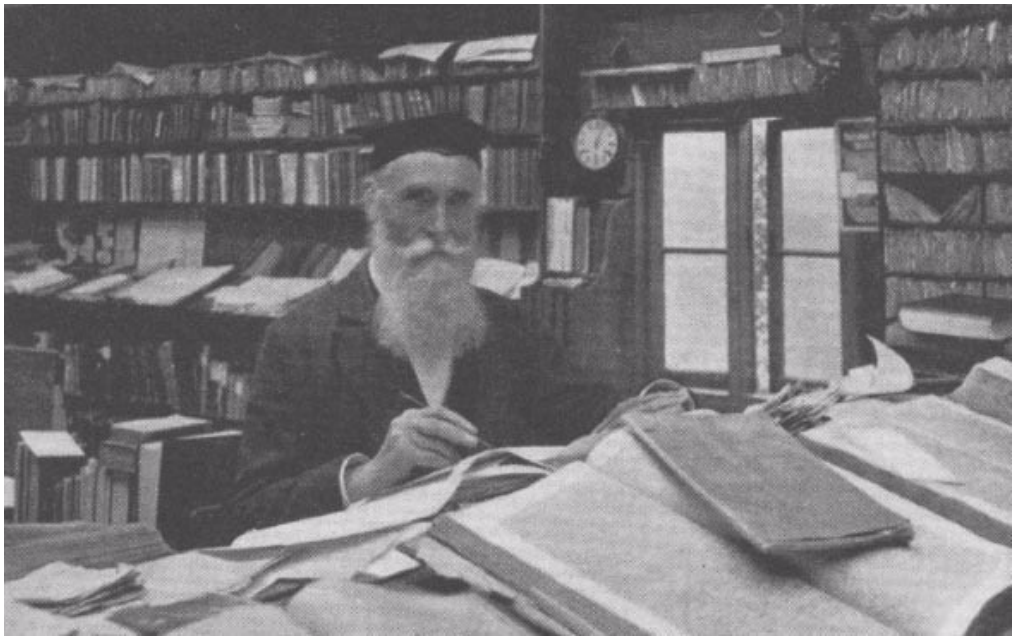
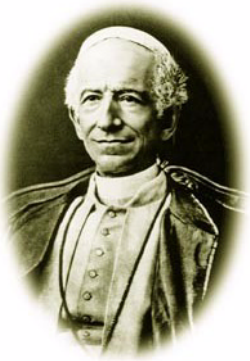


OED Editor James Murray in his Scriptorium.

Would James Murray have inserted that definition, heavily freighted with its double entendre, deliberately, and out of a sense of fun? Probably not: briefs meaning underwear did not come into use until 1933 – in all likelihood its inclusion truly was inadvertent, reflecting only the splendid innocence of the utterly aloof. And yet I like to wonder. There are more than a few photographs of Murray wearing a decidedly impish grin behind his beard, and I like to imagine that, from time to time, this increasingly confident man allowed himself the pleasure of teasing his otherwise rather stern and exacting readership, just a little.



Pope Leo XIII, who was among other things a student of canon and civil law and a sponsor of Catholic University in Washington, D.C., ruled in Rome when the first fascicle of the OED appeared in January 1884.

Ununpublished

Proposed Federal Rule of Appellate Procedure 32.1 ("Citation of Judicial Dispositions") reads as follows:

> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
>
> (b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

The purpose of the proposed rule is to kill off the practice in some federal appellate courts of forbidding citation of unpublished opinions

except for their limited application to arguments about claim preclusion, issue preclusion, law of the case, double jeopardy, and the like. There are large issues in play here – for example, the constitutionality of a court's refusal to treat unpublished opinions as binding precedent, the effect on the administration of justice of the rising workloads of the federal courts, the pros and cons of variation in the rules of the federal jurisdictions – but strangely, the official Committee Note provided by the Advisory Committee on Appellate Rules explicitly declines to address these issues, other than to pooh-pooh arguments about judicial workloads. The Committee's arguments on the merits – the reasons why a national mandate to permit citations to unpublished opinions is necessary – boil down to these:

1. *"[R]estricting the citation of 'unpublished' opinions may spawn satellite litigation over whether a party's citation of a particular 'unpublished' opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals."* The courts of appeals' rules barring citation of unpublished opinions have been around for many years, and yet the Committee Note does not contain even a single citation to such a case (published or unpublished). The Committee's back-of-the-hand response to concerns about judicial workloads applies at least as well to the Committee's own concern about the apparently non-existent satellite litigation: "the sky has not fallen in those circuits."

2. *"[C]onflicting rules [between the circuits] have created a hardship for practitioners, especially those who practice in more than one circuit."* Again, no examples to support the Committee's concern – perhaps because there are no such hardships, or perhaps because self-respecting lawyers are unwilling to admit that they do not bother to study the rules of jurisdictions in which they practice (which vary in many respects other than their treatment of unpublished opinions) or that they cannot read the all-caps warnings that appear on every unpublished opinion from every jurisdiction, spelling out the relevant rule. The Committee does cite one American Bar Association ethics opinion, but the only hardships discussed in that opinion were imposed by *state* courts, where judges appear to be more willing to sanction violations of rules limiting the use of unpublished opinions. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995). The only federal case cited by the Committee, *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), arose during the ferment caused by *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000), and did not result in any hardship on anyone. In other words, the only hardships identified by the Committee are beyond the reach of the proposed rule.

3. *"[G]ame-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an 'unpublished' opinion can now directly bring that 'unpublished' opinion to the court's attention, and the court can do whatever it wishes with that opinion."* Yet again, the Committee provides no examples to support its concern – no cases, no briefs, no anecdotes.

The bottom line: the Committee Note presents no evidence that the current state of affairs, in which different federal courts of appeals have different rules about the citation of unpublished opinions, has hurt anyone. Reasonable minds differ about whether the constitution does, or sound public policy should, permit courts to limit the use and legal force of unpublished opinions. It's too bad the Advisory Committee has done next to nothing to address those differences. Most judges give better reasons for their decisions – at least in their published opinions.