions; nonprecedential opinions; and order opinions.<sup>179</sup> Each type is issued after oral argument or submission of briefs.<sup>180</sup> Wisconsin's citation rule enumerates several types of opinions and orders: unpublished opinions; per curiam opinions; memorandum opinions; summary disposition orders; and other orders.<sup>181</sup> Each of these are written decisions based on the circuit court record and written briefs or motions.<sup>182</sup> Wisconsin's rule differs, however, regarding what becomes citable, because it contains a prospective application provision—the July 1, 2009, cutoff—and an author requirement, under which per curiam opinions, memorandum opinions, summary disposition orders, and other orders become uncitable, even if issued

177. See, e.g., Christina Gomez, *Relying on Internet Sources in the Appeals Courts*, 44 COLO. LAW. 81, 81 (2015) (discussing how both attorneys and judges refer to, and rely on, "extra-record, non-judicially noticed materials in their appellate briefs," and "regularly cite information and statistics from outside sources" in their briefs and opinions); Neylan v. Vorwald, 124 Wis. 2d 85, 99, 368 N.W.2d 648 (1985) (holding Federal Rules of Civil Procedure are persuasive when they are the basis for a Wisconsin Rules of Civil Procedure); Carney v. Mantuano, 204 Wis. 2d 527, 537 n.3, 554 N.W.2d 854 (Ct. App. 1996) ("Federal securities-related case law is persuasive authority when interpreting comparable Wisconsin provisions."); *Converting/Biophile Lab's, Inc. v. Ludlow Composites Corp.*, 2006 WI App. 187, ¶ 25, 296 Wis. 2d 273, 722 N.W.2d 633 (considering persuasive authority from other jurisdictions for an issue of first impression).

178. See WIS. STAT. § 809.23(3)(b) (2021–22).

179. See MINN. APP. P. SPECIAL R. PRAC. 4.

180. MINN. STAT. § 480A.08(3) (2020).

181. See WIS. STAT. § 809.23(3)(a) (2021–22) (emphasis added).

182. *Function*, WIS. CT. SYS., <https://www.wicourts.gov/courts/appeals/function.htm> [<https://perma.cc/ZZ2M-N5X4>] ("The Court of Appeals issues a written decision in every case . . . . The court relies on the circuit court record and the written briefs of the parties."); see also WIS. CT. APPEALS: OFF. CLERK, WISCONSIN COURT OF APPEALS MONTHLY STATISTICAL REPORT, (2023), <https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=700784> [<https://perma.cc/3M79-27UY>] ("Opinions include three-judge and one-judge authored opinions and per curiam opinions. Summary dispositions include opinions issued in the form of a court order after the court has reviewed the briefs and the record and, generally, following a screening and decision conference. Other written decisions include memorandum opinions, which are issued in the form of a court order prior to a screening and decision conference, and miscellaneous orders terminating cases (e.g., voluntary dismissals and stipulations to dismiss).").



after July 1, 2009.<sup>183</sup> Minnesota's citation rules contain no such requirements. Wisconsin's categorical ban on the citation of these unpublished opinions often prevents simple case-to-case analogies or the application of prior legal reasoning to current facts. Practitioners and judges would benefit from citation of all unpublished opinions as persuasive authority.

Although I argue each should be citable, I find Wisconsin's ban on unpublished per curiam opinions especially problematic. Wisconsin Statutes section 809.23(1)(b)(5) provides, "per curiam opinion[s] on issues other than appellate jurisdiction or procedure" should not be published.<sup>184</sup> By definition, then, per curiam opinions, other than those on limited topics, become unpublished, and thus uncitable in Wisconsin.<sup>185</sup> Concerningly, per curiam opinions continue to make up nearly half—if not more than half—of the Wisconsin Court of Appeals opinions.<sup>186</sup> These opinions too often create new rules,<sup>187</sup> apply rules to unique factual situations,<sup>188</sup> contribute to literature by collecting case law,<sup>189</sup> resolve conflicts among decisions,<sup>190</sup> and decide issues of continuing public interest<sup>191</sup>—all considerations for when an opinion should

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183. WIS. STAT. § 809.23(3)(a)–(b) (2021–22) ("A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection.").

184. See WIS. STAT. § 809.23(1)(b)(5) (2021–22).

185. See *id.* § 809.23(3)(b).

186. In 2021, 386 of the court's 707 terminations by opinion were per curiam. WIS. CT. APPEALS, 2021 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121. In 2020, 320 of the court's 648 terminations by opinion were per curiam. WIS. CT. APPEALS, 2020 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121. In 2019, 375 of the court's 741 terminations were per curiam. WIS. CT. APPEALS, 2019 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121. In 2018, 388 of the court's 803 terminations by opinion were per curiam. WIS. CT. APPEALS, 2018 - COURT OF APPEALS ANNUAL REPORT: CASE LOAD STATISTICS, *supra* note 121.

187. See *supra* text accompanying note 149.

188. See generally *Kosobucki v. Kosobucki*, No. 2019AP846, 2020 WL 4188133 (Wis. Ct. App. July 21, 2020); *First Bank Fin. Ctr. v. Miller*, No. 2010AP2263, 2011 WL 5375121 (Wis. Ct. App. Nov. 9, 2011).

189. See *supra* text accompanying notes 149, 188.

190. *Kosobucki*, 2020 WL 4188133, at \*16 (distinguishing the right to a jury trial on a tort claim from undue influence claims).

191. See *Houston ex rel. Stoneking v. Freese*, No. 2011AP2441, 2012 WL 3079237, at \*1 (Wis. Ct. App. July 31, 2012) (applying WIS. STAT. § 895.525 (2021–22)); see also WIS. STAT. § 895.525(1) (2021–22) (stating the purpose of the statute is to "help assure the continued availability in this state of enterprises that offer recreational activities to the public.").

be published.<sup>192</sup> It is not clear, exactly, how so many useful opinions become uncitable.

### C. Illustration

Here is an example of their benefit. Wisconsin Statutes section 895.525(4m) provides immunity to participants in recreational activities with physical contact between persons in a sport involving amateur teams.<sup>193</sup> In a leading Wisconsin case, *Noffke ex rel. Swenson v. Bakke*, the Wisconsin Supreme Court asked whether cheerleading involved “exertion and skill that is governed by a set of rules or customs”—the requirement to be a “team”—and whether the activity involved physical contact between persons.<sup>194</sup> The Wisconsin Supreme Court’s primary concern was whether cheerleading involved “physical contact between persons.”<sup>195</sup> It considered The American Heritage Dictionary, which defined “contact” as “[a] coming together or touching,” and “physical” as “relating to the body as distinguished from the mind or spirit.”<sup>196</sup> It held that cheerleading was a team sport involving physical contact, and granted immunity.<sup>197</sup>

While the court’s reasoning was sound, it left, as many fact-intense decisions do, gaps in the legal standard. For instance, would a participant in a paintball game have immunity should they injure another participant? Regarding the first issue—did the activity involve exertion and skill that is governed by a set of rules or customs—paintball would likely qualify.<sup>198</sup> But contact that occurs during a paintball game is obviously distinct from contact in cheerleading—paintball participants are not physically touching other participants. Should these circumstances arise today, Wisconsin practitioners might find themselves trying to circumvent Wisconsin’s citation rule. And trial court judges would be handcuffed by Wisconsin’s citation rule.

Wisconsin’s Court of Appeals provided a persuasive analysis for this precise circumstance. In a recent unpublished, per curiam opinion, *Houston ex rel. Stoneking v. Freese*, the Wisconsin Court of Appeals addressed whether

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192. See WIS. STAT. § 809.23(1)(a) (2021–22).

193. See *id.* § 895.525(4m).

194. *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 17, 315 Wis. 2d 350, 760 N.W.2d 156; WIS. STAT. § 895.525(4m)(a) (2021–22).

195. *Noffke*, 2009 WI 10, ¶ 18.

196. *Id.* ¶ 19.

197. *Id.* ¶ 58.

198. See, e.g., *Rules & Safety*, LET’S PLAY PAINTBALL, <https://www.letsplaypaintball.com/paintball-rules-safety> [<https://perma.cc/B7XQ-XVVG>].

paintball constituted a contact sport, and was thus immune from liability.<sup>199</sup> The court looked to *Noffke*, and the dictionary definition it had cited, and reasoned that neither required “body-to-body contact.”<sup>200</sup> Instead, the court reasoned that physical contact could be made by an extension of a participant’s body, like pulling a trigger to shoot another participant.<sup>201</sup> It analogized paintball to “dodgeball, a snowball fight, or a water balloon fight,” where the purpose of the activity was to physically strike an opponent.<sup>202</sup>

Practitioners and judges would surely benefit from *Houston* as persuasive value. Both could use *Noffke* as binding precedent, and then be able to extend, or not extend, the *Houston* court’s legal and factual reasoning. Practitioners would be more informed and better able to advise their clients, whether the result of the case would be favorable or unfavorable. That may also lead to more settlements and fewer cases going to trial or being appealed, preserving judicial resources. Judges could find confidence and comfort in their analyses, knowing the Wisconsin Court of Appeals has applied logic and reasoning by relying on Wisconsin Supreme Court precedent.<sup>203</sup> But judges would also have freedom to disagree with the opinion’s reasoning. Moreover, judges would not be faced with an ethical dilemma should they have previously read the case or been presented with the holding by a practitioner. Judges could be transparent.

This illustration also demonstrates how Wisconsin’s citation rule can create competing precedent within Wisconsin’s Court of Appeals. For example, a well-written brief could rely on the Wisconsin Supreme Court’s recognition of “contact” as “[a] coming together or touching,” and “physical” as “relating to the body as distinguished from the mind or spirit.”<sup>204</sup> Without persuasion from *Houston*, a Wisconsin court may conclude paintball does not involve a coming together or touching. If so, Wisconsin’s case law would hold two different interpretations for physical contact sports, creating split districts within its own appellate jurisdiction. It is true that this could occur under my proposed rule, as well. For example, if the Wisconsin Court of Appeals was presented with the same issue and was unpersuaded by the previous court’s analysis. But, in that event, the Wisconsin Court of Appeals would be able to make its decision with

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199. See *Houston ex rel. Stoneking v. Freese*, No. 2011AP2441, 2012 WL 3079237, at \*1 (Wis. Ct. App. July 31, 2012).

200. *Id.* at \*3–4.

201. *Id.* at \*4.

202. *Id.*

203. See *id.* at \*3–4.

204. See *Noffke*, 2009 WI 10, ¶ 19.

all the information available. And should the Wisconsin Supreme Court take on the case, practitioners on both sides of the dispute would have citable arguments. It is more consistent and amenable to the judicial integrity of Wisconsin courts for both the Wisconsin Court of Appeals and trial courts to have access to all the information, especially considering its their own information.

#### V. PROPOSED AMENDMENT TO WIS. STAT. § 809.23(3)

Jeff Markowitz and Stephen Warner—experienced attorneys in both Minnesota and Wisconsin’s courts of appeals—captured my hope for Wisconsin’s citation rule when discussing Minnesota’s recent amendment: “Don’t be shy about citing nonprecedential . . . Court of Appeals opinions as persuasive authority.”<sup>205</sup>

Foremost, I recommend the Wisconsin Supreme Court refrain from adopting Minnesota’s use of various names for different types of opinions. This Comment proposes a change to a Wisconsin rule that is often misinterpreted—or maybe, disregarded—by both judges and practitioners.<sup>206</sup> New language may create confusion with pre-amendment opinions or when practitioners cite to opinions issued in different jurisdictions.<sup>207</sup> My proposed amendment to Wisconsin Statutes section 809.23(3) maintains its already familiar language but accounts for its outdated rationales.

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205. Markowitz & Warner, *supra* note 139, at 16.

206. *See, e.g.*, Open Administrative Conference, *supra* note 54, at 30:00–35:00 (including a discussing by Justice Ann Walsh Bradley of her confusion regarding the citability of a traffic opinion authored by a single-judge); *see also* Brandt v. Lab. & Indus. Rev. Comm’n, 160 Wis. 2d 353, 677–678, 466 N.W.2d 673 (Ct. App. 1991) (engaging in statutory interpretation and using context to determine whether a parties’ citation to an unpublished circuit court opinion was prohibited by Wisconsin’s citation rule); Crissey Irrevocable Fam. Tr. v. Auto-Owners Ins. Co., No. 2022AP206, 2023 WL 2768098, at \*1 n.3 (Wis. Ct. App. Apr. 4, 2023) (reminding counsel that it expected compliance with Wisconsin’s citation rule); *see also generally* text accompanying *supra* note 10.

207. For example, categorizing “published” opinions as “precedential” opinions may lead practitioners to assume that all published opinions, regardless of the jurisdiction, are precedential. *See, e.g.*, Open Administrative Conference, *supra* note 54, at 30:00–35:00. Wisconsin’s citation rule provides a better approach, classifying the opinion as published or unpublished and instructing practitioners when such opinions may be cited for their persuasive value. *See* WIS. STAT. § 809.23(3)(a) (2021–22).

*A. Paragraph (a)*

First, Wisconsin Statutes section 809.23(3)(a) should read as follows:

- (a) An unpublished opinion may not be cited in any court of this state as precedent, except to support a claim of claim preclusion, issue preclusion, or the law of the case.

My changes do no more than redact two phrases: (1) “or authority,” and (2) “and except as provided in par. (b).”<sup>208</sup> First, “or authority” suggests unpublished opinions may not be cited as precedent or persuasive authority. The second redaction avoids any confusion regarding the weight of authority given to unpublished opinions when they are cited for reasons other than to “support a claim of claim preclusion, issue preclusion, or the law of the case.”<sup>209</sup>

*B. Paragraph (b)*

My proposed amendment to Wisconsin Statutes section 809.23(3)(b) is the most significant. Wisconsin Statutes section 809.23(3)(b) should read as follows:

- (b) In addition to the purposes specified in par. (a), an unpublished opinion that is authored or issued by a member of a three-judge panel, by a single judge under s. 752.31 (2), or by the court may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is considered an opinion that is authored or issued by the court for purposes of this subsection.

First, I removed “issued on or after July 1, 2009.”<sup>210</sup> Second, instead of the original language, “authored by,”<sup>211</sup> I inserted “authored or issued by.” Third, instead of “member of a three-judge panel or by a single judge under s. 752.31(2),”<sup>212</sup> I included a third possibility: “by the court.” Fourth, instead of language that such opinions and orders are “not an authored opinion for the purposes of this subsection,”<sup>213</sup> I tied together my initial recommendations, stating such opinions are authored or issued by the court for the purposes of this subsection.

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208. WIS. STAT. § 809.23(3)(a) (2021–22).

209. *See id.*

210. *See* WIS. STAT. § 809.23(3)(b) (2021–22).

211. *Id.*

212. *Id.*

213. *Id.*

These changes remove the Wisconsin citation rule's prospective application provision—the July 1, 2009, cut-off date.<sup>214</sup> They also permit practitioners and judges to consider per curiam opinions, memorandum opinions, and summary disposition orders for their persuasive authority. As my previous Parts indicate, it appears the Wisconsin Court of Appeals has been improperly categorizing such opinions, exacerbating the issue of absent case law for important Wisconsin issues. Wisconsin's Supreme Court has recognized the commonality of this issue:

The court of appeals, in particular district IV with respect to the very issue presented here, has been issuing unpublished opinions, per curiam opinions, or summary disposition decisions even when the issue satisfies the criteria for publication. This not only deprives the bench and bar of important guidance on legal issues of substantial and continuing public interest, it risks inconsistent disposition of cases across Wisconsin.<sup>215</sup>

### *C. Paragraph (c)*

Because Minnesota's original citation rule created confusion regarding an unpublished opinion's weight of authority,<sup>216</sup> I recommend that Wisconsin bifurcate its original paragraph (b), creating a unique subsection that addresses the weight of authority. This change will allow practitioners and judges to determine weight of authority issues with ease. Thus, I propose Wisconsin Statutes section 809.23(3)(c) read as follows:

- (c) Weight of Authority: Except for unpublished opinions cited for the purposes specified in par. (a), an unpublished opinion is cited for its persuasive value, it is not to be considered precedent, and it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion, and a party has no duty to research or cite it.

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214. *Id.*

215. *Deutsche Bank Nat. Tr. Co. v. Wuensch*, 2018 WI 35, ¶ 26 n.13, 380 Wis. 2d 727, 911 N.W.2d 1.

216. Robins Kaplan, *When to Cite Unpublished Appellate Decisions*, ROBINS KAPLAN LLP (May 16, 2016), <https://www.robinskaplan.com/resources/publications/2016/05/when-to-cite-unpublished-appellate-decisions> [<https://perma.cc/BKX5-47A9>] (“Much of the confusion about unpublished court of appeals opinions comes from the tension between their non-precedential nature and the role they nevertheless play in certain circumstances as persuasive authority.”).

The retention of par. (b)'s original language<sup>217</sup> assures the proper weight of authority, retains judicial discretion to disregard unpersuasive, unpublished opinions, and imposes no additional duties on counsel to research or cite adverse, unpublished authority. To be sure, relocating this language creates no material change; it simply makes the statute easier to navigate.

It is important to note, however, that Wisconsin's current citation rule contains a par. (c), which states, "A party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited."<sup>218</sup> Because this Comment focused little on this issue, I merely provide two alternatives that others have suggested: include language that "[a]ny person citing to an unpublished opinion shall structure the citation in a way that makes clear the opinion's publication and authorship status";<sup>219</sup> or, eliminate the requirement altogether.<sup>220</sup>

## VI. CONCLUDING REMARKS

My hope for this Comment is to, once again, bring to light the problems created by Wisconsin's citation rule—and the diminished concerns that supported it. The current July 1, 2009, cut-off date for the citation of unpublished opinions did not alleviate the frustrations of many Wisconsin practitioners. Moreover, it did not permit citation of unpublished per curiam opinions, memorandum opinions, or summary disposition orders. This

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217. Currently, Wisconsin Statutes section 809.23(3)(b) designates the weight of authority that should be given to unpublished decisions. However, the weight comes at the end of a lengthy paragraph. It reads:

In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31 (2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

WIS. STAT. § 809.23(3)(b) (2021–22). In my recommendation for par. (c), I retain the principles that unpublished opinions are not precedent, are not binding, and should only be used for their persuasive value. Additionally, I retain the language at the end of the current par. (b), which provides for judicial discretion to disregard unpublished opinions that a court finds not persuasive. Lastly, my recommendation does not impose a duty on counsel to research or cite unpublished opinions.

218. See WIS. STAT. § 809.23(3)(c) (2021–22).

219. Gustafson, *supra* note 2.

220. Markowitz & Warner, *supra* note 139, at 18.

Comment demonstrates that the Wisconsin Supreme Court's original concerns exist no more—it is time for change.

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