IS UNPUBLISHED UNEQUAL? AN EMPIRICAL EXAMINATION OF THE 87% NONPUBLICATION RATE IN FEDERAL APPEALS

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Federal judges resolved more than eighty-seven percent of appeals through unpublished opinions over the past five years. These dispositions are non-precedential and typically contain abbreviated reasoning. Such high rates of nonpublication may be difficult to reconcile with the core values of the federal judiciary—values grounded in precedent, reason-giving, and equal treatment. After intense attention to the prevalence of unpublished opinions some fifteen years ago, far less attention has been paid to the phenomenon in recent years. But a new debate is beginning to emerge.

This Article makes three contributions to the ongoing conversation. First, it brings hard data to the debate. Drawing on a dataset of over 400,000 appeals from the Federal Judicial Center and a sample of more than 1,400 unpublished opinions randomly selected from six federal circuits, this Article examines nonpublication rates across several dimensions, including case type, party type, and outcomes. For example, from

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2008 to 2018, pro se, or as we will refer to them, self-represented, appellants were twelve times less likely to receive a published opinion than appellants represented by counsel. Appeals initiated by incarcerated people and immigrants also had publication rates significantly below the baseline for all appeals. In contrast, when the United States is the underlying plaintiff, opinions are published at a significantly higher-than-usual rate. These findings reveal a pattern of differential treatment that merits attention.

Second, we introduce an expanded theoretical framework for evaluating unpublished opinions. Rather than focusing on a single feature of these opinions (e.g., their nonprecedential status) we utilize a framework that highlights the dynamic tradeoffs involved in any system of publication and reveals that precedent, reason-giving, citation, and public dissemination—the primary features of judicial opinions implicated by nonpublication—combine to affect the legal system's core values in complex, context-dependent, and sometimes offsetting ways.

Finally, an important takeaway from our piece relates to the serious transparency problems that pervade current nonpublication practices. Our work uncovered significant barriers to accessing and studying unpublished opinions on a large scale. These barriers make it difficult for scholars, the public, and even some judges to find these opinions, much less to study them and understand the effects of nonpublication on the judicial system and those who participate in it.

INTRODUCTION

Over the last five years, eighty-seven percent of federal appeals were resolved in unpublished opinions.[1] These opinions do not create legal precedents. They are typically short. And most contain an abbreviated summary of the facts and legal reasoning. Some are no longer than a sentence stating the outcome.[2] As the name would suggest, unpublished opinions are also not published in the Federal Reporter, many are not accessible on commercial databases,[3] and until 2006, many circuits prohibited litigants from even citing to them.[4]

These practices may surprise those unfamiliar with the judicial system, and even some steeped in litigation. The fact that the vast majority of federal appellate decisions are nonprecedential and contain limited reason-giving seems at odds with the core organizing principles of the federal judicial system. It also calls into question the system's commitment to some of its fundamental values, including equal treatment, reason-giving, predictability, and transparency.

Some scholars have criticized unpublished opinions as the "twilight zone" of appellate law[5] or as judicial "shortcuts" responsible for the "deterioration . . . of one of the nation's great

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1 As of 2020, the most recent year for which statistics are available. *See Judicial United States Courts, Table 2.5*, U.S. CTS. (2020), https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2020.pdf [https://perma.cc/5TZ7-Z4MZ] (reporting that 87.8% of opinions were unpublished between 2015 and 2020 in the regional circuit courts). We use this five-year range due to a change in the AO's methodology for this calculation in 2015.

2 *See, e.g.*, Evans v. Tex. Dep't of Transp., 273 F. App'x 391 (5th Cir. 2008) (per curiam) (affirming the district court's judgment in one sentence).

3 *See* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1103 (2021).

4 *See* Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 220 (2006); *see also* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1436 (2004) [hereinafter Pether, *Inequitable Injunctions*] (describing the features of unpublished opinions).

5 Ricks, *supra* note 4, at 228 (quoting Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 943 (1989) [hereinafter Robel, *Myth*]). For other critiques of nonpublication, see, for example, Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CALIF. L. REV. 755, 759 (2003); Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 541 (2020); Pether, *Inequitable Injunctions*, *supra* note 4, at 1483; William L. Reynolds & William M. Richman, *The Non-Precedential Precedent-Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1189–99 (1978) [hereinafter Reynolds & Richman, *Non-Precedential*].

legal institutions."[6] Some also view them as yet another judicial tool that impedes access to the courts—and to judges.[7] But others have lauded unpublished opinions, both for efficiency reasons and on the ground that *too many* precedential opinions muddy the clarity of the law.[8] Either way, no one doubts the new reality in which unpublished opinions dominate federal appellate dispositions.

This Article makes several important contributions to the ongoing debate about unpublished opinions[9] and, by extension, the broader conversation about access to justice through the modern American federal court system.[10] The first is empirical. Thus far, the judiciary and the public have been operating without sufficient information when it comes to unpublished opinions. While there has been some welcome new work in this area over the last few years, especially from

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6 *See* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS at ix, xi (2013) [hereinafter RICHMAN & REYNOLDS, INJUSTICE ON APPEAL].

7 *See id.* at 119–20; *see also infra* Part II (addressing the role of unpublished opinions in the larger scholarly debate relating to access to justice).

8 *See infra* notes 171, 364 and accompanying text.

9 For other notable scholarship on unpublished opinions, see *infra* notes 135–141, 152–173 and accompanying text.

10 *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982) (explaining that judges' managerial roles force them to prioritize efficiency); Brooke D. Coleman, *One Percent Procedure* , 91 WASH. L. REV. 1005, 1008 (2016) (noting that only the wealthiest individuals can afford to engage in complex civil litigation); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2123 (2015) (reporting that after *Twombly* and *Iqbal*, individuals' cases are more likely to be dismissed than are other institutions' cases). For a discussion about the ways in which the rules and practices of modern federal courts may limit access to justice see *infra* Part II. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275, 277 (1996) [hereinafter Richman & Reynolds, *Elitism*] (describing the rise of unpublished opinions as creating a system where judicial attention depends on a "litigant's ability to mobilize substantial private legal assistance"); RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at ix, xii (describing a "Two-Track system" where judges "lavish attention" on published opinions and spend "a few minutes" on unpublished opinions); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 (2005) (same); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 58 [hereinafter Robel, *Caseload*] (emphasizing the need for judicial attention in routine cases); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 20 (2007) [hereinafter Pether, *Sorcerers*] (raising the concern that nonpublication disparately impacts minority groups); RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS 53 (2017) [hereinafter POSNER, REFORMING THE FEDERAL JUDICIARY] (explaining that judges can minimize the time spent on self-represented and uncomplicated cases through unpublished opinions that use "boilerplate language unchanged in the past two decades").

Merritt McAlister, no one has yet compared publication rates across a variety of different types of litigants[11] or different areas of substantive law, let alone considered the effects that such rates might have on the judicial system. For example, differentiation among classes of litigants should raise equality concerns; differentiation across substantive areas of the law might lead some areas to develop more slowly due to more limited reason-giving and precedent.[12]

This Article draws on multiple datasets, including more than 400,000 cases in the Federal Judicial Center ("FJC") Integrated Database that the FJC and Administrative Office of the U.S. Courts ("AO") have recently made available on the FJC website.[13] We also sample more than 1,400 unpublished opinions randomly selected from six federal circuits and employ other methodologies of searching for unpublished opinions with the full text available online.[14] The latter dataset allowed us to review the full text of the unpublished opinions; the FJC dataset contains only metadata about each opinion and information coded by circuit to describe each case (e.g., a code identifying the type of suit).

The data reveal strikingly low publication rates for appeals brought by vulnerable groups. For instance, from 2008 to 2018, only 2.1% of cases brought by pro se, or as we will refer to them, self-represented, appellants resulted in published opinions, and appellants represented by counsel were over

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11 A recent study by Merritt E. McAlister in the *Michigan Law Review* examined correlation between rates of self-represented appeals and nonpublication rates across circuits but did not examine nonpublication rates for appeals with self-represented appellants. McAlister, *supra* note 5, at 541 (discussing the "correlation between pro se litigation and unpublished decisions" identified by the study).

12 Several scholars have carried out qualitative case studies focusing on how nonpublication has affected a single area of the law in a single circuit. *See, e.g.*, Ricks, *supra* note 4, at 222 (substantive due process "state-created danger" theory); David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45, 64 (2010) [hereinafter Cleveland, *Clear as Mud*] (qualified immunity doctrine); Scott Rempell, *Unpublished Decisions and Precedent Shaping: A Case Study of Asylum Claims*, 31 GEO. IMMIGR. L.J. 1, 6 (2016) (asylum cases). However, we study empirically the way in which nonpublication has affected a number of areas of law across every circuit.

13 *See Integrated Database*, FED. JUD. CTR., https://www.fjc.gov/research/idb [https://perma.cc/6QJR-HAT7]; *infra* section III.B.1 (discussing data source and methodology).

14 Our sample drew from unpublished opinions issued by the Second, Fourth, Fifth, Eighth, Ninth, and District of Columbia Circuits. The Federal Circuit was excluded from this study due to its specialized docket. *See infra* subsection III.B.2.b (discussing the reasoning behind the selection of these circuits).

twelve times more likely than self-represented appellants to receive a published decision.[15] Civil appeals involving incarcerated individuals were also unpublished at higher rates. From 2008 to 2018, just 5% of such opinions were published, compared with 17.4% of opinions across all civil appeals over ten years.[16] In contrast, when there is a civil appeal involving the United States as the plaintiff in the underlying case, those appeals were published at a rate of 37.9%.[17] Although these findings do not demonstrate any causal connection between representation or incarceration status and nonpublication, they lend support to the possibility that unpublished opinions may create, as Merritt McAlister warns, a "two-tier" system of justice.[18] This differential treatment may also exacerbate dignitary harms caused by nonpublication, especially for parties who are already at a disadvantage in the judicial system.

The data also show that nonpublication practices are likely disproportionately impacting certain substantive areas of the law, including several that have particular importance for disadvantaged litigants. For instance, we found that only 3.5% of civil rights cases brought by incarcerated individuals were published during this time period, compared to a 17.4% rate for civil appeals in general. Habeas corpus cases brought by incarcerated individuals and prison condition cases were also published at lower rates—4.7% and 6.1% respectively.[19] And the publication rate for appeals from the Board of Immigration Appeals, representing many of the claims brought by immigrants and asylum seekers, was only 6.3%.[20] In contrast, cases involving commercial matters, which often include corpo-

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15 *See infra* subsection III.C.1.a. We use the term "self-represented" to refer to litigants representing themselves who have traditionally been described as "pro se". This statistic includes both self-represented appellants in cases where the appellee is represented and in cases where both parties are self-represented. As discussed *infra*, these numbers rise slightly to 2.8% when opinions denying certificates of appeal (COA)) are removed. In the discussion that follows, we break out the COA numbers as relevant; because COA opinions are not quite the same as merits appeals but are very likely to be unpublished, it is valuable to present the data both ways.

16 *See infra* subsection III.C.1.b (describing cases identified as civil prisoner petitions in the FJC database). The number rises to 9.4% when COA denials are excluded.

17 Jurisdiction data, from which this statistic is calculated, is reported only for civil appeals in the FJC data.

18 McAlister, *supra* note 5, at 544.

19 The number for habeas cases rises to 12.3% for habeas if opinions denying COAs are excluded.

20 As we discuss *infra,* these findings might not be surprising, considering the procedural hurdles that litigants must overcome when making § 1983, habeas corpus, and immigration claims.

rate parties, were published at more than double the overall rate for all civil appeals, and environmental matters were also disproportionately published (59%). As a result, the accretion of precedent and development of legal doctrine may be more stunted in some areas than others, by virtue of the decisions of individual judicial panels not to publish. These choices send a powerful normative message, whether intentionally or not, about which cases, and which areas of law, the judiciary deems "important," or at least "not easy."[21]

Our second contribution is theoretical. We unbundle what "nonpublication" means and analyze its relationship to key features of American judicial adjudication. "Nonpublication" departs from traditional values of procedure in several ways: most obviously, unpublished means nonprecedential, but it also generally means less reasoned, less cited, and less accessible to the public. Each of those features of unpublished opinions intersects directly with other core commitments of procedure that are our focus here—in particular, development of the law, equality, dignity, transparency, efficiency, and perceived legitimacy of the courts. Disaggregating the features of nonpublication highlights the complex tradeoffs involved in any system of publication. An opinion that lacks precedential status has different effects on, and different potential harms for, litigants than one that is unreasoned or one that is impossible to find online. The same goes for an opinion that judges choose to designate as unpublished because it involves a routine matter, compared with one they fear would muddy the clarity of precedent or draw criticism if explained in full[22]—or, for that matter, one they choose not to publish as part of a "bargain" with other judges on the panel to reach consensus.[23] Moreover, the system's values as they intersect with nonpubli-

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21 *Cf. generally*, Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 929 (2000) ("Federal judges describe their courts as the venue for 'important' matters, as contrasted (implicitly and sometimes explicitly) with 'ordinary,' . . . litigation.").

22 *See* Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & CONTEMPORARY PROBLEMS 157, 176–77 (1998).

23 *See* Panel Discussion on Equity, Access to Justice, and Transparency in the Operation of the Supreme Court before Presidential Commission on the Supreme Court of the United States 19-20 (June 30, 2021) (Statement on the Record by Judith Resnik, Professor Yale Law School), https://www.whitehouse.gov/wp-content/uploads/2021/06/Resnik-PDF-Presidential-Commission.pdf [https://perma.cc/LT9V-QFL2][hereinafter "Panel Discussion"]

cation—for example equality vs. efficiency—are sometimes in tension with each other.[24]

This framework helps to raise important questions. How much precedent is too much? What is the right amount of reason-giving? What are the core features of American adjudication that make a proceeding a "judicial" proceeding, and that make a decisionmaker a "judge"? And is the answer different if we look at individual opinions in isolation versus the appellate system as a whole? Are unpublished opinions neither inherently bad nor good but rather simply a tool that the federal judiciary can use to strike the right balance between competing values in a world of limited resources?

This Article, as a conversation-opener, does not answer these questions definitively. Nor could we—as a third takeaway from our study relates to serious transparency problems attendant to current nonpublication practices. The judiciary has not yet comprehensively self-monitored how nonpublication affects certain types of parties and cases. The current data tables published by the FJC and AO do not provide insight into differential treatment of litigants or substantive areas of the law that arise from the use of unpublished opinions. Instead, the FJC and AO only publish statistics on publication rates by circuit and over time.[25] Because those data are not broken down by types of litigants or subject matters, they do not allow scholars, litigants, Congress, or the courts themselves to identify and address unequal treatment that may result from nonpublication.

There are also significant barriers to accessing the underlying text of unpublished opinions at any large scale. This study began six years ago as a simple effort to review a sample of opinions that were unpublished. The authors were surprised by how difficult it was to compile a dataset of such opinions—even when using a combination of commercial legal databases, docket searches, court websites, and the resources of the FJC and AO. The FJC and AO recently made a database of metadata on published and unpublished opinions available

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24 *Cf.* Fed. R. Civ. Pro. 1. This tension is, of course, reflected in the very first rule of Federal Rules of Civil Procedure, which establishes a goal of "just, speedy, and inexpensive" procedure.

25 *See Judicial Facts and Figures*, U.S. Cts., https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures [https://perma.cc/P6LX-2BMA]; *Judicial Business*, U.S. Cts., https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts [https://perma.cc/585D-MCFV].

through the FJC website,[26] but as we discuss further below, even that database does not have the kind of sufficient or consistently-entered information that would allow for a substantially deeper dive than we offer here. Prior to the release of the FJC and AO data, numerous attempts to obtain data—or even a list of citations for unpublished opinions—from the FJC or AO were unproductive, not for lack of cooperation but because the data were simply not available. Similarly, we found that court websites and commercial databases contained only limited subsets of all unpublished opinions, limiting the empirical study that could be undertaken.[27] A recent study by McAlister confirms that commercial databases are indeed missing a significant share of federal appellate dispositions.[28] The courts of appeals also each maintain their own unique set of terminology and rules governing nonpublication, further complicating this search.[29] These difficulties in accessing and compiling data on unpublished opinions alone warranted our study, but they limit our findings and reveal the challenges of fully understanding and critiquing the system of nonpublication.

Finally, this Article joins a broader conversation about access to courts and changing norms about judging. Over the past half-century, federal courts have sounded the alarm bells of increasing docket pressures (even as appellate cases have plateaued in recent years[30]) and the challenges of resolving complex and novel claims arising from problems associated with modern society. Even if not borne out by data of rising case levels, the sense of pressure has helped fuel the rise of more managerial judging, restrictive pleading standards, multidistrict litigation, arbitration, staff attorney screenings, and disposition without oral argument, among other developments that some scholars have critiqued as limiting access to justice. Unpublished opinions are part of this context—another central aspect of today's legal system in which courts under modern stresses have moved away from the "textbook" image of civil

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26 *See infra* notes 185–188 and accompanying text.

27 For a study on access to federal appellate opinions on commercial databases and federal court websites, see generally McAlister, *supra* note 3.

28 *Id.* at 3.

29 *See infra* subpart I.C.

30 *See infra* note 36 and accompanying text; *see also* McAlister, *supra* note 5, at 552 (documenting federal appeals commenced across all circuits annually since 1997).

procedure in favor of workarounds that risk unequal access and convey a changing view of the judicial role.[31]

The Article begins with a brief history of the use of unpublished opinions in the federal circuit courts of appeals and previous controversies surrounding their use. It also reviews the status of nonpublication since the adoption of Federal Rule of Appellate Procedure ("FRAP") 32.1—which allowed for citation of unpublished opinions—and the rules governing unpublished opinions across the circuits today. Part II analyzes the current state of the debate over nonpublication and situates it in the broader debates over changes in modern judging and modern civil procedure that impact access to justice. Part III lays out the empirical findings, starting with a comparison of unpublished versus published opinions from the FJC dataset of more than 400,000 federal appeals from 2008 to 2018, supplemented with our coded sample of more than 1,400 unpublished opinions. Other analyses, including word count and citation comparisons, are conducted on a broader array of full-text opinions available online. Finally, Part IV explores the values implicated by the system of nonpublication, focusing on the relationship between some of the core values of the legal system and four important features of judicial opinions: precedent, citation, reason-giving, and publication. Part IV also advances some modest proposals to address concerns with nonpublication practices, focusing on transparency and accountability, promoting equality and healthy development of the law, and treating all litigants with dignity.

I
AN ABBREVIATED HISTORY OF UNPUBLISHED OPINIONS

A. The Advent of Nonpublication

Nonpublication first emerged as a response to the federal "caseload explosion" that began in the 1960s and 70s.[32] From 1960 to 2005, the number of federal appeals increased over 1,500 percent. In 1960, 3,899 cases were filed in the regional

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31 *See infra* Part I. *Cf.* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1669 (2017); *see also* McAlister, supra note 5, at 554.

32 RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at 3. A variety of factors contributed to this staggering growth in appeals, ranging from increases in population and economic activity to the birth of the modern administrative state to the increased civil rights litigation that followed the Warren Court era. In recent years, the adoption of federal sentencing guidelines and an increase in immigration appeals has also driven caseload growth. *Id.* at 3–4.

circuit courts of appeals.[33] By 2005 that number was 65,418.[34] Meanwhile, the number of federal appellate judgeships only increased by 146 percent: from 68 to 167.[35] In other words, while federal circuit judges handled approximately 57 filings per year in 1960, they handled around 392 per year in 2005. And although appellate filings have since plateaued around 50,000 in 2015-2018,[36] that still leaves judges with approximately 300 filings per year. One might expect a backlog in decisions to have ballooned in equal measure, but the time to disposition has only grown modestly by comparison.[37] How did the federal courts of appeals manage this feat? The advent of unpublished opinions played a key role.[38]

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33 *Id.* at 3.

34 *U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2004 and 2005*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/sites/default/files/statistics_import_dir/B00mar05.pdf [https://perma.cc/J58Q-PZ48].

35 *Authorized Judgeships – From 1789 to Present*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/judges-judgeships/authorized-judgeships [https://perma.cc/4RT3-JJX7]; see *also* RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at 5–6; *Judicial Facts and Figures 2015, Table 1.1*, https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2015 [https://perma.cc/XFY5-G6TS]. *See also Jon O. Newman, Are 1,000 Federal Judges Enough?*, N.Y. TIMES, May 17, 1993, at A17 (explaining that as caseloads had mounted one of the negative "shortcuts" adopted by the judiciary was that "more than half of all appeals are decided without oral argument and published opinions").

36 *Judicial Caseload Indicators – Judicial Business 2015*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/statistics-reports/judicial-caseload-indicators-judicial-business-2015 [https://perma.cc/Y2Q8-666C] (reporting that 52,698 federal appeals were filed in 2015, excluding the Federal Circuit); *Judicial Caseload Statistics 2018*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/H9L9-D2XU](recording 49,363 appeals filed in the regional courts of appeals in 2018); *see also* McAlister, *supra* note 5, at 552 (documenting federal appeals commenced across all circuits annually since 1997).

37 In 1980 the median time between submission and disposition was 6 months, and in 2015 that time was still only 8.6 months. RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at 5; *U.S. Courts of Appeals – Judicial Caseload Profile*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/fcms_appeals_profiles_december_2015.pdf [https://perma.cc/GT5Q-FNXT] (reporting a median time from filing of notice of appeal to disposition of 8.6 months).

38 For a discussion of the ways unpublished opinions have been used to move cases more quickly, see generally Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 414 (2013) [hereinafter Levy, *Judicial Attention*] (describing nonpublication as a way for appellate courts to manage rising caseloads).

Although the federal judiciary had considered forms of limited publication as early as the late 1940s,[39] unpublished opinions did not become a formalized practice across the circuits until the 1964 Judicial Conference of the United States. The Conference resolved "[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value."[40] The Judicial Conference further expanded and formalized the practice of nonpublication in 1972, when it asked "each circuit to develop an opinion publication plan," many of which were based in part on recommendations by the FJC.[41]

Over the next few years, the FJC and the Judicial Conference collected the circuit courts' "Publication Plans."[42] However, the development and implementation of rules governing nonpublication remained entirely in the hands of the various circuits. The 1974 Judicial Conference report explained why they made this decision: "There are in effect 11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, . . . it should not be discontinued until there is considerably more experience under the diverse circuit plans."[43] To this day, there is no federal rule that lays out the appropriate criteria for nonpublication.

B. The Constitutional Controversy and the Enactment of FRAP 32.1

Although the use of unpublished opinions had become commonplace by the late 1970s,[44] it was not until the new

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39 RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at 11.

40 JUD. CONF. OF THE U.S., Report of the Proceedings of the Judicial Conference of the United States: March 16-17, 1964, at 11 (1964). For another, more critical view of the advent of unpublished opinions, see Pether, *Inequitable Injunctions*, *supra* note 4, at 1460 (arguing that the advent of unpublished opinions was motivated by a desire to "find a satisfactory process for disposing of *pro se* post-conviction appeals without the appointment of counsel, without hearing, and via unpublished opinions" in response to the Warren Court era).

41 JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: MARCH 7-8, 1974, at 12 (1974).

42 RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at 13–15.

43 JUD. CONF. OF THE U.S., *supra* note 41, at 12 (1974). For discussion of further developments during the 1980s and 90s, see Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1434–37 (2005) [hereinafter Schiltz, *Much Ado*].

44 *See* Reynolds & Richman, *Non-Precedential*, *supra* note 5, at 1168–72; Schiltz, *Much Ado*, *supra* note 43, at 1434–35. The use of unpublished opinions

millennium that two dueling judicial opinions drew national attention to the practice.[45] The first opinion was *Anastasoff v. United States*.[46] In an unprecedented move, the Eighth Circuit in *Anastasoff* struck down its own circuit rule designating unpublished opinions non-precedential.[47] The opinion centered on precedent as a core feature of the judicial role. The rule conferred on judges authority, the court held, that went "beyond the 'judicial [power]'" contemplated by the Framers.[48] Designating unpublished opinions as non-precedential "would allow [Article III judges] to avoid the precedential effect of . . . prior decisions," and thus violated "the doctrine of precedent" enshrined in Article III.[49]

A year later, the Ninth Circuit rejected *Anastasoff*'s conclusion in *Hart v. Massanari*.[50] The *Hart* court upheld the constitutionality of the Ninth Circuit's nonpublication rule, which likewise barred the citation of unpublished opinions and desig-

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first began to rise rapidly in the 1960s. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 164 (1996) [hereinafter POSNER, FEDERAL COURTS]. In the late 1990s, the practice began to garner more attention from both scholars and judges—and, in turn, became more divisive. *See, e.g.*, Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 225 (1999) (arguing that attorneys should be able to cite unpublished opinions); The Honorable Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO STATE L.J. 177, 181–83 (1999) (noting that judges could not maintain their caseloads without unpublished opinions); Robel, *Myth*, *supra* note 5, at 946 ("[S]elective publication plans, at least in their present form, cannot be supported as a fair or just way to manage the workload of the courts. Differential access to the opinions favors certain litigants."); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose A Greater Threat?*, 44 AM. U. L. REV. 757, 785 (1995) (finding that unpublished opinions unfairly advantage some litigants, increase the judicial system's costs, and minimize the Supreme Court's opportunity to review the opinions).

45 *See* Cappalli, *supra* note 5, at 758, 759 n. 28 (describing *Anastasoff v. United States* 223 F.3d 898, 900 (8th Cir. 2000) as "spark[ing a] . . . nationwide reexamination of non-precedent practice"); Donn G. Kessler & Thomas L. Hudson, *Losing Cite: A Rule's Evolution*, Ariz. Att'y 10 (2006) ("*Anastasoff* renewed the debate concerning unpublished opinions."); Steve Sheppard, *The Unpublished Opinion Opinion: How Richard Arnold's* Anastasoff *Opinion Is Saving America's Courts From Themselves*, 2002 Ark. L. Notes 85, 87 (2002); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 118 (2001) (describing *Anastasoff* as having "sent shock waves through the legal community"); Barbara Busharis, *Unpublished Opinions: The Saga Continues*, 25 Trial Advoc. Q. 5, 5 (2006) (noting the "arguments over judicial authority that came to the forefront in *Anastasoff v. United States*").

46 223 F.3d 898, 899 (8th Cir. 2000), *opinion vacated on reh'g en banc*, 235 F.3d 1054, 1056 (8th Cir. 2000).

47 *Id.* at 899.

48 *Id.*

49 *Id.* at 899-900 (internal citations omitted).

50 266 F.3d 1155 (9th Cir. 2001).

nated them as non-precedential.[51] The *Hart* court focused on a different aspect of the judicial role—*managing* precedent and the development of the law via *selective* publication. The court was "unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority."[52] Rather, the panel noted that "an inherent aspect of [their] function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit."[53] And it saw "no constitutional basis for abdicating this important aspect of [their] judicial responsibility."[54]

The *Hart* court also made policy arguments for the Ninth Circuit's no-citation rule. Given caseload and practical demands, the court observed that "few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them."[55] However, eliminating no-citation rules would force "judges . . . to start treating unpublished dispositions . . . as mini-opinions."[56] And, the court explained, "[t]his new responsibility would cut severely into the time judges need to fulfill their paramount duties: producing well-reasoned published opinions and keeping the law of the circuit consistent through the *en banc* process."[57] Although the *Anastasoff* decision was later vacated as moot on a rehearing *en banc*,[58] the conflicting decisions in *Anastasoff* and *Hart* "sent shock waves through the legal community" and ignited a debate over nonpublication.[59]

While this debate raged, unpublished opinions continued to grow as a share of appellate dispositions through the early 2000s. Data from the AO going back to 1990—the earliest year reported in the Judicial Tables[60]—shows a steady rise in both

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51 *Id.* at 1163.
52 *Id.* at 1180.
53 *Id.*
54 *Id.*
55 *Id.* at 1177.
56 *Id.* at 1178.
57 *Id.*
58 *See* 235 F.3d 1054 (8th Cir. 2000). *Anastasoff* was a tax refund case. The panel ruled against the taxpayer, and the case was mooted because the government agreed to pay the taxpayer's claim in full after she petitioned for a rehearing en banc. *Id.* at 1055-56.
59 Merritt & Brudney, *supra* note 45, at 118. Although the Eighth Circuit later vacated *Anastasoff* as moot, the decision is widely viewed as catalyzing the nationwide debate on rules governing unpublished opinions.
60 *Judicial Facts and Figures 2005, Table 2.5*, U.S. CTS.,https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2005 [https://perma.cc/3TZG-EFFS].

the absolute number and share of opinions that the federal judiciary designated as unpublished. In 1990, the courts of appeals issued roughly 14,300 unpublished opinions; fifteen years later, in 2005, that number was over 24,400.[61] This increase largely tracked the overall growth in the total number of opinions issued annually. Importantly, however, because the number of published opinions per year did not grow at the same rate, the share of unpublished opinions grew from 68.4% in 1990 to 81.6% in 2005.[62] Figure 1 tracks this rise in the relative share of unpublished opinions.[63]

The debate that *Hart* and *Anastasoff* sparked ultimately culminated in the adoption of FRAP 32.1 in 2006.[64] After years of deliberation,[65] the final Rule barred the federal appellate courts from "prohibit[ing] or restrict[ing] 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."[66] Importantly, "Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as 'unpublished' or 'non-precedential.'"[67] As the drafters themselves asserted, the new rule was thus "extremely limited."[68]

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61 *Judicial Facts and Figures 2018, Table 2.5*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2018 [https://perma.cc/VJ3Z-8BRA]. All years are fiscal years ending in September 30, except for 1990 for which the 12-month period ends June 30. These data exclude the Federal Circuit.

62 *Id.*

63 *Judicial Facts and Figures 2020, Table 2.5,* U.S. CTS., *supra* note 1.

64 *See* FED. R. APP. P. 32.1. For a more in-depth discussion of Rule 32.1 and its origins, see Schiltz, *Much Ado*, *supra* note 43, at 1443–46.

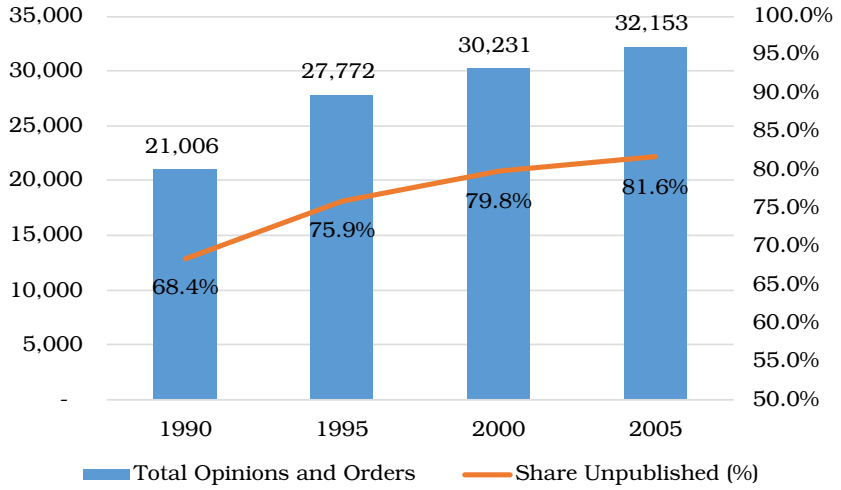
65 *See* Schiltz, *Much Ado*, supra note 43, at 1434–58. These extended deliberations were, in part, driven by a deluge of comments submitted in response to the new proposed rule. *See id.* at 1432 ("The comments that were submitted on Rule 32.1 were the second-most ever submitted on a proposed amendment to a rule of practice and procedure.").

66 FED. R. APP. P. 32.1(a).

67 FED. R. APP. P. 32.1 advisory committee's note.

68 *Id.*

FIGURE 1: TOTAL OPINIONS AND NONPUBLICATION RATE BY YEAR IN THE LEAD UP TO FRAP 32.1[69]



Rule 32.1 attempted to appeal to both critics and opponents of nonpublication but satisfied few. It eliminated no-citation rules for unpublished opinions but at the same time left untouched both the practice of issuing non-precedential opinions and the process for determining which opinions to designate as unpublished.[70] This compromise failed to resolve many of the policy arguments advanced by each side of the debate.[71] The Rule also took no position on—and thereby maintains—the patchwork set of local rules by which each circuit can determine for itself which opinions merit publication and what precisely the "unpublished" designation means.[72] Similarly, the Rule failed to set any minimum standards for the substantive content and reason-giving provided in unpublished opinions.[73]

Although opponents of FRAP 32.1 had warned of a sharp decline in the use of unpublished opinions if the new Rule was enacted, these predictions proved overblown. After a brief dip

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69 *Judicial Facts and Figures 2020, Table 2.5*, U.S. CTS., *supra* note 1.

70 *See infra* subpart I.C.

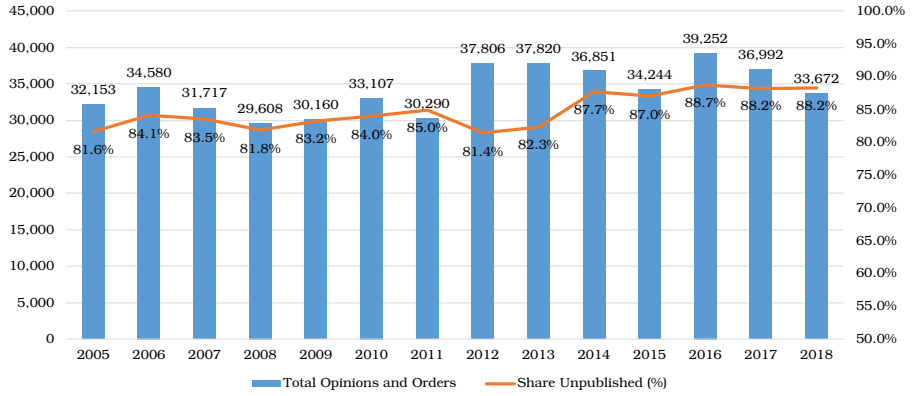
71 *See generally* notes 165-173 and accompanying text (describing various arguments for and against unpublished opinions based on their non-precedential status and frequent lack of reasoning, regardless of whether such opinions are citable).

72 *See infra* subpart I.C.

73 FED. R. APP. P. 32.1; *see also* Elizabeth Earle Beske, *Rethinking the Non-precedential Opinion*, 65 UCLA L. REV. 808, 816–17 (2018) (stating that due to the lack of standards in FRAP 32.1, it "did little more than allow unpublished opinions out from under their rock").

in nonpublication following enactment, the rise in nonpublication continued through the late 2000s and into the 2010s, eventually plateauing in the high eighty percent range, as shown in Figure 2.

FIGURE 2: TOTAL FEDERAL APPELLATE OPINIONS AND NONPUBLICATION RATE BY YEAR: 2005-2018[74]



C. Rules and Practices Governing Nonpublication

We now turn to the rules governing nonpublication: how do judges decide when to publish an opinion and when not to? The federal courts of appeals have adopted a wide array of rules and practices regarding nonpublication: they discuss unpublished opinions using different terminology, classify different types of opinions in different ways, and use different standards to determine whether a given opinion will be published. These inconsistencies make doing any kind of empirical analysis of these opinions difficult. They also exacerbate concerns about transparency and accessibility.

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74 Judicial Facts and Figures 2015, Table 2.5, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2015 [https://perma.cc/HGM9-MU2A]; Judicial Facts and Figures 2020, Table 2.5, U.S. CTS., *supra* note 1. Due to a change in the AO's methodology noted in 2018, there is a mismatch between years reported prior to 2015 and the numbers published in the 2018 table. See Judicial Facts and Figures 2018, Table 2.5, U.S. CTS., *supra* note 61. The 2018 report includes the year 2010, but not 2011 with this new methodology; this may explain the lower numbers for 2011, which was calculated with the pre 2018 methodology. *Id.*

1. *Official and Unofficial Terminology*

The federal courts of appeals' local rules and internal operating procedures use a confusing collection of terms to refer to what FRAP 32.1 calls "unpublished" opinions.[75] Some circuits use fairly straightforward terminology: the Fifth, Eighth, and Eleventh Circuits' local rules simply refer to such dispositions as "unpublished opinions,"[76] while the Tenth Circuit issues "unpublished decisions" and the Second Circuit issues "summary order[s]."[77] However, as the chart below makes clear, other circuits use a wider variety of terms to describe different types of unpublished opinions.[78]

Circuit Court of Appeals	**Terminology for "Unpublished Opinions" in Local Rules**
First Circuit	"unpublished judicial opinion, order, judgment or other written disposition"[79]
Second Circuit	"summary order"[80]
Third Circuit	"not precedential opinion"[81] or "judgment order"[82]
Fourth Circuit	"[u]npublished opinions,"[83] "unpublished dispositions,"[84] or "summary opinion"[85]
Fifth Circuit	"unpublished opinions"[86]
Sixth Circuit	"unpublished opinion, order, judgment or other written disposition,"[87] or "unpublished decision"[88]

75 FED. R. APP. P. 32.1 advisory committee's note.

76 5th Cir. R. 47.5.3; 8th Cir. R. 32.1A; 11th Cir. R. 36-2. In the Fifth and Eighth Circuits, the court can also affirm or enforce a judgement or order without issuing an opinion. 5th Cir. R. 47.6; 8th Cir. R. 47B.

77 2nd Cir. I.O.P. 32.1.1(a).

78 *See also* JON O. NEWMAN & MARIN K. LEVY, THE INTERNAL OPERATIONS OF THE FEDERAL COURTS OF APPEALS, Ch. "Appellate Opinions" at 4 (unpublished manuscript) (on file with authors) (detailing "Labeling [of] Nonprecedential Opinions" by circuit).

79 1st Cir. R. 32.1.0(a).

80 2d Cir. I.O.P. 32.1.1(a).

81 3d Cir. I.O.P. 5.3.

82 3d Cir. I.O.P. 6.2.1.

83 4th Cir. Loc. R. 36(b).

84 4th Cir. Loc. R. 32.1.

85 4th Cir. I.O.P. 36.3.

86 5th Cir. R. 47.5.3.

87 6th Cir. R. 32.1.

88 6th Cir. I.O.P. 32.1(b)(3).

Circuit Court of Appeals	**Terminology for "Unpublished Opinions" in Local Rules**
Seventh Circuit	"orders," which bear the label "[n]onprecedential disposition.[89]
Eighth Circuit	"unpublished opinions"[90]
Ninth Circuit	"A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER."[91]
Tenth Circuit	"unpublished decisions"[92]
Eleventh Circuit	"unpublished opinions"[93]
D.C. Circuit	"[u]npublished orders or judgements of this court, including explanatory memoranda and sealed dispositions" [94] or "unpublished dispositions"[95]
Federal Circuit	"nonprecedential opinion"[96] or "nonprecedential dispositions"[97]

Much of this terminology is not sufficiently transparent. For example, although the Ninth Circuit's rules explain the distinction between a memorandum and an order, its two types of unpublished dispositions, not all circuits make clear to the public the difference between their various types of unpublished decisions. For example, one circuit's rules refer to "unpublished opinion[s], order[s], judgment[s], or other written disposition[s],"[98] and although the court explained to us that "[o]pinions and [j]udgments issued by a merits panel dispose of a case," "[o]rders typically dispose of a motion or order a party to act in a certain manner," and "[d]ispositions include judicial opinions, orders, judgments, or other written directives issued

89 7th Cir. R. 32.1(b).

90 8th Cir. R. 32.1A.

91 9th Cir. R. 36-1. Within the Ninth Circuit, "memorandum dispositions" are "affectionately known as memdispos." Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!*, CAL. LAW. 43, 43 (June 2020).

92 10th Cir. R. 32.1(A).

93 11th Cir. R. 36-2.

94 D.C. Cir. R. 32.1(b)(1)(A).

95 D.C. Cir. R. 32.1(b)(1).

96 Fed. Cir. I.O.P. 10(3).

97 Fed. Cir. R. 32.1(c).

98 1st Cir. R. 32.1.0(a).

by the court,"[99] these distinctions are not apparent from the face of the court's rules. The circuits also do not necessarily keep statistics on all the different types of unpublished dispositions that they issue. For example, the Sixth Circuit reported that its official statistics regarding how many opinions are published and how many are unpublished "do not reflect all of the ways that an appeal can be disposed—dispositions by order, for example, are not included in these figures."[100] Additionally, in some circuits, cases that the court disposes of through orders are unavailable on the court's website.[101]

2. *Circuit Rules on Publication*

In addition to using different terms to refer to different types of unpublished opinions, the courts of appeals also apply a wide variety of rules and standards when determining whether to publish an opinion. Generally speaking, the circuits instruct their judges to publish all opinions that have "precedential value."[102] However, they determine an opinion's precedential value in different ways.

The Fourth, Fifth, Sixth, Ninth, and D.C. Circuits all use multifactor tests to determine whether to publish an opinion.[103] The exact factors included in the test vary from circuit to circuit. The Fourth Circuit will publish an opinion if it "establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit," "involves a legal issue of continuing public interest," "criticizes existing law," "contains a historical review of a legal rule that is not duplicative," or "resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit."[104] The Sixth Circuit's publication test contains several similar factors, but it also asks whether an opinion "applies an established rule to a novel factual situa-

99 Results from Circuit Survey (distributed Jan. 13, 2021) (responses on file with authors).

100 Email from Susan Rogers, Chief Deputy Clerk of the 6th Circuit Court of Appeals, to Bennett Ostdiek (Jan. 14, 2019, 11:56 CST) (on file with authors).

101 Phone call with Susan Gelmis, Chief Deputy Clerk for Operations, 9th Circuit; Phone call with Debbie Graham, Opinions Supervisor, 5th Circuit (July 17, 2018) (on file with authors). *See also* McAlister, *supra* note 3, at 1135-46 (documenting coverage gaps in the court website for the First Circuit).

102 *See, e.g.*, 1st Cir. R. 36.0(c) ("[A] panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion."). *See also* 2d Cir. I.O.P. 32.1.1(a); 3d Cir. I.O.P. 5.3; 5th Cir. R. 47.5.3; 10th Cir. R. 36.1; 11th Cir. R. 36, I.O.P. 6.

103 The Federal Circuit also uses a multifactor balancing test to determine publication; Federal Circuit cases are not included in the FJC data set or our coded sample.

104 4th Cir. Loc. R. 36(a).

tion," "[i]s accompanied by a concurring or dissenting opinion," "[r]everses the decision below," "[a]ddresses a published lower court or agency decision," or "[h]as been reviewed by the United States Supreme Court."[105] The tests used by the Fifth, Ninth, and D.C. Circuits, all fall somewhere between those used by the Fourth and the Sixth Circuits—they generally include every factor from the Fourth Circuit test but not all of the additional factors that the Sixth Circuit uses.[106] Additionally, the Fourth Circuit appears to have default rules against publication, with its rules providing that an opinion "will be published only if" it meets one of the court's publication criteria.[107] The Fifth, Ninth, and D.C. Circuits all take a more neutral approach, simply stating in their rules that opinions are published if they meet one of the court's publication criteria but not presuming either in favor of or against publication.[108] Finally, while the Sixth Circuit merely instructs its judges to "consider" the factors when deciding whether to publish an opinion, the other circuits with multifactor tests all require judges to publish any opinion that satisfies at least one of the publication factors and prevent judges from publishing any opinion that does not satisfy any of the factors.[109]

The remaining circuits give their judges even fewer guidelines when making publication decisions. These courts fall into three groups. The First and Eleventh Circuits have established rebuttable presumptions regarding publication. The First Circuit presumes in favor of publication, with its rules declaring "the court thinks it desirable that opinions be published," while the Eleventh Circuit presumes against it, providing in its rules that "[a]n opinion shall be unpublished unless a majority of the panel decides to publish it."[110] The Second, Third, Seventh, and Tenth Circuits have announced broad standards for

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105 6th Cir. I.O.P. 32.1(b)(1).

106 *See* 5th Cir. R. 47.5.1; 9th Cir. R. 36-2; D.C. Cir. R. 36(c)(2); Fed. Cir. I.O.P. 10(4).

107 4th Cir. Loc. R. 36(a). The Federal Circuit has a similar rule, stating that the "court's policy is to limit precedent to dispositions meeting one of more of" the criteria for publication. Fed. Cir. I.O.P. 10(4).

108 5th Cir. R. 47.5.1 ("[A]n opinion is published if it . . . ."); 9th Cir. R. 36-2 ("A written, reasoned disposition shall be designated as an OPINION if it . . . ."); D.C. Cir. R. 36(c)(2) ("An opinion . . . will be published if it . . . .").

109 6th Cir. I.O.P. 32.1(b)(1).

110 1st Cir. R. 36.0(b)(1); 11th Cir. R. 36-2. The First Circuit has also established bright lines rules that "[w]hen a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication" and that "[i]n any case decided by the court en banc the opinion or opinions shall be published." 1st Cir. R. 36.0(b)(2)(c). The Eleventh Circuit also provides judges with a standard to guide

judges to apply when making publication decisions—the Second Circuit allows unpublished opinions when "each panel judge believes that no jurisprudential purpose is served by an opinion," the Third Circuit designates an opinion as unpublished if it "appears to have value only to the trial court or the parties," the Seventh Circuit instructs its judges "to avoid issuing unnecessary [published] opinions," and the Tenth Circuit issues an unpublished opinion when "the case does not require application of new points of law that would make the decision a valuable precedent."[111] Finally, the Eighth Circuit leaves the question of publication to the discretion of its judges, with its rules stating only that "[t]he panel determines whether the opinion in the case is to be published or unpublished."[112]

Although these three approaches differ in their details, they all give courts significant freedom when making publication decisions, effectively asking judges some version of the question, "Do you think that this opinion is the type of opinion that should be published?" In other words, while the multifactor test approach constrains judges with some guardrails, all of these approaches sanction individualized decisionmaking on the question of which opinions judges think should be published. Mitu Gulati and C.M.A. McCauliff, in earlier work on the topic of unreasoned opinions, characterized this practice as allowing panels to decide for themselves when "not to make law."[113] They also made another point that translates importantly here: different opinion-writing practices across circuits may lead some circuits to have more influence over the development of certain areas of law than others, if more opinions from certain circuits are published.[114]

The circuits also vary in who has the power to determine whether an opinion is published.[115] The First, Second, Fifth, Sixth, and Ninth Circuits publish opinions at the request of any member of the panel.[116] In contrast, in the Third, Seventh, Eighth, Tenth, and Eleventh Circuits, the panel as a whole

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their publication decision: "Opinions that the panel believes to have no precedential value are not published." 11th Cir. R. 36, I.O.P. 6.

111 2d Cir. I.O.P. 32.1.1(a); 3d Cir. I.O.P. 5.3; 7th Cir. R. 32.1(a); 10th Cir. R. 36.1. Additionally, the Second Circuit requires panels to publish opinions when a judge dissents from the outcome. *See* 2d Cir. I.O.P. 32.1.1(a).

112 *See* 8th Cir. I.O.P. IV(B). We confirmed that the criteria for publication are left to individual judges. Circuit Survey Results, *supra* note 99.

113 Gulati & McCauliff, *supra* note 22, at 158.

114 *See id.* at 205.

115 *See generally* NEWMAN & LEVY, *supra* note 78, at 5, 15.

116 *See* 1st Cir. R. 36.0(b)(2)(B); 2d Cir. I.O.P. 32.1.1(a); 5th Cir. R. 47.5.2; 6th Cir. I.O.P. 32.1(b)(2); 9th Cir. Gen. Ord. 4.3.

generally determines whether an opinion will be published,[117] and in the Fourth Circuit either an opinion's author or a majority of the joining judges can require publication.[118] Additionally, in some circuits, parties or even members of the public may request that the court publish an unpublished decision.[119] Although this does not appear to be a frequent occurrence, courts have occasionally granted motions from parties to publish a previously unpublished opinion.[120] This may be more common for more sophisticated or repeat litigants such as government agencies,[121] for a party that hopes to extend the

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117 The Third, Eleventh, and Federal Circuits all specifically allow a majority of the panel to decide whether to publish an opinion, though the Federal Circuit also allows a dissenting judge to require publication. *See* 3d Cir. I.O.P. 5.1; 11th Cir. R. 36-2; I.O.P. (6); Fed. Cir. I.O.P. 10(6). The Eighth Circuit's internal operating procedures state that "[t]he panel determines whether the opinion in the case is to be published or unpublished," 8th Cir. I.O.P. IV(B), but the court clarified to us that the publication decision is made by the judge authoring the opinion usually after consultation with others on the panel. Circuit Survey Results, *supra* note 99. The Tenth Circuit explained to us that the panel decides whether to publish an opinion. *Id.* The Seventh Circuit noted that although the panel ultimately decides whether to publish, "[a]s a general rule . . . circuit policy is to set all cases with counsel on both sides for oral argument and—again as a general matter—cases that are orally argued generate a published precedential opinion," while "cases without counsel on both sides are [generally] not orally argued and result in non-precedential orders. The panel of judges decide whether to make exceptions to this norm." *Id.*

118 4th Cir. Loc. R. 36(a). We could not determine who decides whether an opinion is published in the D.C. Circuit.

119 *See, e.g.*, 1st Cir. R. 36.0(b)(2)(D) ("Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion."); 5th Cir. R. 47.5.2 ("If any judge of the court or any party so requests the panel will reconsider its decision not to publish an opinion."); 7th Cir. R. 32.1(c) ("Any person may request by motion that an order be reissued as an opinion."); 8th Cir. I.O.P. IV(B) ("Counsel may request, by motion or letter to the clerk, that an unpublished opinion be published."); 9th Cir. R. 36-4 ("Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication."); 11th Cir. R. 36-3 ("At any time before the mandate has issued, the panel, on its own motion or upon the motion of a party, may by unanimous vote order a previously unpublished opinion to be published."); D.C. Cir. R. 36(f) ("Any person may, by motion made within 30 days after judgment or, if a timely petition for rehearing is made, within 30 days after action thereon, request that an unpublished opinion be published.").

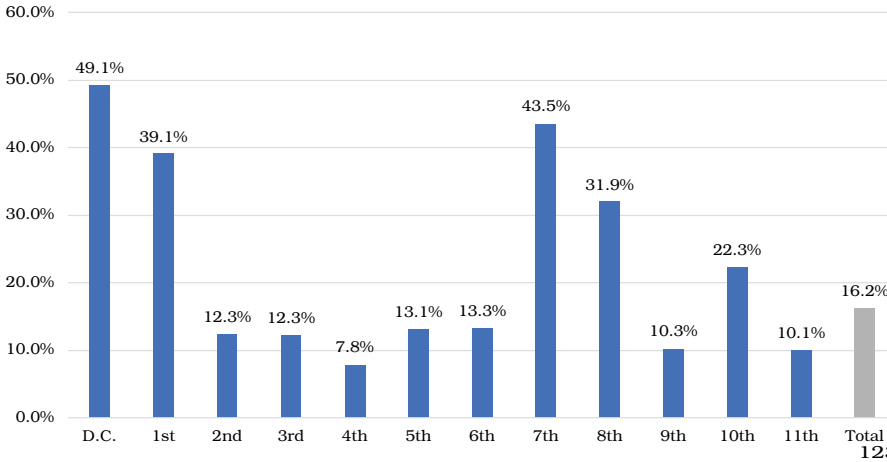
120 *See, e.g.*, Sec. & Exch. Comm'n v. Monterosso, 756 F.3d 1326, 1329 (11th Cir. 2014) ("This court issued an unpublished opinion in this case on March 3, 2014. Appellee, the Securities and Exchange Commission, subsequently moved to publish the opinion. Appellee's motion is GRANTED. We vacate our prior, unpublished opinion and substitute the following opinion for publication."); *see also* Scott E. Gant, *Unpublished Opinions in Federal Litigation,* PRACTICAL LAW THE JOURNAL 1, 2 (April/May 2015).

121 *See* 756 F.3d at 1329 (publishing, at SEC's motion, an unpublished opinion).

reach of a favorable opinion, or a non-party to the decision that would benefit from having the rule enshrined as precedent.[122]

Unsurprisingly, circuit publication rates differ dramatically. Figure 3 shows the publication rate for each regional circuit from 2008 to 2018 based on FJC data.

FIGURE 3: PERCENT OF ALL APPEALS PUBLISHED BY CIRCUIT (2008-2018)



[123]

However, the wide variation in publication rates, including among circuits with similar rules governing publication, suggests other factors may play a larger role in driving publication decisions. Indeed, as discussed further in Part III below, our findings suggest that commentators should be careful not to put too much emphasis on the official rules governing publication, as compared with other external factors, such as caseload composition, as well as internal norms and practices, such as staff screening programs.[124]

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122 Gant, *supra* note 120, at 2.

123 This analysis relies on the FJC data's CIRCUIT and PUBSTAT variables. FJC Appeals Codebook, FED. JUD. CTR., 1, 12 https://www.fjc.gov/sites/default/files/idb/codebooks/Appeals%20Codebook%202008%20Forward%20rev%2002102021.pdf [https://perma.cc/XU3X-7DYT] [hereinafter FJC Appeals Codebook, FED. JUD. CTR.]. Unless otherwise noted the publication rates in this Article are calculated using the PUBSTAT variable and whichever other variable is discussed for the section (e.g. OUTCOME, NOS etc.). The publication rates are then calculated as a share of all cases that are published (PUBSTAT = 2,4,6) over all cases for which there is a PUBSTAT value, and unpublished rates are calculated the same way except for when PUBSTAT = 1,3,5,7. Cases missing a PUBSTAT value are excluded from our analysis.

124 *See infra* Part III.C.1-2, 5-6.

II
NONPUBLICATION IN THE DEBATE OVER ACCESS TO COURTS

This Article offers an intervention into the robust and much wider debate about the variety of ways in which the rules and practices of modern federal courts—under enormous pressure to streamline—limit access to justice.

Forty years ago, Judith Resnik coined the phrase "managerial judging" to describe changes in the courtroom that amount to moves away from trial, transparency, information production, appropriate formality, and rule-based guardrails. Resnik illustrated how these "managerial responsibilities give judges greater power," enabling them to play "a critical role in shaping litigation and influencing results," and warned that "the restraints that formerly circumscribed judicial authority are conspicuously absent" from this new judicial paradigm.[125] Managerial judges, she wrote, "frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review."[126] Accordingly, Resnik concluded, "managerial judging may be redefining *sub silentio* our standards of what constitutes rational, fair, and impartial adjudication."[127]

A wide array of scholars have since explored related questions. For example, William Richman and William Reynolds contend that the increasing use of various "appeal-expediting devices," including "denial of oral argument, reliance on central staff attorneys, withholding formal publication, and denial of precedential status," has transformed the federal courts of appeals "from courts of mandatory jurisdiction to certiorari courts," with the impact of this change falling "disproportionately on the poor and middle class, whose appeals are deemed less momentous than the 'big' cases brought by or against the government or major private economic actors."[128] Brooke Cole-

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125 Resnik, *supra* note 10, at 377–78.

126 *Id.* at 378.

127 *Id.* at 380. *Cf.* William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55, 58 (2013) (describing "how concerns about docket efficiency came to overshadow both the district judge's traditional role and the measurement of adjudicative quality" and proposing "a more complete model of district court productivity" that measures "the time that a federal district judge spends on the bench, presiding over the adjudication of issues in an open forum").

128 RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at xiii; *see also* Richman & Reynolds, *Elitism*, *supra* note 10, at 275, 277 (arguing that in the federal courts of appeals, "important cases (usually measured by monetary value) and powerful litigants receive greater judicial attention" while "those without power receive less (and different) justice"); Vladeck & Gulati, *supra* note 10, at

man has documented how "elite judges, lawyers, and parties" have used federal rulemaking to "bend the rules of the civil litigation system toward their best interests," primarily through "limiting discovery and encouraging settlement."[129] Alexander Reinert argues that the Supreme Court's tightening of federal pleading standards "has exacerbated inequality in the courts between individual litigants on the one hand and corporate and governmental entities on the other."[130] Elizabeth Burch and Abbe Gluck have written on the rise of multi-district litigation—the "MDL revolution," another example of what Gluck calls "unorthodox civil procedure": a judicially-driven procedural innovation that often drives litigants out of the courtroom, away from traditional procedural safeguards and transparency rules, and raises questions about due process for plaintiffs.[131] Judge William G. Young describes how federal jury trials, which he views as the "most stunning and successful experiment in direct popular sovereignty in all history," are increasingly "marginalized in both significance and frequency."[132] And Resnik herself has raised significant concerns about both the physical closing of courthouses themselves and, with

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1668 (suggesting that the increasing use of various "docket-management tools," including staff attorney screening, disposition without argument, and nonpublication, has created "two separate and unequal tracks by which cases are considered and resolved in our federal appellate courts"); Pether, *Sorcerers*, *supra* note 10, at 20 (arguing that appellate cases involving "have-nots" frequently receive "second-tier justice"); POSNER, REFORMING THE FEDERAL JUDICIARY, *supra* note 10, at 3–86, 135-44 (describing the staff attorney programs that handle self-represented appeals and arguing that most judges and staff attorneys are indifferent to the needs of litigants acting as their own counsel).

129 Coleman, *supra* note 10, at 1008, 1011.

130 Reinert, *supra* note 10, at 2123. For additional critiques of the change to federal pleading standards brought about by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 870-76 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 556 (2010); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010); Brooke D. Coleman, *What If?: A Study of Seminal Cases As If Decided Under a* Twombly/Iqbal *Regime*, 90 OR. L. REV. 1147, 1164-68 (2012); Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 526–28 (2012) [hereinafter Coleman, *Vanishing Plaintiff*].

131 Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 67-71(2021); Gluck, *supra* note 31; *see also* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1531 (2017).

132 Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69, 74 (2006).

others, the *de facto* closing of courthouses to many through the pervasive use of arbitration.[133]

All these scholars are telling different parts of the same story—one about the ways in which modern courts are looking for ways to address docket pressures and novel litigation, many of which involve quintessentially modern claims that are national or even international in scale. And as a result, we have seen the courts move away from the textbook picture of civil procedure, in which every dispute is tried in a public courtroom and under a uniform set of rules that applies to all cases.

Unpublished opinions are another example of those changes. To date, most critics of unpublished opinions have focused on their nonprecedential status.[134] Some find nonprecedential judicial decisions inherently problematic. For example, Richard Cappalli examines nonpublication "through the lens of the common law tradition" and contends that the "body of law is . . . victimized by the loss of valuable precedent."[135] Elizabeth McCuskey argues that a phenomenon she terms "submerged precedent," which occurs when a district court

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133 *See generally* Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 L. & ETHICS HUM. RTS. 1, 24–28 (2011); Judith Resnik, *Equality's Frontiers: Courts Opening and Closing*, 122 YALE L.J. ONLINE 243, 248-49 (2013); Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1634-37 (2015); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2894-2915 (2015). For additional critiques of arbitration, see MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 4-5 (2013); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71,73 (2014).

134 Before the 2006 adoption of FRAP 32.1, commentators frequently focused specifically on the non-citability of unpublished opinions. *See, e.g.*, Vladeck & Gulati, *supra* note 10, at 1676 ("[W]e want to emphasize that our objection, and indeed the objection of most of the critics of contemporary publication restrictions, principally goes to the prohibitions on citation."). Because unpublished opinions are now citable in the federal courts of appeals, the following discussion primarily examines issues relating to whether unpublished opinions should be binding on future courts rather than whether parties should be allowed to cite them in their briefs.

135 Cappalli, *supra* note 5, at 759; *see also* Lauren Robel, *The Practice of Precedent:* Anastasoff*, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 417 (2002) (arguing that noncitation rules undermine the American legal community's "commitment to the idea of precedent" because they "say to American lawyers that vast numbers of decisions from the appellate courts have less precedential value than, say, a decision from France, which can be freely cited for whatever persuasive value it might have"); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule,* 79 IND. L.J. 711, 732 (2004) (arguing that the ability to issue nonprecedential opinions can lead to arbitrary judicial decision-making).

issues an opinion that is not only unpublished but also unavailable on Westlaw and Lexis, "undermine[s] the system's animating principles of fairness, efficiency, and legitimacy by obscuring decisional law."[136]

Other commentators are concerned with the discretion judges have to determine which opinions are published. Martha Dragrich argues that "[o]nly through publication of opinions in all potentially law-making decisions can the courts secure the values of stability, certainty, predictability, consistency, and fidelity to authority, which are essential to the vitality and legitimacy of the judicial system."[137] But many doubt whether courts are in fact publishing all "law-making" decisions. Deborah Merritt and James Brudney found that the corpus of unpublished opinions "include[s] a surprising number of reversals, dissents, and concurrences," which suggests that "[u]npublished decisions do not reflect routine applications of existing law with which all judges would agree."[138] Likewise, Reynolds and Richman have identified numerous examples of "lawmaking opinions . . . going unpublished," leading them to conclude that "judges cannot, at the time of writing, correctly distinguish between lawmaking and dispute-settling opinions."[139] Donald Songer and his coauthors have shown that the decision of whether to publish an opinion involves "discretionary decision-making by the judges," with different judges using "different criteria for publication," leading to the result that publication decisions are "much more subjective than the circuit courts would have us believe."[140] And David Law's case study of Ninth Circuit asylum cases reveals that "there exists, for some judges, a significant relationship be-

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136 Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 516–17 (2016).

137 Dragich, *supra* note 44, at 800; *see also* Beske, *supra* note 73, at 810 (describing "the clear conflict between a groundbreaking nonprecedential opinion and settled principles of adjudicative retroactivity").

138 Merritt & Brudney, *supra* note 45, at 119–20

139 Reynolds & Richman, *Non-Precedential*, *supra* note 5, at 1192, 1194; *see also* Robel, *Practice of Precedent*, *supra* note 135, at 405–07 (explaining that "attorneys do not share the view that there are too many precedential opinions available" and that practitioners often derive value from opinions that have been labelled nonprecedential); Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and the New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 735 (2006) (suggesting that the judgment as to whether an "opinion has advanced the development of the law or will never again interest anyone but the parties to that case" should be "made with the benefit of time, and with input from lawyers, litigants, and other judges").

140 Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 975, 984 (1989).

tween how the judge votes on the merits of the case, and whether the case is published," suggesting that, in some cases, "voting and publication . . . are . . . strategically intertwined."[141]

Brooke Coleman's work on motions to dismiss, in the context of the modern "restrictive procedural regime"[142] occasioned by the *Twombly*[143] and *Iqbal* decisions,[144] is instructive here. She illustrates that *accretion* is an important part of lawmaking. That is, it may not be clear at the moment of the first motion to dismiss—or a decision whether to publish—that a case raises an emerging legal issue that may merit attention. But if Case One is dismissed or not published, Case Two begins anew. "Fringe" claims therefore may never reach the mainstream and judges may not realize that a claim which appears novel is in fact increasingly common and worthy of attention.[145] Richman and Reynolds likewise discuss the "cumulative effect of precedent," noting that "many cases in an area suggest the problem might need to be revisited, that the solutions judges and legislators have attempted might not be working."[146]

Coleman further argues that the kinds of marginalized claims that are now increasingly dismissed under *Twombly* and *Iqbal* bring about social benefits that "stretch well beyond a plaintiff's potential victory" when they are actually litigated: such claims can "reinforce and push the development of path-breaking laws," "forc[e] organizations to abide by existing laws and social mores," and "lead[ ] to a very public discussion about what is right and what is wrong."[147]

A similar point could be made about nonpublication. When, for example, appellate courts repeatedly dispose of claims about inadequate healthcare in prison via summarily reasoned unpublished opinions, those claims are significantly less likely to press the development of the law or start a broader

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141 David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CINCINNATI L. REV. 817, 820 (2005); *see also* Merritt & Brudney, *supra* note 45, at 120 (showing that "individual courts and judges do not exhibit uniform tendencies to publish their opinions" and reasoning that if "these judges and courts also differ on their substantive results, as much research suggests, then the shape of precedent will be affected by seemingly neutral publication decisions").

142 Coleman, *Vanishing Plaintiff*, *supra* note 130, at 505.

143 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

144 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

145 *See* Coleman, *Vanishing Plaintiff*, *supra* note 130, at 501-03, 526-31, 536-40, 551-52.

146 RICHMAN & REYNOLDS, *supra* note 6, at 33.

147 *Id.* at 526–28.

public discussion in the way that they might otherwise. In this sense, nonpublication can lead to a skewed development of the law in areas that judges find less interesting or important.[148]

Nancy Gertner makes a related argument about a phenomenon that she terms "Losers' Rules."[149] Efficiency pressures create a situation in which "judges are encouraged to write detailed decisions when *granting* summary judgment and not to write when *denying* it."[150] This produces a body of caselaw on "why the plaintiff loses," distorting outcomes and "provid[ing] a blueprint for the judge to grant the defendant summary judgment or to dismiss the complaint" in the next case.[151] Repeated use of nonpublication for certain categories of cases could produce similar distortions.

A few studies have focused on how the nonprecedential status of unpublished opinions has stunted the development of certain substantive areas of the law. David Cleveland argues that, because qualified immunity cases often turn on whether a right is clearly established, the uncertain precedential value of unpublished opinions "has a direct and dire effect on the qualified immunity analysis."[152] Sarah Ricks has found that "the doctrinal inconsistencies between the Third Circuit's precedential and non-precedential state-created danger opinions" confuses "both litigants and trial courts" and potentially leads "to more litigation, fewer settlements, and additional adjudication."[153]

This point goes also to the question of the "value" of publication. Recall the Third Circuit's rule: an opinion is designated unpublished if it "appears to have value only to the trial court or the parties."[154] While the immediate value of any opinion, and maybe of some more than others, may be only to the parties, over time, the value of aggregated opinions on a particular question can change the development of the law.

A number of writers have also argued, as did the Eighth Circuit in *Anastasoff,* that nonprecedential opinions violate va-

148 *See* Gulati & McCauliff, *supra* note 22, at 189-90 ("The availability of the JO distorts the development of the law toward areas that judges enjoy.").

149 Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 110 (2012).

150 *Id.*

151 *Id.* at 123.

152 Cleveland, *Clear as Mud*, *supra* note 12, at 50.

153 Ricks, *supra* note 4, at 222; *see also* Scott Rempell, *supra* note 12, at 48 (arguing, based on a case study of Ninth Circuit asylum cases, that "the court should publish more cases" to "provide additional precedents" and thereby "further develop the law").

154 3d Cir. I.O.P. 5.3.

rious provisions of the Constitution.[155] That court concluded that the "Framers of the Constitution" believed that "the doctrine of precedent" functions as a "limit" on "the judicial power delegated to the courts by Article III of the Constitution."[156] Accordingly, the court held that its own rule declaring "that unpublished opinions are not precedent is unconstitutional under Article III because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"[157] David Cleveland maintains that "the scheme of declaring some decisions non-precedential violates the Equal Protection Clause," reasoning that nonpublication "treats similarly situated litigants in a disparate manner."[158] And Edward Cantu has raised due process concerns, seeing "a systemic threat to appellants' due process rights by, in the name of pragmatism, disposing of appeals without full and thorough adjudication."[159]

The dignity and equality of litigants and the legitimacy of the federal courts are also important themes.[160] Reynolds and Richman posit that unpublished opinions "are so short that they raise serious questions concerning the exercise of judicial

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155 223 F.3d 898, 899 (8th Cir. 2000), *opinion vacated on reh'g en banc*, 235 F.3d 1054, 1056 (8th Cir. 2000).

156 *Id.* at 900 & n.3 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (quoting U.S. Const. Art. III, § 1, cl. 1)).

157 *Id.* at 899; *see also* Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 963, 1032 (2009) (describing the debate over "whether nonprecedential status rules and the practices they justify and enable are ultra vires Article III" as "narrow, formalistic, and largely misdirected" and advocating instead for the development of "a doctrine of Article III *duty*").

158 David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 146, 152, 153 (2009) [hereinafter Cleveland, *Overturning*].

159 Edward Cantu, *No Good Deed Goes Unpublished: Precedent-Stripping and the Need for a New Prophylactic Rule*, 48 DUQ. L. REV. 559, 596 (2010); *see also* Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 574–91 (2005) (arguing that a "due process analysis shows that the restrictions no-citation rules place on litigants' right to be heard evoke significant constitutional doubts"); Cleveland, *Overturning*, *supra* note 158, at 155–60 (suggesting that non-precedential opinions violate both procedural and substantive due process); Melissa H. Weresh, *The Unpublished, Non- Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS 175, 192 (2001) (showing that "allowing courts to refuse to acknowledge any binding effect of prior decisions raises concerns under the Due Process Clause, the Equal Protection Clause and the statutory right to appeal granted by federal statute").

160 For the definitive study of the relationship between dignity and legitimacy in the judicial system, see generally TOM R, TYLER, WHY PEOPLE OBEY THE LAW 94–98 (2006).

responsibility."[161] When courts issue unreasoned decisions, neither "the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin."[162] Indeed, as Tom Tyler's work has shown, the perceived lack of procedural fairness may be more important to litigants' perception of the system's legitimacy than the outcome itself.[163] McAlister has also recently argued that "the failure of appellate courts to provide reasoned explanation for many unpublished decisions," which "has insulated thousands of appellate decisions from public scrutiny, stripped them of any precedential value, and deprived litigants of a meaningful response to their appeals," ultimately proves "both marginalizing and (potentially) legitimacy threatening."[164]

Posner has explained that "institutions with recurrent litigation in particular areas—government agencies, insurance companies, railroads, and so forth—are likely to derive an advantage over one-shot litigants from nonpublication" because they both have "easier access to unpublished opinions" and can "review unpublished opinions systematically and . . . request publication of those that favor their litigation interests."[165] Robel emphasizes how such publication requests allow sophisticated litigants to manipulate nonpublication to

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161 William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 600–01 (1981) [hereinafter Reynolds & Richman, *Evaluation*]. Indeed, Reynolds and Richman suggest that "lower quality of unpublished opinions may be the most important of the costs of limited publication." *Id.* at 606. *See also* Dragich, *supra* note 44, at 781 (explaining that "[o]pinion writing facilitates the decision-making process by sharpening analysis, and by imposing a sense of responsibility and discipline on judges") (footnotes omitted).

162 Richman & Reynolds, *Elitism*, *supra* note 10, at 282–83.

163 TYLER, *supra* note 160, at 107; *see also* McAlister, *supra* note 5, at 566 (discussing how Tyler's work relates to the legitimacy of unpublished opinions).

164 McAlister, *supra* note 5, at 541. *See also* Rempell, *supra* note 12, at 48 (arguing, based on his case study of Ninth Circuit asylum claims, that "even when the court determines that a case is not precedential, the unpublished disposition should provide greater detail," because his study "documented too many instances where the court employed verbiage that masked or arguably misconstrued the record").

165 POSNER, FEDERAL COURTS, *supra* note 44, at 167. *See also* Robel, *Myth*, *supra* note 5, at 946, 955, 958 (arguing that "selective publication plans . . . cannot be supported as a fair or just way to manage the workload of the courts," since frequent litigants such as the federal government both have superior "access to unpublished opinions" and can use publication requests to "stack the precedential deck" in their favor).

"stack the precedential deck" in their favor.[166] Patrick Schiltz observes that "[l]arge institutional litigants—and the big firms that represent them—disproportionately receive careful attention to their briefs, an oral argument, and a published decision written by a judge" while "[o]thers—including the poor and the middle class, prisoners, and pro se litigants—disproportionately receive a quick skim of their briefs, no oral argument, and an unpublished decision copied out of a bench memo by a clerk."[167]

On the other side of the debate, many judges have maintained that unpublished opinions are a necessary response to the judiciary's workload pressures,[168] and some scholars have provided support for that assessment. For example, Marin K. Levy argues that if we "conceive of the primary input of the appellate courts as judicial attention or time, and of the outputs as a combination of error correction and law development," a rational court "attempting to maximize error correction and law development" would "separate certain kinds of cases—repeating appeals, patently frivolous appeals, and those that have received at least one meaningful review before reaching the appellate courts—and mark them for less judicial attention."[169] Similarly, K.K. DuVivier observes that "some decisions . . . have the potential to play a more significant role in shaping future decisions" and argues that "[c]ourts should be permitted to spend additional time in producing these decisions."[170] Other judges and scholars have suggested that limited publication actually better promotes the development of the law than would full-scale publication. As former Sixth Cir-

166 Robel, *Myth*, *supra* note 5, at 946, 955, 958.

167 Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 49 (2005).

168 *See, e.g.*, Kozinski & Reinhardt, *supra* note 90, at 44 (arguing that judges could not write published opinions in every case "without neglecting our other responsibilities"); Martin, *supra* note 44, at 189 (explaining that the federal courts of appeals "use unpublished opinions in order to get through our docket); POSNER, FEDERAL COURTS, *supra* note 44, at 168–69 (asserting that, given the workload of the federal courts, "the realistic choice is not between limited publication, on the one hand, and, on the other, improving and then publishing all the opinions that are not published today; it is between preparing but not publishing opinions in many cases and preparing no opinions in those cases").

169 Levy, *Judicial Attention*, *supra* note 38, at 429, 435. Levy finds that the federal judiciary's "current case management practices," including, among others, nonpublication, "comport fairly well with an attempt by the courts to maximize their error-correction and law-development functions with their limited resources." *Id.* at 406. *But see* McAlister, *supra* note 5, at 541 (arguing that "the time-saving rationale for unpublished opinions is mostly a myth").

170 K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 418 (2001).

cuit Judge Boyce F. Martin, Jr., put it: "We are creating a body of law. There is value in keeping that body cohesive and understandable, and not muddying the water with a needless torrent of published opinions."[171] Similarly, Seventh Circuit Judge Diane Sykes has suggested that because unpublished opinions "are often highly fact-bound and necessarily more summarily reasoned," they are "usually unhelpful and potentially misleading as citable authority."[172] And still other commentators warn of the increased legal costs associated with permitting the citation of unpublished opinions, which would in turn disadvantage litigants with fewer resources.[173]

However, one feature has been lacking in this debate—data, and specifically data on publication practices across different case- and party-types. We cannot fully assess the system of nonpublication without a rigorous understanding of how it actually functions in practice.

III
THE EMPIRICS: PUBLICATION IN PRACTICE

Our empirical work took six years to complete, in large part due to data access barriers that, in addition to partially ex-

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171 Martin, *supra* note 44, at 192. *See also id.* at 189 (explaining that unpublished opinions give courts a way of distinguishing "those opinions worthy of publication, and of making a meaningful contribution to our body of precedent, from those that merely apply settled law to decide a dispute between parties"); Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1495 (1995) (book review) (suggesting that "[t]rends in the law are becoming much more difficult to ferret out" as a result of "promiscuous growth of published precedent" and concluding that the "real concern should be not that too few opinions are published, but that too many are"); Jeffrey O. Cooper, Symposium, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 431 (2002) (explaining that "if all decisions of the appellate courts are binding precedent, the courts' ability to develop precedent in a coherent manner is significantly impaired by the dictates of the courts' mandatory jurisdiction"); Caleb E. Mason, *An Aesthetic Defense of the Nonprecedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure*, 55 UCLA L. REV. 643, 648 (2008) (arguing that unpublished opinions "play a useful role in the life of the law—quite apart from whatever savings in time and paper they offer—because their production and dissemination" trains the appellate bar "to intuitively perceive the bounds of current doctrine, both its heartland and its margins").

172 Diane S. Sykes, *Citation to Unpublished Orders Under New FRAP Rule 32.1 and Circuit Rule 32.1: Early Experience in the Seventh Circuit*, 32 S. ILL. U. L.J. 579, 591 (2008); *see also* Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36, 37–39 (2004); Kozinski & Reinhardt, *supra* note 90, at 44.

173 *See* J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 492 (1994); Kozinski, *supra* note 172, at 40–41; Daniel B. Levin, Note, *Fairness and Precedent*, 110 YALE L.J. 1295, 1300-1302 (2001).

plaining the paucity of empirical legal scholarship in this area, raise questions about judicial transparency, accountability, and equity.

Our empirical findings are based primarily on two datasets. The first is the FJC Integrated Database, which contains information about federal appellate cases compiled quarterly by the AO.[174] We examined over 400,000 federal appeals from 2008 to 2018 from the FJC Integrated Database. The second is a sample of over 1,400 unpublished opinions randomly selected from six circuits: the Second, Fourth, Fifth, Eighth, Ninth, and District of Columbia. Together, these two datasets allow us to compare unpublished and published opinions in a variety of ways. We augmented these datasets with a broader selection of cases available online to compare word counts between published and unpublished opinions, as well as the citations of unpublished opinions. At large, the data presented here are purely descriptive; we do not make causal or predictive claims or control for interactions between different variables (e.g., the fact that many appeals by incarcerated individuals are self-represented), although those are areas of future study that should be pursued.

A. High-Level Summary of the Findings

Our empirical findings shed light on at least four important dynamics in nonpublication practices. First, they reveal significant disparities in publication rates across types of litigants and substantive areas of law. Our data show that litigants with access to fewer resources are disproportionately denied published opinions, as are areas of law that are often associated with those types of litigants. Other scholars have theorized that these types of disparities exist and have conducted small-scale case studies.[175] This study substantiates those disparities—and illustrates just how extensive they are—using historical publication rates across party- and case-type from the last decade of federal appellate decisions.

Second, our findings suggest that, when making decisions about publication, federal judges are exercising significant discretion based on their views of the stakes of the case, what they

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174 *The Integrated Database: A Research Guide*, FED. JUD. CTR., https://www.fjc.gov/sites/default/files/IDB-Research-Guide.pdf [https://perma.cc/87JJ-5YKS].

175 McAlister, *supra* note 5, at 541.

perceive as important, the need to clarify precedent for lower court judges, and the volume of precedents.[176]

Third, our findings unearth some specific implications for the disparities in publication across case- and party-type. Unpublished opinions are generally less reasoned, less reviewed, and less cited than their published counterparts. Disproportionately declining to publish opinions for certain types of litigants and cases thus threatens to stunt development of the law in those substantive areas. Finally, our findings show how many barriers persist for outside researchers to analyze these discrepancies.

1. *Disparities Across Types of Litigants and Associated Areas of Law*

First, the data reveal that the federal judiciary is disproportionately and systematically not publishing cases brought by certain types of litigants—namely litigants representing themselves and incarcerated individuals. From 2008 to 2018, self-represented appellants were twelve times less likely to receive a published opinion than appellants represented by counsel. Self-represented and incarcerated appellants also received published opinions at a rate significantly lower than the base line: just 2.1% of self-represented and 5.3% of incarcerated persons received published opinions in their cases, compared with the baselines of 16.2% for all appeals and 17.4% for all civil appeals. If we remove opinions that deny requests for certificates of appealability (COAs)—incarcerated persons must receive COAs before they can appeal certain types of habeas or 28 U.S.C § 2255 rulings—the numbers rise somewhat. Excluding COA cases, self-represented appellants were nine times less likely to receive a published opinion and received a published opinions in 2.8% of cases; incarcerated persons received published opinions in 9.4% of cases. We break out the COA numbers as relevant to present the data both ways. COAs are an important stage at which incarcerated and self-represented individuals interact with the system and some denials can be substantial opinions. At the same time, given the high statutory hurdles imposed on incarcerated individuals seeking such permission to appeal and the fact that COA opinions are mostly unpublished, they can have a substantial effect on the numbers we report.

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176 *Cf.* Gulati & McCauliff, *supra* note 22, at 165-73 (arguing that norms and "reputational sanctions" may constrain the abuse of under-reasoned opinions).

Relatedly, our findings suggest that certain areas of the law may be developing more slowly and less broadly because they are deprived of precedential, reasoned opinions. Often these areas of the law correlate with claims brought by disempowered litigants. For instance, although most civil rights cases, such as employment rights cases, were published at higher rates, civil rights cases brought by incarcerated individuals were published at around one-fifth the overall rate for all civil appeals (3.5% versus 17.4%). Habeas corpus cases brought by incarcerated individuals and prison condition cases were also published at significantly lower rates (4.7% and 6.1%, respectively; without COA cases, 12.3% of habeas cases were published—a higher statistic that makes sense given the likelihood that those habeas appeals that do receive COAs are more substantial). Similarly, the publication rate for appeals from the Board of Immigration Appeals, which represent many of the claims brought by immigrants, was only 6.3%.

In contrast, nearly 40% of the appeals in which the United States was the underlying plaintiff were published. Likewise, cases involving commercial matters, which often include corporations as parties, were published at more than double the publication rate for all civil appeals (36.7% for copyright and trademark cases and 49.0% for securities, commodities, and exchange cases).[177] These relatively high rates of publication may reflect the fact that appeals where the United States is the plaintiff in the case and commercial suits are more likely to be well-lawyered—particularly when compared with self-represented appeals.

Indeed, some of the trends in the subject matter of published cases may reflect systemic barriers for appellants in certain areas of law or discriminatory biases. Immigration appeals, for example, routinely lack effective counsel.[178] Incarcerated individuals who bring habeas cases are also often unrepresented. Without effective counsel to argue the appeal, judges may be less likely to identify important, publication-worthy questions of law in these cases. After years of handling

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177 Commercial matters include disputes relating to insurance, stockholder suits, copyright, trademark, and securities.

178 *See, e.g.*, Nina Bernstein, *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. TIMES (Mar. 12, 2009), https://www.nytimes.com/2009/03/13/nyregion/13immigration.html [https://perma.cc/FF8X-H5YX] (describing dearth of lawyers to litigate immigration appeals in New York and noting that, although "immigrants with legal representation are three to four times more likely to win their case, yet nationwide, only about 35 percent have any kind of lawyer").

these often poorly litigated claims that take up a substantial share of their docket, judges may also become unconsciously biased against these types of appeals.[179]

However, it should still be noted that even when cases in the areas that have especially high rates of nonpublication—self-represented cases, immigration cases, and cases brought by incarcerated individuals—are excluded *the level of nonpublication across federal appeals is still 70%.* While this is considerably lower than the overall rate, it still reveals that less than a third of cases even in areas of the law without systemic barriers to meritorious appeals are published.

2. *Exercising Discretion in Publication*

Inherent in the decision to publish is a normative decision that the subject of the opinion is important. It is also a decision that the law has room to evolve or is not adequately clear at present. Although we do not seek to make causal inferences from the data and present only descriptive statistics, certain patterns in the data suggest that judges are exercising discretion to publish cases where they believe the stakes are higher or where the legal questions seem weightier.[180] For instance, although judges publish a disproportionately low number of habeas corpus cases generally, they publish habeas corpus cases involving the death penalty at noticeably higher rates (62% or 69.5% excluding cases denying COAs). This decision to prioritize and publish cases that are perceived as more important may help explain the disparities in publication rates noted above.

Judges may also publish fewer decisions resolving certain types of claims because they genuinely raise fewer novel or unresolved questions of law. The types of cases with the lowest publication rates also tend to be cases with the highest docket volume—including immigration appeals or appeals brought by incarcerated individuals where "the efficiency rationale is espe-

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179 *See* Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html [https://perma.cc/9S8U-JVZG]. As Judge Richard Posner told the *New York Times* after his resignation from the Seventh Circuit, "The basic thing is that most judges regard these people," referring to self-represented and indigent litigants, "as kind of trash not worth the time of a federal judge." *Id.*

180 *Cf.* Gulati & McCauliff, *supra* note 22, at 190-91 (explaining how in a system of nonpublication it is the litigants who present hard cases that will end up creating precedent).

cially predominant."[181] Certain types of cases may also have more frivolous appeals that can be disposed of through short, unpublished opinions. And as a result, the absolute number of published opinions in these areas of law per year may not be so different from other areas of law with lower volumes but higher publication rates.

Similarly, judges also prioritize publication for reversals (46%) rather than for affirmances (16%). This could be because they want to make the precedent clear where the district court has erred, or because the judges are in fact creating new precedent in these cases on novel issues of law, or because the judges believe the reversal merits public attention. These findings show why it is necessary to disentangle the competing values and tradeoffs at stake in nonpublication, as we do in Part IV. In at least some cases, nonpublication may be a reasonable way of ensuring that resources are directed to the most novel or weighty cases while excessive precedents are not created in high-volume areas of law.

3. *Less Reasoned, Less Reviewed*

Third, our data confirm that unpublished opinions are disadvantaged dispositions in terms of reason-giving and later review. We found that unpublished opinions are usually a fraction of the length of published opinions—about one-fifth on average in recent years from 2010 on—and thus contain less reason-giving when compared with published decisions.[182] In many circuits, staff attorneys help draft some unpublished opinions.[183] And in terms of review, unpublished opinions are rarely granted certiorari by the Supreme Court. Between 2018 and 2021, the Court granted certiorari on thirty-one unpublished federal appellate decisions, although it may surprise some that the Supreme Court reviews any non-precedential opinions at all.[184] This is not to say that all unpublished opinions are unreasoned or unreviewed. They are not a homogenous category and some unpublished opinions are lengthy,

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181 Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 165 (2012) (pointing out the high use of unpublished opinions in immigration cases for this reason).

182 *See* Figure 17 *infra.* As explained *infra* subsection III.C.5, this is based on a word count analysis of nearly 600,000 of unpublished opinions available online since 2000.

183 Results from Circuit Survey, *supra* note 99. The seven circuits that responded to the survey with information about who drafts unpublished opinions confirmed that staff attorneys are sometimes involved in drafting unpublished opinions.

184 Panel Discussion, *supra* note 23, at 19.

with extensive reasoning and dissents and concurrences. However, these cases are the exception, not the rule.

4. *Transparency Failures*

The final area of concern highlighted by our findings centers on the lack of transparency surrounding the differential treatment of cases for publication. The AO and the FJC do not publish reports on publication rates by party- or case-type; they receive data from the courts, but the data are usually far less detailed than what would be needed for a study of this nature and are coded by the circuits without requirements that circuits use consistent coding guidelines. There are also significant barriers to collecting the underlying text of unpublished opinions at any large scale, which impedes independent research on aggregate trends and practices. As a result, the public has had almost no window into the differential treatment caused by unpublished opinions, and courts themselves may not know the impact of their nonpublication choices, given that publication decisions are made on a case-by-case basis and not assessed systemically.

B. Data Sources and Methodology

This Article is the result of a six-year effort to assemble a comprehensive dataset of unpublished opinions that would allow for both quantitative analysis of unpublished opinions across circuits as well as qualitative analysis based on the text of opinions themselves. This section explains the different datasets used in this Article and the data access issues encountered with each. The difficulty we had collecting the data is as much a part of our findings as the findings themselves.

1. *Federal Judicial Center Data*

The FJC Integrated Database includes information on all civil and criminal federal appeals dating back to 1971.[185] This database is the most comprehensive government dataset available on federal appeals,[186] but it still has some significant limi-

185 *See* FED. JUD. CTR., *supra* note 174.

186 Note that the FJC dataset also does not contain the text of the opinions or dispositions themselves. Nor does it contain complete information linking an appellate case to the originating case(s) in a lower court. Linking the district court dockets to the appellate cases using the FJC database is possible for some, but not all, cases using the DDOCKET and DDISTRICT fields. The FJC dataset also does not contain information on whether the case was appealed for panel rehearing, rehearing *en banc*, or petitioned for certiorari. The FJC dataset also may contain multiple entries for each case. In some instances, a case may be appealed

tations, as we discuss. The FJC acquires data from the AO on which the AO's annual Judicial Business Reports are based.[187] Although the FJC has collected this metadata for nearly fifty years, it now hosts this data for download on its website.[188]

For our quantitative empirical analysis addressing publication rates for different types of parties, types of cases, sources of jurisdiction, and outcomes, we used the FJC "Appeals Data" dataset, which includes all federal appellate cases filed, terminated, and pending from fiscal year 2008 to the present.[189] The year 2008 was chosen to allow for a ten-year set of data from the time we started utilizing the FJC data, although in Figures 1–2 and the accompanying discussion in subsection I.B we do survey the landscape of unpublished opinions starting from an earlier date in the context of the introduction of FRAP 32.1. We filtered the data to focus on appeals resolved by judicial disposition from 2008 and 2018.[190] With these filters, our dataset included 419,784 appellate cases in total.

The raw data from the FJC Integrated Database enabled us to run novel analyses. Although the AO publishes information on nonpublication rates annually in its Judicial Business Reports, it only reports those numbers by circuit. It does not break out nonpublication rates across even basic dimensions like case type, party type, and outcome.[191] Using the raw FJC data enabled us to run such analyses.

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multiple times, whether through interlocutory appeal or because the appellate court remanded the case to the trial court. For more information on how the AO collects the data and how the FJC processes the dataset, see *id.*

187 *Id.*; *see also Judicial Business Tables of the United States Courts*, U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts [https://perma.cc/585D-MCFV] (listing annual Judicial Business Reports).

188 Email from Federal Judicial Center (Kristin Garri, Data Resources Specialist/Senior Research Associate, Research Division FJC) to co-author Jade Ford (Feb. 14, 2020) (on file with authors). Prior to March 2017, the data were available upon request from the Inter-University Consortium for Political and Social Science Research ("ICPSR") at the University of Michigan.

189 Available for download at FED. JUD. CTR., *supra* note 174. We downloaded the dataset in January 2020. Note that the dataset available on the website is updated every quarter. Authors have a copy of the January 2020 dataset available on file. This dataset includes appellate cases from all circuits, except the Federal Circuit.

190 For details on the variables we used to filter the data, see Methodology section in Appendix.

191 *See, e.g.*, *Judicial Business 2018*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS (2018), https://www.uscourts.gov/statistics-reports/judicial-business-2018 [https://perma.cc/G9XR-JKB5]; *Judicial Facts and Figures, Table 2.5*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS (2018), https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2018 [https://perma.cc/VJ3Z-8BRA].

It is also important to recognize that although the FJC dataset is the most comprehensive officially recognized dataset on federal judicial appeals—and therefore the dataset typically used by scholars studying the judiciary, and specifically non-publication[192]—and although the FJC and AO "make every effort to ensure the accuracy of the data,"[193] the data are not perfect. The circuits categorize the data they send, for example, designating the area of law the appeal involves or whether the opinion is a merits opinion or a "procedural termination" for purposes of the dataset. Decentralized data entry of this nature may lead to inconsistent categorization. The FJC data also does not categorize cases by cause of action—for instance, constitutional law questions versus statutory questions—and it lumps in decisions denying requests for certificates of appealability (COA) in habeas cases (which sometimes result in substantive opinions but often do not) with other civil appeals.[194]

Our discussion relies on all the merits dispositions in the data set and a subset of cases of the FJC's "procedural termination" category, as elaborated in the note.[195] We break out

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192 *See, e.g.*, RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at 3, 38, 89, 157 (2013) (citing Judicial Business Tables produced by the Administrative Office of the U.S. Courts based on the AO and FJC dataset); McAlister, *supra* note 5, at 535-36 (same and relying on Judicial Business Tables for empirical analyses); McAlister, *supra* note 3, at 1120-1121 (explaining use of "Judicial Business reports" (i.e., the Judicial Business Tables), and specifically Table B-12 which includes publication status, produced by the Administrative Office of the U.S. Courts in methodology).

193 FED. JUD. CTR., *supra* note 174, at 4.

194 *See, e.g.*, Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261 (11th Cir. 2015) (four-page opinion dealing with issues in substance before denying certificate).

195 The six categories of procedural terminations in use in the FJC code book are: 1) "Jurisdictional Defects (Any disposition based on lack of jurisdiction by the court e.g., Title 28, USC Sections 1291 and 1292;" 2) Voluntary dismissals under F.R.A.P. 42(b); 3) Default as a result of "failure of the appellant to prosecute the case on appeal, comply with Federal or local rules, or abide by a court order"; 4) Denial of the issuance of a "certificate of probable cause" under F.R.A.P 22(b) for appellate review of a habeas proceeding under a state court judgment; 5) Transfer; 6) Dismissed/Other, which includes "any procedural disposition involving judicial activity" not included in another category; and 7) Certificate of appealability, defined as a "[d]isposition based on denial by a circuit judge of issuance of a certificate of appealability." These correspond respectively to the PROCTERM codes 1, 2, 5, 6, 7, 8, and 9 in the FJC Appeals Codebook. FJC Appeals Codebook, FED. JUD. CTR., supra note 123, at 10-11. There were 79,881 procedural terminations after judicial action in the dataset, but because many have a missing publication status there were 25,960 for which the publication status was known and would thus appear in our results. We excluded procedural terminations taken without judicial action, since no substantive decision would likely arise in such cases, and actions classified as "Original Proceedings" which are not appeals.

cases involving denials of COAs where relevant.[196]

The FJC's Integrated Database Research Guide also notes that data quality concerns "are more likely to affect specific fields related to under-served populations," such as information "regarding pro se litigants, in forma pauperis (IFP) status, and class action allegations."[197] While the FJC data may not be perfect, it remains the best available large scale official dataset about federal appeals. Overall, the FJC Integrated Database provides a wealth of information that allows researchers to analyze federal appellate decisions in a wide variety of ways.

One additional limitation of the FJC data is that the dataset does not include the underlying text of the opinions themselves, as the FJC does not collect that data and is not authorized to request it unless asked to do so by a court or

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The three categories of procedural terminations that seemed highly unlikely to result in any merits opinion were voluntary dismissals, defaults, and transfers, but together these cases made up 1.1% of cases with a publication status in our full data (both merits and procedural terminations). Relatively few procedural terminations are published (1.4%) and many procedural termination opinions are very short; we recognize that this could skew the numbers we present. They might also affect the word count data to the extent these opinions are in the sample used for that analysis. We retained this category of opinions, however, because a sample revealed that, while some are not substantive, for example, a litigant who failed to file a timely notice of appeal, *see, e.g.*, USA v. Sherman Emerson, No. 18-3367 (7th Cir. Jan. 7, 2019) (order dismissing appeal because not filed within 14 days), others are merits opinions on matters such as jurisdiction, and equitable tolling, with some circuits possibly coding appeals terminated on procedural *grounds* as procedural terminations rather than merits opinions. Some of the opinions are quite substantial, addressing questions of first impression such as whether a particular type of action is an appealable final judgment. For the three categories we focus most heavily in our discussion — self-represented appeals, appeals by incarcerated individuals, and BIA Appeals — removing all procedural terminations would alter the numbers but not the overarching point about which classes of cases get published more than others. For example, the share of opinions published when the appellant alone is self-represented rises from 2.1% to 2.4% with procedural terminations entirely excluded, the share of appeals brought by incarcerated individuals that are published rises from 5.3% to 5.8% , and the share of BIA appeals published rises from 6.3% to 7.1%.

196 The decisions denying certificates of appealability appear in the dataset in two places – as a class of procedural terminations (PROCTERM=9) and as terminations on the merits with the OUTCOME variable listed as "9 – Certificate of appealability." These cases only arise in seven types of cases in the dataset: 1) Alien Detainee (NOS – 463); 2) Federal Prisoner Habeas Claims under 28 U.S.C. § 2255 (NOS – 510) 3) General Habeas Petitions Under 28 U.S.C. § 2254 and § 2241 (NOS – 530); 4) Habeas Corpus – Death Penalty (NOS – 535); 5) Prisoner Petitions – Mandamus and Other (NOS – 540); 5) Prisoner – Civil Rights (NOS – 550); and 6) Prisoner – Prison Condition (NOS – 555). Nearly all of these cases were in the second and third categories. Overall, there were 63,881 COA cases, of which 42,651 had a publication status.

197 FED. JUD. CTR., *supra* note 174, at 4 (emphasis omitted).

other entity as part of a research request. This limitation makes it impossible to run qualitative analyses on unpublished opinions, and the reasoning contained in them, in turn making the FJC Database an inadequate resource for those interested in the substance of unpublished opinions. Thus, we supplemented the FJC data with a sample dataset described below.

2. *Coded Sample*

Because of the limits of the FJC database, we also assembled a secondary dataset containing the actual text of unpublished opinions.

a. *Data Access Challenges*

While courts of appeals' websites and legal research databases make some unpublished opinions accessible, no one source contains a comprehensive set of the text of the opinions in those cases or their subsequent treatment. Our study could not rely on commercial databases such as LexisNexis and Westlaw because they do not provide bulk access to their information and were resistant to providing an exception for this project. Their terms of use also prohibit users from writing automated software to access their systems and compile the information into a bulk-data format.[198] Additionally, although those sites host many unpublished opinions, their datasets are not entirely complete. Indeed, when we first began this study, we identified a gap in coverage for unpublished opinions in the major commercial databases. As a recent study by McAlister confirmed, a significant share of federal appellate opinions—27% at least—do not make it into the major commercial databases.[199]

We also explored using information from the courts of appeals' websites. However, not all of these websites make all merits decisions, including unpublished opinions, available for free.[200] McAlister likewise confirmed our findings on this point, noting that missing decisions are adjudications "resolved with orders or memoranda," including some unpublished opinions, which "are hidden behind a PACER paywall

198 *See, e.g.*, *Terms of Use*, THOMSON REUTERS, WESTLAW https://legal.thomsonreuters.com/en/legal-notices/terms-of-use [https://perma.cc/HR36-9XTH] (forbidding the use of "automatic software" when accessing Westlaw) (last accessed Sept. 16, 2019).

199 McAlister, *supra* note 3, at 1103-04.

200 *See id.* at 6 (stating that decisions that are unavailable on court websites will likely be unavailable for free in commercial databases).

under the label 'judgments.'"[201] Courts of appeals' websites also vary considerably in how they distinguish between unpublished and published opinions when a user seeks to access opinions.[202] For instance, in the Eighth Circuit, the opinion search does not filter by published and unpublished opinions. As such, there is no way to view only unpublished opinions.[203] By contrast, the Second and Ninth Circuit provide filters or separate search pages for unpublished opinions.[204] These gaps in coverage and differences in website organization made it infeasible for us to rely exclusively on pulling full text opinions from circuit court websites.

Ultimately, we used two sites to assemble our dataset of the texts of unpublished opinions—Court Listener and PACER. We used a combination of multiple data sources because no one site contained all the text of the opinions included in the FJC and AO datasets. Our research team compared the cases available from multiple sources, including Lexis and Westlaw, circuit court websites, and PACER against the number of opinions listed by the FJC and AO and continued to find gaps in the underlying case dispositions. As a result, we concluded that the cases listed in the AO database and/or included in the FJC database were not uniformly available in one commercial database. For this reason, we decided to use multiple data sources to try to collect a sample of the relevant texts of unpublished opinions.

b. *Methodology*

Our dataset of the texts of unpublished opinions includes opinions from the Second, Fourth, Fifth, Eighth, Ninth, and D.C. Circuits.[205] We limited the number of circuits to keep both project costs and coding time manageable. In an effort to assemble a diverse sample of cases, we chose these circuits based on a mixture of caseload, expected case type, and fraction of political appointees by party.

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201 *Id.* at 45.

202 *See* NEWMAN & LEVY, *supra* note 78, at 4, 19–21.

203 Full Text Opinion Search, U.S. Ct. Appeals for Eighth Cir., https://www.ca8.uscourts.gov/full-text-opinion-search.

204 *See* U.S. CT. APPEALS FOR SECOND CIR., https://www.ca2.uscourts.gov/decisions.html [https://perma.cc/ZD4Z-RKLS] ("summary orders" filter); U.S. Ct. Appeals for Ninth Cir., https://www.ca9.uscourts.gov/memoranda/ [https://perma.cc/472M-HM7J] ("unpublished dispositions" search page).

205 The Federal Circuit was excluded from this study due to its specialized docket. It would, of course, be worth studying this circuit in its own right.

After the circuits were chosen, we randomly selected an initial pool of 2,000 case numbers among those in the Integrated Database, from 2000 to the end of 2017, to analyze the full-text opinion. This initial pool was stratified by volume of unpublished opinions in the chosen circuits. Out of these 2,000 cases, we were able to find a digital version of the opinion for more than 1,400 cases. Those unpublished opinions were combed through to construct our coded dataset, giving a standard error of at most 1.3% for a binary variable.[206] We selected 2000 as the start date because that is approximately when a relatively large number of courts began using PACER. This is a longer range of years than those analyzed using the FJC Appeals data used in subsections III.C.1-4.a. The text of the opinions was then pulled from PACER and Court Listener.

The selected cases were then coded by more than twenty research assistants along a variety of dimensions using an online survey form.[207] When students coded the cases they identified and excluded non-merits orders or opinions denying certificates of appealability. Thus, while certificates of appealability are included in our analysis of the FJC data as addressed in more depth in the sections on self-represented litigants, habeas, and inmate cases, they were not included in the analysis that resulted from this sample. The dataset allowed us to analyze opinions in more qualitative detail. By reading the full text of the opinions, we could see, for example, the types of reasoning that judges engaged in when writing unpublished opinions. The questions in the instrument that we ultimately used may be found in Appendix 3. We subjected the coded opinion data to several quality checks to ensure consistency and accuracy, including a test of inter-rater agreement for cases coded by multiple individuals.[208]

Separate from the survey, we looked at alternative data to answer tailored questions. To compare length (word count) of published opinions versus unpublished opinions, we analyzed federal appellate opinions available in Court Listener from

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206 In general, the standard error of the mean of a sample is the standard deviation of the population divided by the square root of the sample size. Here, most variables of interest were binary variables, that is, variables indicating the presence or absence of some aspect of the case. For these variables, the maximum standard deviation was 0.5, giving a maximum standard error of 0.5/sqrt(1418), or approximately 1.3 percentage points.

207 For more details on the survey instrument, see Methodology section in Appendix.

208 For a description of the inter-rater reliability tests we used, see Methodology section in Appendix.

1991 to 2017. To understand if and how the opinions were subsequently cited by other courts, we analyzed online full-text opinions available on Court Listener as of 2017. Additionally, we also looked at all cases granted certiorari from 2001 to 2018 to identify instances of unpublished opinions reviewed by the Supreme Court.

3. *Circuit Survey*

To better understand how publication practices vary across circuits we also conducted a survey sent to the Chief Judge and Circuit Executive of each federal circuit. The survey covered questions related to: terminology and rules around publication; the decision-making process for designating certain opinions as unpublished; screening programs to identify opinions that are likely candidates for disposition via unpublished opinions; drafting practices for published versus unpublished opinions; the relationship between oral argument and publication; the relationship between dissents and publication; and access to unpublished opinions on court websites. A full list of the questions can be found in the Appendix. We received responses from seven circuits.

C. Empirical Findings

Our empirical study compares published and unpublished opinions across six variables: types of parties, types of cases, outcomes, word length, post-appeal treatment, and citation. When looking at the first three of these variables we used appeals data from the FJC Integrated Database, while the other three we examined using a mix of the coded sample (for post-appeal treatment), citation data and opinions on Court Listener (for citations to opinions and word count), and Westlaw (for citations in appellate briefs).

1. *Types of Parties*

We were interested in whether certain types of litigants—including litigants representing themselves and incarcerated individuals—were less likely to bring cases that resulted in published opinions.

The data show that appeals brought by self-represented litigants had significantly lower publication rates from 2008 to 2018 than the rate across all appeals (2.1% compared with 16.2% for all appeals or 2.8% compared to 18.3% if excluding opinions denying COAs). Civil cases brought by incarcerated people also resulted in lower publication rates (5.3% compared

with 17.4% for all civil appeals or 9.4% compared to 18.3% for all civil appeals if excluding opinions denying COAs).

Consider, in contrast, cases where the United States was a party. From 2008 to 2013, federal courts of appeals published more than half of cases where the United States initiated the appeal (50.3%).[209]

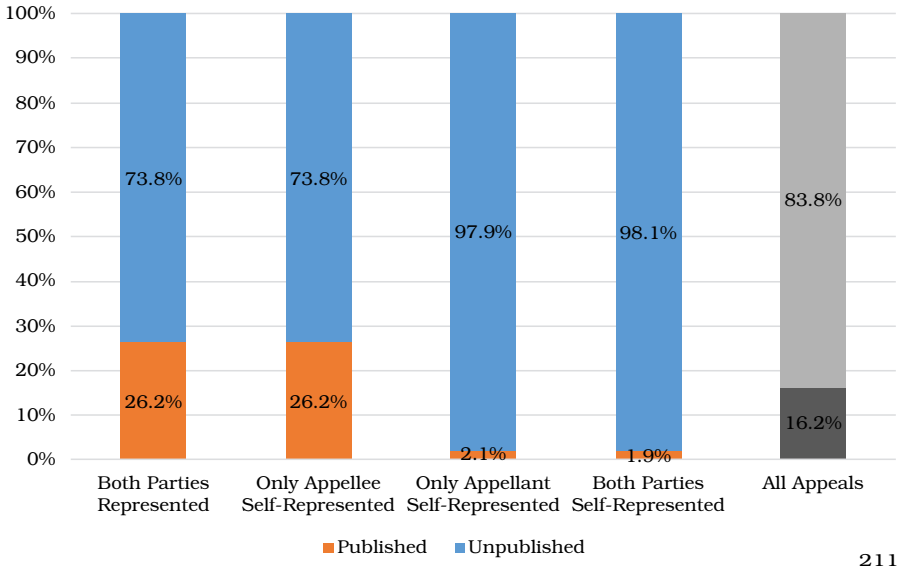
a. *Self-Represented Parties*

Figure 4 shows the publication rates for federal appeals over the decade between 2008 to 2018 based on whether the appellant was self-represented, the appellee was self-represented, both parties were self-represented, or neither was.[210] The gray bar in Figure 4 shows the overall publication rate across all appeals during this time period, approximately 16.2%. Cases where both parties were represented were published twelve times more often than cases where the appellant alone was self-represented: 26.2% versus 2.1%. Appeals where both parties were representing themselves experienced similarly low publication rates: 1.9%. However, appeals where only the *appellee* was self-represented were published 26.2% of the time. In other words, cases in which the appellant was represented enjoyed higher publication rates regardless of whether the opposing party was representing themselves.

209 According to the FJC, the variables for when the U.S. is an appellee and appellant have not been used since 2013 so we have not included an analysis of those variables in subsequent years. Email from Federal Judicial Center (Kristin Garri) to co-author Jade Ford (May 3, 2021) (on file with authors).

210 These data rely on the FJC data's PROSETRM variable, which indicates the self-represented status of the parties at termination of the appeal. There were 419,784 observations in this set of data of which 53,921 had a missing publication status and were excluded.

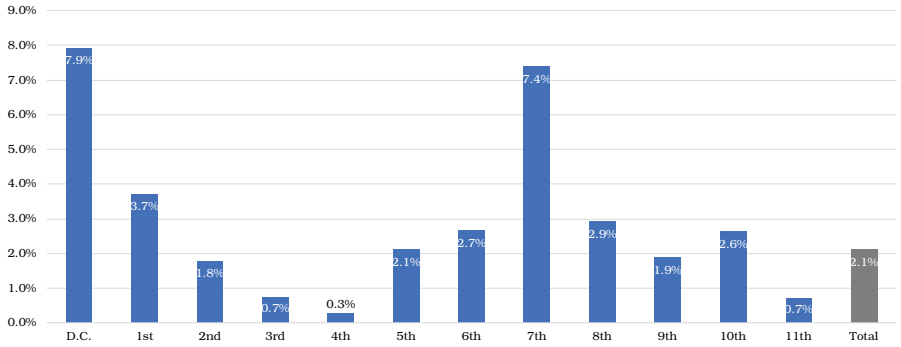
FIGURE 4: PUBLICATION RATES BY REPRESENTATION STATUS



211

Figure 5 shows the publication rate for self-represented appellants by circuit, with the rate across all circuits shown by the gray bar. The D.C. and Seventh Circuits had the highest publication rates for self-represented appellants, while the Fourth Circuit had the lowest.

FIGURE 5: PUBLICATION RATES FOR APPEALS BY SELF-REPRESENTED APPELLANTS BY CIRCUIT



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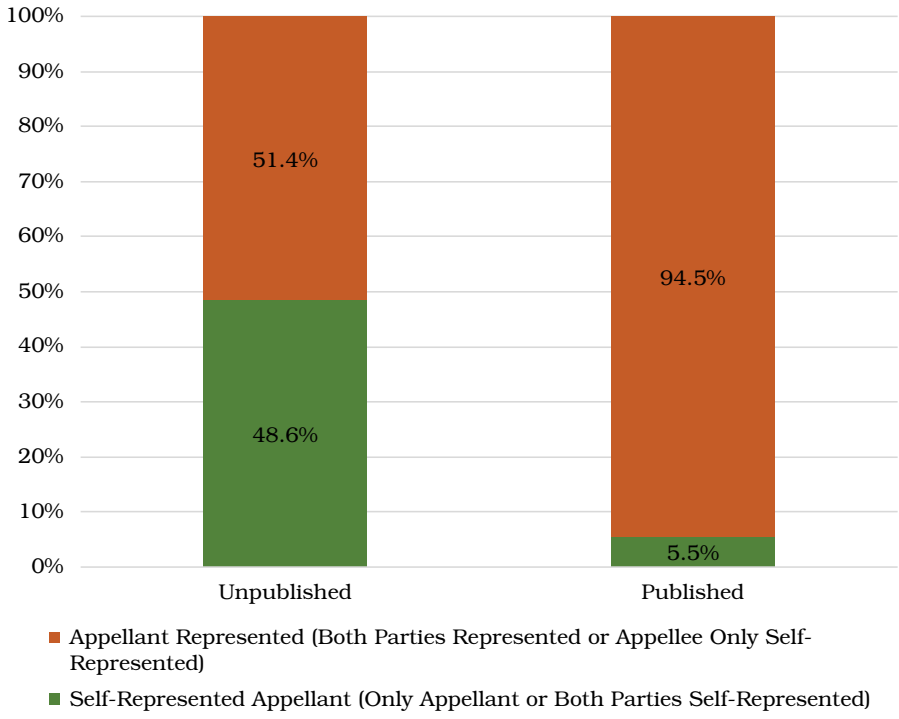
211 The figures in this Article reflect the statistics calculated with opinions denying COAs included. The statistics with cases denying COAs are broken out in the text.

212 In both Figures 5 and 6, self-represented appellants encompass both appellants who represent themselves while the appellee is represented and self-represented appellants in cases where both parties are self-represented. There

We also looked at the share of both unpublished and published opinions involving self-represented appellants. As shown in Figure 6, nearly half of all unpublished opinions, 48.6%, involve a self-represented appellant – either one such appellant against a represented appellee or where both parties represent themselves, as opposed to only 5.5% of all published opinions. Conversely, in an overwhelming majority of published opinions, 94.5%, the appellant was represented.

FIGURE 6: BREAKDOWN OF UNPUBLISHED AND PUBLISHED OPINIONS BY SHARE INVOLVING SELF-REPRESENTED APPELLANT



Finally, as we also do with respect to habeas cases and cases brought by incarcerated persons, we break out certificate-of-appealability cases in the interest of transparency. In the habeas context, the petitioner cannot simply appeal from a denial of relief by the district court but, rather, must make a "substantial showing of the denial of a constitutional right" to obtain a COA.[213] The government, if it loses below, does not need to obtain a COA to appeal. COAs are included in both the

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are 191,048 such cases of which 152,140 have a publication status and 32,908 had a missing publication status.

213 28 U.S.C. § 2253(c)(2).

Integrated Database's civil appeals data and procedural terminations data, but given that a vast number of COAs are denied in short and typically unpublished opinions, they affect the numbers we report for habeas, incarcerated, and self-represented cases. Still, COA applications are ways in which often-unrepresented litigants interact with the legal system, and a major hurdle to review. We therefore note where this may make a difference and report the data both ways.[214]

Out of the 42,651 certificate-of-appealability opinions, in 4,778 both parties were represented, in 37,867 only the appellant was self-represented, in one only the appellee was self-represented, and in five both parties were self-represented.[215] When opinions denying COAs are removed, the publication rate for parties based on their representation status rises slightly to: (1) both parties represented (26.8%); (2) appellee self-represented (26.2%); (3) appellant self-represented (2.8%); (4) both parties self-represented (1.9%). The overall publication rate for all appeals excluding COAs rises to 18.3%.[216] The share of published opinions involving a self-represented appellant falls to 5.3% when cases denying COAs are excluded (as opposed to 5.5% when COA cases are included) and the share of unpublished opinions involving a self-represented appellant falls to 42.1% (as opposed to 48.1%).

* * *

The findings on the publication status for cases brought by self-represented appellants may give credence to what former Judge Richard Posner has called the "downright indifference of most judges to the needs of pro se's."[217]

The disproportionate rate at which appeals in which the appellant is self-represented go unpublished merits further investigation. Neutral explanations for this differential treatment may exist. Perhaps such appeals are in fact less likely to raise meritorious claims or novel legal issues than cases involving

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214 We only include cases with a publication status; we have dropped cases for which publication status is missed, as noted in Appendix 1. COAs arise in two places in the dataset – among cases that are terminated on the merits and procedural terminations. To remove them from the dataset a binary variable was constructed and coded as 1 if there was either a merits or a procedural termination that resulted in denial of a COA and as 0 if there was not and used COA = 0 to exclude cases.

215 There were also 21,230 cases with missing publication values that are excluded from our analysis.

216 These rates were calculated using the same methodology as for Figure 4 with the added filter of the COA = 0.

217 POSNER, REFORMING THE FEDERAL JUDICIARY, *supra* note 10, at 31.

represented parties, making them good candidates for relatively short, nonprecedential opinions. Or perhaps self-represented appellants suffer from poor advocacy making them less likely to present their arguments in a way that seems noteworthy or compelling to a judge.[218] Some judges may fear that self-represented appellants have not presented the strongest legal arguments or adequately developed the record below.[219] But bias could be another explanation. Judge Posner told the *New York Times* after his resignation from the Seventh Circuit that "judges regard these people," referring to self-represented and indigent litigants, "as kind of trash not worth the time of a federal judge."[220] Regardless of the cause, this differential treatment threatens to inflict a dignitary harm, if a class of litigants views themselves as receiving second-class treatment.

b. *Appeals Brought by Incarcerated People*

Our data also reveal the infrequency with which appeals brought by incarcerated persons result in precedential opinions: 5.3% of civil appeals brought by incarcerated litigants received a published disposition, as compared to the 17.4% of all civil appeals that are published (Figure 7).[221] Overall, be-

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218 *See* Martin, *supra* note 44, at 178, 183 (arguing that unpublished opinions are a "necessary" tool for the federal appellate judiciary in part because more appeals lack merit than in the past); *see also* McAlister, *supra* note 5, at 561(acknowledging that "[n]o doubt, many pro se appeals present routine, meritless, and even potentially frivolous issues").

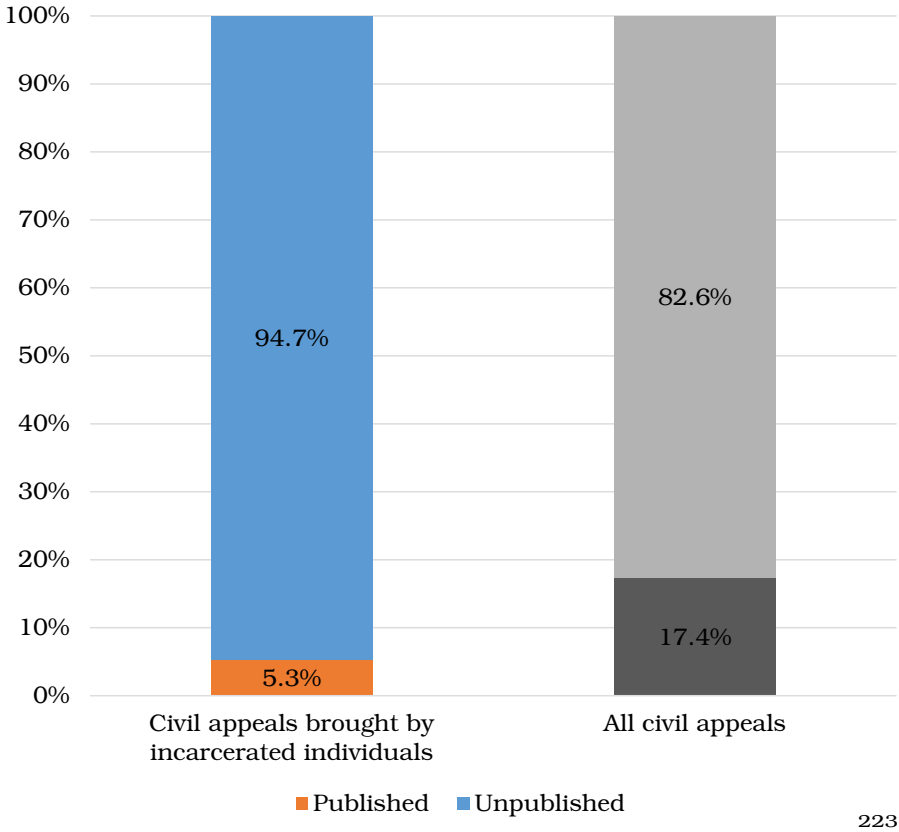
219 *Cf.* Letter from Alex Kozinski, U.S. Cir. J. for the Ninth Cir., to Samuel A. Alito, U.S. Cir. J. for the Third Cir. 6 (Jan. 16, 2004) (explaining that "[m]any cases are badly briefed; many others have poorly developed records" and that "[i]ssuing a precedent that rejects outright a party's argument may signal the death of a promising legal theory, simply because it was poorly presented in the first case that happens to come along"), http://www.nonpublication.com/kozinskiletter.pdf [https://perma.cc/CDR4-5MJA].

220 Liptak, *supra* note 179]; *see also* POSNER, REFORMING THE FEDERAL JUDICIARY, *supra* note 10, at 135 (2017) (describing the "massive indifference of most judges . . . to the plight of the pro se").

221 Note that the FJC dataset uses the term "prisoner petitions" for these appeals. They are identified by NOS codes 510, 530, 535, 540, 550, 555. Note that we do not include NOS code 560 "Civil Detainee – Conditions of Confinement" in any of our analysis of "prisoner" cases as this data is an "[a]ction by former prisoner who was involuntarily committed to a noncriminal facility after expiration of his or her prison term alleging unlawful conditions of confinement while in the non-criminal facility." *See* Civil Nature of Suit Code Descriptions, U.S. Courts (Apr. 2021), https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf#:~:text=560%20Civil%20Detainee%20%2D%20Conditions%20of,in%20the%20non%2Dcriminal%20facility [https://perma.cc/3FAW-LR6W]. We have used the codes classified as prisoner petitions on the U.S. Courts civil cover sheet in 2008, the year our data begins, and the codes indicated in the FJC Appeals Codebook. *See* Sample JS44 Civil Cover Sheet (revised 01/2008), https://www.courtalert.com/SDNY/08cv09115.pdf [https://perma.cc/C5CZ-S9AM]. For

tween 2008 and 2018, there were 94,129 appeals brought by incarcerated people for which the publication status was known, but only just over 5,000 of these were published.[222] If opinions denying certificates of appealability are removed from this sample, the publication rate nearly doubles to 9.4% (and the publication rate for all civil appeals rises to 22.1%).

FIGURE 7: PUBLICATION RATES FOR CIVIL APPEALS BROUGHT BY INCARCERATED INDIVIDUALS VERSUS ALL CIVIL APPEALS



[223]

this reason, we do not include NOS Codes "463: Alien Detainee" or "560: Civil Detainee Condition of Confinement" in any of our analysis of prisoner petitions. The number of observations for each is unusually low – 226 cases for NOS 463 and 173 for NOS 560, suggesting a possible lack of reporting. Moreover, given now small these numbers are they are unlikely to affect our data on prisoner petitions.

[222] These statistics exclude cases where the publication status was missing. In total, there were 124,557 such appeals and 30,428 (24%) had a missing publication status.

[223] The gray bars for all civil appeals in this chart and other figures in the paper represent the share of all appeals in the relevant comparator category that are published (dark gray) and unpublished (light gray).

As we detail below, the high nonpublication rates for most types of appeals brought by incarcerated people—and the high rate of nonpublication across all of these appeals (94.7%)—raise concerns that these litigants are receiving differential treatment and that the law may be developing slowly in most areas that affect incarcerated people. As noted above with respect to cases involving self-represented litigants, however, these appeals may be less likely to raise novel legal claims or may be more likely to be frivolous.[224]

As noted earlier, claims brought by incarcerated individuals sometimes involve higher burdens and more stringent procedural thresholds for plaintiffs to succeed than claims typically brought by non-incarcerated individuals.[225] To that end, we note that a large portion of these cases—45.3% of all civil appeals involving incarcerated individuals—are denials of motions for certificates of appealability, which govern whether plaintiffs can appeal certain types of habeas and 28 U.S.C. § 2255 cases.

2. *Types of Cases*

Differences in publication status for opinions in different areas of the law also implicate questions of equality. After all, many areas of law are coterminous with the types of parties involved, including immigration law, claims brought by incarcerated people, and corporate cases. Thus, the publication status of different types of cases reveals how courts treat different types of parties.

To explore these questions, we looked at the rates of published and unpublished opinions in appellate cases across the major categories of law that FJC uses (e.g., civil, criminal, bankruptcy etc.). We then examined the publication rates across a range of diverse subject-matter areas, to determine if

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224 *See, e.g.*, Bontemps v. Godina, No. 2:15-cv-03171-JFW-SP (9th Cir. Dec. 21, 2017) (affirming district court's order dismissing incarcerated person's state Section 1983 action for failure to pay a fee after revoking his in forma pauperis status (IFP) on the grounds that the plaintiff had reached the three "strikes" limit under 28 U.S.C. § 1915). 28 U.S.C. § 1915 bars IFP status for "prisoner[s]" who have "on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

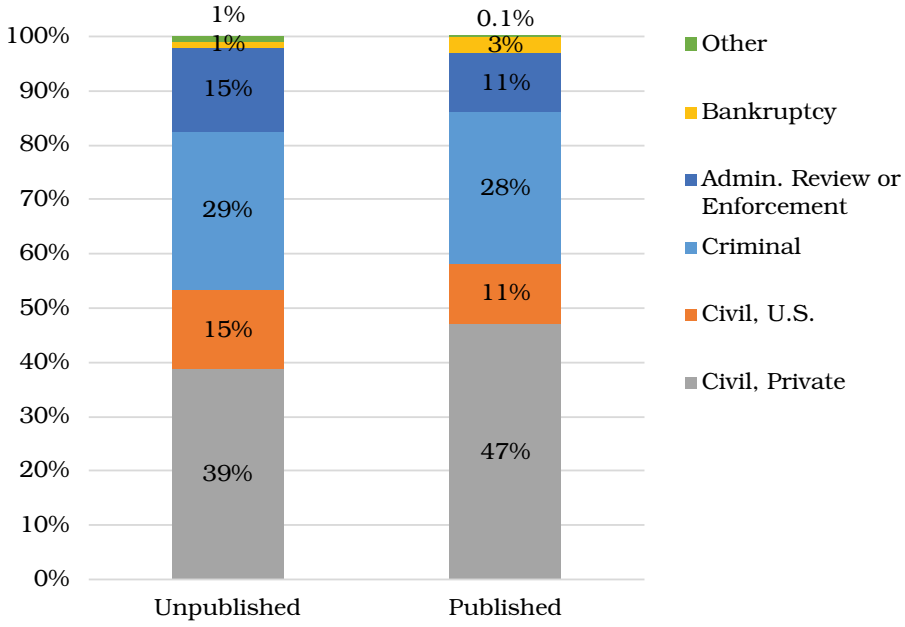
225 To take one example, the Prison Litigation Reform Act requires that an incarcerated individual must exhaust "such administrative remedies as are available" before bringing a suit "with respect to prison conditions under section 1983 . . . or any other Federal law." 42 U.S.C. § 1997e(a).

different subjects and constituencies might give rise to different patterns of publications. Specifically, we examined civil rights, benefits cases, civil commercial cases, immigration appeals from the BIA, prison condition cases, habeas cases, and labor and environmental cases.

a. *Overall Breakdown of Appeals*

To start, we wanted to determine what types of cases make up the approximately 85% of all federal appeals that were resolved in unpublished opinions in the ten years of FJC data we examined, from 2008 to 2018. Figure 8 breaks down unpublished opinions in the FJC dataset by appeal type. The dataset includes 306,521 unpublished opinions and 59,342 published opinions issued by the U.S. Courts of Appeals from 2008 to 2018.[226] Civil appeals made up the greatest share of unpublished opinions (39% civil, private, and 15% civil, U.S.), followed by criminal appeals (29%).

FIGURE 8: UNPUBLISHED AND PUBLISHED OPINIONS BY APPEAL TYPE



226 This number excludes the 53,921 cases from 2008 to 2018 where the publication status was not recorded. *See* Appendix 1 for more details on these decisions. This number also excludes original proceedings, which are included in the FJC dataset but are not appeals of cases decided at the district court level and therefore excluded from our analysis.

Similarly, for published opinions, civil appeals also made up the greatest share (47% civil, private, and 11% civil, U.S.), followed by criminal appeals (28%).

We broke down the largest case category in unpublished opinions—civil appeals, including both civil, private and civil, U.S. appeals—into certain subcategories for further investigation.

b. *Civil Rights Cases and Benefits Cases*

The FJC dataset contains information on various types of civil rights cases, broken out based on the "nature of suit" codes that come from the U.S. Courts civil cover sheet.[227] Civil rights cases accounted for a relatively large share of the total civil appeals (30%).[228] These nature of suit codes for the time period of data that we used include eight different categories: civil rights voting, civil rights jobs, civil rights accommodations, civil rights welfare, ADA-employment, ADA-other, "prisoner" civil rights,[229] and "other" civil rights.[230] Of these categories, "prisoner" civil rights cases (31%), employment (22%), and "other" civil rights cases (42%) are the largest.

Only 3.5% of civil rights cases brought by incarcerated people were resolved by published opinions on appeal, compared with 17.4% for all civil appeals.[231] By contrast, other civil rights cases had publication rates above the rate for all civil appeals: 18% for civil rights employment cases, and 21% for civil rights accommodations cases.

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227 Note that our figures will not match with Judicial Business Table B-7 "Civil and Criminal Appeals Commenced, by Cases and Nature of Suit or Offense" per year, see, *e.g.*, *Judicial Business Tables for 2015: Table B-1A*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS., https://www.uscourts.gov/sites/default/files/jb_na_app_0930.2018.pdf [https://perma.cc/XNU8-STRK], because those figures show the number of appeals commenced per year, whereas we used the judgment date variable for our analyses (i.e., we looked at all appeals with judgment dates from 2008 to 2018, as opposed to commencement dates within that time period).

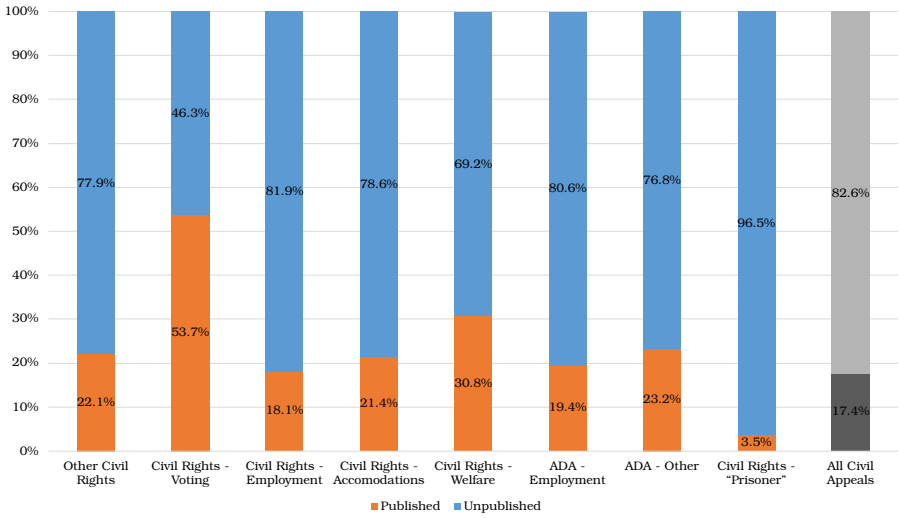
228 There were 59,246 civil rights cases with a publication status, out of 198,280 total cases in this category with a publication status. 7,029 civil rights cases had a missing publication status and have been excluded from our analysis.

229 "Prisoner" is the label used by the FJC. We use the term "incarcerated" in our own discussion.

230 In the FJC Codebook, the Nature of Suit codes for these categories are 440 – other civil rights, 442 – civil rights jobs, 443 – civil rights accommodations, 444 – civil rights welfare, 445 – ADA Employment, 446 – ADA Other, and 550 – Prisoner civil rights. FJC Appeals Codebook, FED. JUD. CTR., supra note 123, at 21-22.

231 The publication rate for "prisoner" civil rights cases is similar when certificates of appealability are removed since there were only 48 such cases.

FIGURE 9: PUBLICATION RATES FOR CIVIL RIGHTS APPEALS VERSUS ALL CIVIL APPEALS



We were also interested in the publication status of cases involving access to government benefits. The FJC dataset includes data for a range of Medicare- and Social Security-related cases.[232] Only 10% of these cases were published, which is below the publication rate for cases overall. It is possible that this low publication rate in part reflects that a high proportion of these cases—some 20%—involve self-represented parties or that they may involve relatively routine issues of law frequently seen by the courts.

c. *Commercial Cases*

We also examined rates for commercial ligation, using the FJC data to examine two categories within civil suits: copyright and trademark cases, as well as securities, commodities, and exchange cases.[233]

Figure 10 shows the publication rates for these various types of commercial civil appeals from 2008 to 2018. Suits in the securities, commodities, and exchange category were pub-

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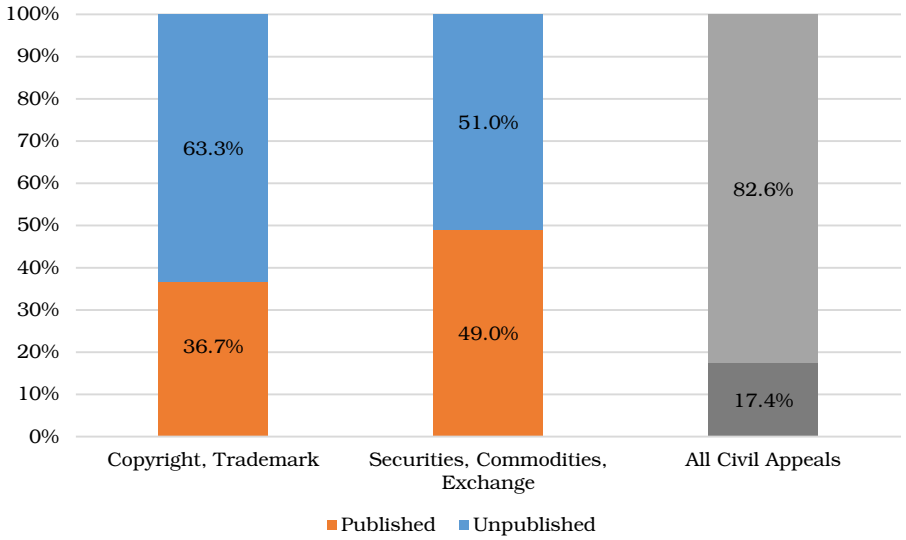
232 These cases include payments for those with black lung, programs for disabled individuals, Retirement Survivor Insurance, and Medicare-related social security cases.

233 The "Nature of Suit" codes for these cases in the FJC Appeals Codebook were 820 ("Copyright"), 840 ("Trademark"), and 850 ("Securities, Commodities, Exchange"). FJC Appeals Codebook, FED. JUD. CTR., *supra* note 123, at 22. In total, there were 4,028 appeals in these categories with recorded publication status. There were 339 with a missing publication status and were excluded.

lished at 49.0%, followed by copyright and trademark at 36.7%.

FIGURE 10: PUBLICATION RATE FOR COMMERCIAL APPEALS VERSUS ALL CIVIL APPEALS



These publication rates are significantly higher than the 17.4% publication rate for all civil appeals. Thus, while commercial civil appeals make up a relatively small share of the overall federal appellate caseload (just 1% of civil appeals for which there is a publication status), they are published more often than civil appeals are in general.

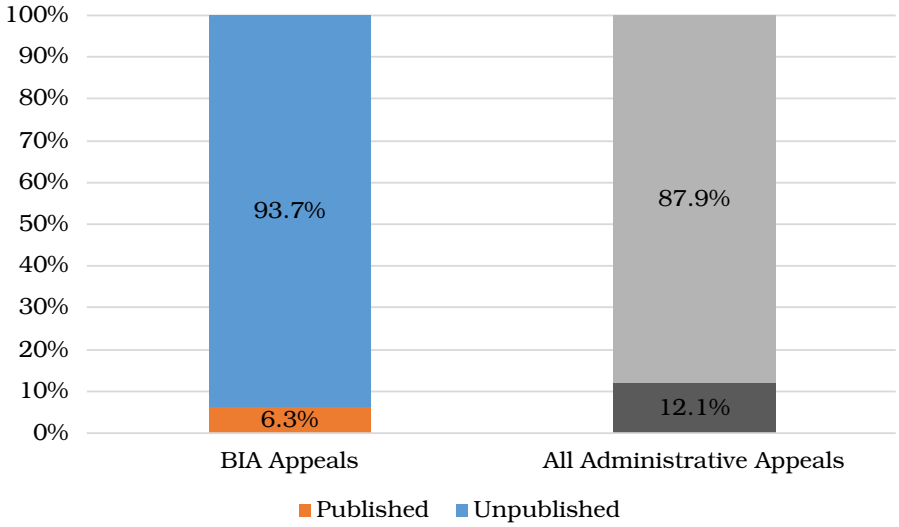
d. *Immigration Appeals*

Another category of civil cases that we studied consists of appeals from the Board of Immigration Appeals ("BIA").[234] The BIA is an administrative appellate agency within the Department of Justice that reviews decisions related to immigration made by immigration judges, and in some cases the Depart-

234 This analysis was based on the FJC data on appeals from the BIA (AGENCY = 6). The FJC Appeals Codebook indicates these are appeals from Immigration and Naturalization Services ("INS"), FJC Appeals Codebook, FED. JUD. CTR., *supra* note 123, at 6; however, an FJC administrator confirmed that these data capture BIA appeals, since the INS was replaced by the BIA. Email from Federal Judicial Center (Kristin Garri) to co-author Rachel Brown (Mar. 9, 2020) (on file with authors). Of the 52,291 total appeals from the BIA from 2008 to 2018, there were 6,591 appeals with missing publication status which were excluded from this analysis.

ment of Homeland Security.[235] The majority of cases before it involve orders of removal or applications for relief from removal, such as applications for asylum.[236] Other matters include family-based visa petitions, waivers of inadmissibility, and denials of bond or parole for detained noncitizens.[237] Nearly all decisions by the BIA are subject to judicial review in the U.S. Courts of Appeals.[238] Figure 11 shows the publication rate for BIA appeals compared with that for all administrative appeals from 2008 to 2018.

FIGURE 11: PUBLICATION RATE FOR BIA APPEALS VERSUS ALL ADMINISTRATIVE APPEALS



From 2008 to 2018, federal courts only published 6.3% of the 45,700 opinions they issued resolving BIA appeals. This publication rate is notably lower than the 12.1% rate for administrative appeals overall. Immigration appeals are also by far the largest category of administrative appeals for which publication status is known (85%).

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235 *Board of Immigration Appeals*, U.S. DEP'T. JUST., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/JKT8-M2XK] (May 30, 2020). The FJC categorizes BIA appeals under "Administrative Review" rather than civil appeals. *Id.*

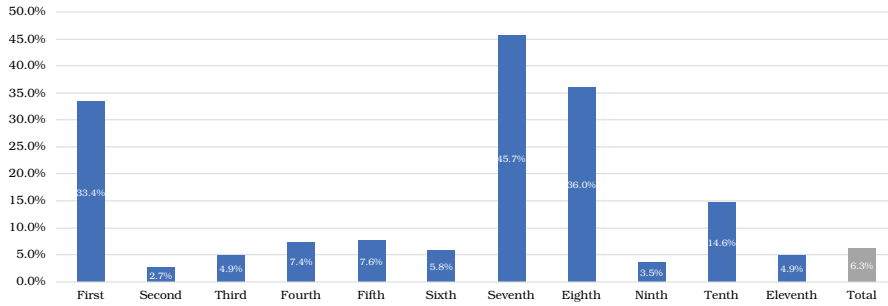
236 *Id.*

237 *Id.*

238 *See id.* ("Most BIA decisions are subject to judicial review in the federal courts."); 8 U.S.C. § 1252.

Figure 12 shows the publication rate for BIA appeals across the circuits.[239] The First, Seventh, and Eighth Circuits had notably higher publication rates for these appeals than the other circuits—all above 30%. These circuits all have relatively low numbers of immigration cases. Meanwhile, the Second and Ninth Circuits, which had by far the largest number of immigration opinions, had quite low publication rates. In part, this may reflect that, because of the large number of immigration cases in these circuits, precedent may already be well-developed.

FIGURE 12: PUBLICATION RATE FOR BIA APPEALS BY CIRCUIT



In considering non-publication of immigration appeals, it is noteworthy that even in circuits that have large numbers of immigration cases which they publish at a low rate—e.g., the Second and Ninth Circuits—it is not just the low publication rates of these cases that is driving high levels of nonpublication. Even when immigration cases, cases brought by incarcerated individuals, and cases involving self-represented parties are excluded, the publication rates for both circuits are below 30%.[240] Of course, those cases remain on the court's dockets, and the accompanying workload pressures could indirectly affect publication rates for other types of cases.

e. *Habeas Corpus Appeals*

The FJC Integrated Database contains data on different types of civil habeas corpus petitions brought by incarcerated

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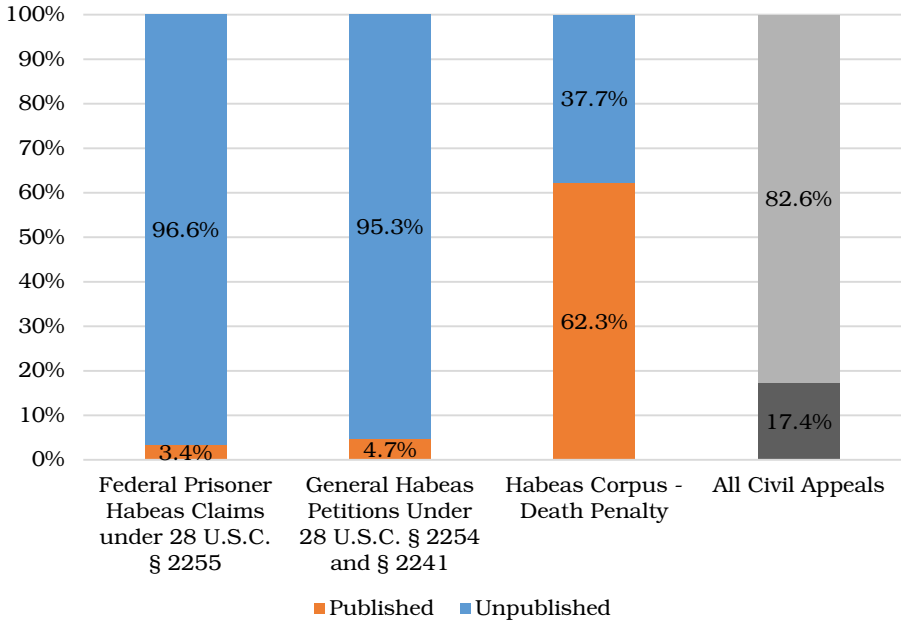
239 We excluded the D.C. Circuit from this chart given that BIA appeals are typically resolved by the other regional circuits, although they are included in the analysis of the publication rate for BIA appeals overall.

240 This was calculated by excluding NOS codes 510, 530, 535, 540, 550, 555; PROSETRM codes 1,2, and 3, and AGENCY code 6 for BIA appeals in addition to the usual filters described earlier in the methodology.

people.[241] Figure 13 below shows the different publication rates across these appeals compared with all civil appeals.

FIGURE 13: PUBLICATION RATE FOR HABEAS APPEALS VERSUS ALL CIVIL APPEALS



The proportion of habeas corpus death penalty petitions that are published proves strikingly high—at 62.3%, these cases are published at some of the highest rates that we have seen. Given the literally life-or-death consequences of these cases, it makes sense that courts are reluctant to make these opinions unpublished—but this fact drives home the *normativity* of the decision whether to publish. "Important" cases—cases with significant consequence—get published. In contrast, non-death penalty habeas corpus cases brought by incarcerated individuals have very low publication rates. Indeed, they are published at less than one-third of the overall rate across all civil appeals (4.7% versus 17.4%), or when COA opinions are excluded at a little over half the overall rate (12.3% v. 22.1%).

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241 In the FJC Integrated Database, these categories correspond respectively to the "Nature of Suit" (NOS) codes 530 and 535. *See* FJC Appeals Codebook, FED. JUD. CTR., supra note 123, at 22 (corresponding to 530: Prisoner Petition -Habeas Corpus; 535: Habeas Corpus -Death Penalty). In total there were 44,067 "prisoner petitions – habeas corpus," with a publication status and 18,432 missing a publication status and excluded. There were 1,611 "Habeas Corpus -Death Penalty" cases with publication status and 190 missing publication status and excluded.

We also found even lower publication rates for other types of appeals seeking post-conviction relief. At the appellate level, only 3.4% of federal cases brought by federally incarcerated individuals seeking to vacate a sentence by collateral attack and not via habeas—e.g. via 28 U.S.C. § 2255, which Congress enacted as a substitute for habeas corpus for individuals with federal convictions—are disposed of through published opinions.[242] That is less than one-fifth the overall publication rate across all federal civil appeals from 2008 to 2018. When opinions denying COAs are excluded, the publication rate for cases brought by federally incarcerated individuals seeking to vacate a sentence by collateral attack rises to 12.3%. Similarly, when opinions denying COAs are excluded, the publication rate for habeas petitions under § 2254 and § 2241 rises to 12.3%, and the rate for death penalty cases rises to 69.5%. It is notable that cases denying COAs make up nearly two thirds of all habeas and § 2255 cases in the dataset (65.2%).[243]

f. *Prison Condition Cases*

The FJC Integrated Database also contains data on non-habeas prison condition cases. Figure 14 below shows the publication for these appeals compared with all civil appeals.[244]

Cases challenging prison conditions were published at less than half the overall rate for all civil appeals (6.1% versus 17.4%). There were also 15 cases in this category that were resolved with denials of COAs. Because that number is so small, however, the rate of publication does not change when they are excluded.

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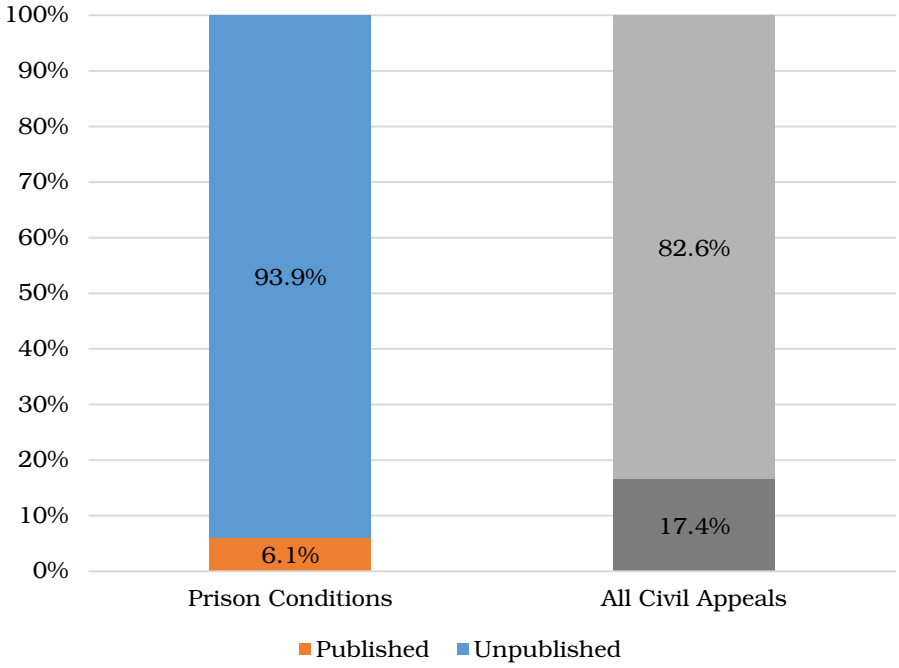
242 In the FJC Integrated Database, this category corresponds to NOS code 510 "Prisoner Petitions -Vacate Sentence." FJC Appeals Codebook, FED. JUD. CTR., *supra* note 123, at 22. This category includes post-conviction relief claims to vacate an individual's sentence, for instance based on 28 U.S.C. § 2255. *See* Caro v. United States, No. 16-6027, at *2 (4th Cir. Apr. 3, 2017) (per curiam) (unpublished 28 U.S.C. § 2255 motion), https://www.govinfo.gov/content/pkg/USCOURTS-ca4-16-06027/pdf/USCOURTS-ca4-16-06027-0.pdf [https://perma.cc/GT89-4EJT]. There were 19,508 opinions in this category with publication status recorded and 7,389 where publication status was missing, and they were thus excluded.

243 There were 65,186 such cases that had a publication status, of which 42,510 were resolved on certificates of appealability and 22,676 were not.

244 In the FJC Integrated Database, this category corresponds to NOS code 555 "Prisoner – Prison Condition." *See* FJC Appeals Codebook, FED. JUD. CTR., supra note 123, at 22. There were 8,038 opinions in this category with publication status recorded and 1,136 with a missing publication status.

FIGURE 14: PUBLICATION RATE FOR PRISON CONDITION CASES VERSUS ALL CIVIL APPEALS



g. Labor and Environmental Cases

Finally, we were also interested in cases that had low publication rates but were nonetheless published more frequently than the baseline. Two such areas include labor-related appeals and appeals in environmental matters.

Thirty-eight percent of labor-related appeals were published, which included, per the FJC's designation, cases under the Fair Labor Standards Act, the Labor/Management Relations Act, Labor/Management Report and Disclosure, Family and Medical Leave Act, ERISA, and other labor litigation.[245] Notably, this is a higher rate of publication than that in the universe of cases excluding immigration appeals and cases involving self-represented individuals and incarcerated individuals (30%).

Similarly, the category of cases involving environmental matters (as defined in the nature of suit codes) also had unusually high rates of publication with a majority (59.3%) resulting

245 These correspond to NOS codes 710, 720, 730, 740, 751, 790, 791.

in precedential opinions.[246] This was a higher rate of publication than even for the commercial cases discussed above.

While we do not attempt to suggest what might be driving high rates of publication in these areas, understanding this dynamic and whether it arises from higher rates of representation, more novel cases, the frequency with which the U.S. appeals (likely high, but this cannot be determined from existing FJC data given limitations in the variables for when the U.S. is the appellant and the U.S. is the appellee), or other dynamics would be a valuable avenue for future study. We additionally used our coded sample to compare what percent of unpublished opinions involved state law, criminal law, constitutional law, administrative law, statutory law, and so on. Civil cases were the largest category of cases in our sample followed by criminal cases. Nearly all of the cases were federal statutory or constitutional cases, and state law cases rarely appeared. Because many of the cases in the other categories often involved multiple areas of law (e.g., statutory interpretation and administrative law questions in the same case), we concluded that further work was needed to refine the data breaking down those categories. A valuable future project would examine any such differences.

3. *Source of Jurisdiction for Civil Causes of Action*

We also used the FJC data to examine publication rates across the different sources of federal jurisdiction, in order to determine if federal courts treated state law cases (i.e., diversity jurisdiction) differently for purposes of publication than cases based on federal question or U.S.-party jurisdiction. After all, federal court decisions on state law are not precedential, and so we might expect diversity cases to have very low publication rates.

We were wrong. Diversity jurisdiction cases and federal question cases had nearly equal rates of publication (29.8% versus 28.6%). Also striking is the fact that when the United

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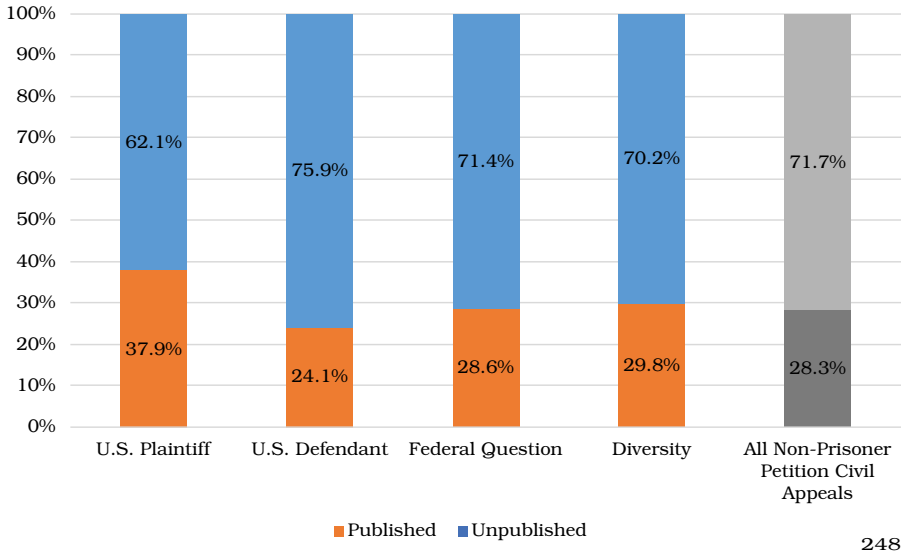
246 An environmental matter is defined as: "Action filed under Air Pollution Control Act 42:1857-57L, Clean Air Act 42:1857:57L, Federal Environment Pesticide Control Act, Federal Insecticide, Fungicide & Rodenticide Act 7:135, Federal Water Pollution Control Act 33:1151 et seq., Land & Water Conservation Fund Act 16:4602,460 1-4, Motor Vehicle Air Pollution Control Act 42:1857F-1-8, National Environmental Policy Act 42:4321, 4331-35G, 4341-47, River & Harbor Act penalty 3:401-437, 1251. It corresponds to the nature of suit code 893. Civil Nature of Suit Code Descriptions, U.S. COURTS (Apr. 2021), https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf [https://perma.cc/MLR6-MTZC].

States was the plaintiff in the underlying case, there was a disproportionately high publication rate (37.9%). This is a much higher rate than when the United States was the defendant (24.1%). The discrepancy in publication rates may reflect the fact that the United States is more likely to bring cases involving substantive legal issues since it brings comparatively few civil cases. Additionally, since only civil appeals are included in the jurisdiction data, this analysis excludes criminal cases in which the United States is often the plaintiff. Notably, however, this data must be considered with the caveat that petitions from incarcerated individuals are also excluded from this section of the analysis, as their data are coded differently for jurisdictional purposes.[247]

FIGURE 15: PUBLICATION RATE BY SOURCE OF JURISDICTION FOR NON-"PRISONER" PETITION CIVIL CAUSES OF ACTION



[248]

Of the non-"prisoner" petition civil appeals in the FJC database, 61% were federal question cases without the U.S. government as a party and 19% were diversity cases. The other

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[247] FJC Appeals Codebook, FED. JUD. CTR., supra note 123, at 6. For prisoner petitions, the JURIS codes instead correspond to 2 – Federal, 3- State, 5 – Local, and inclusion of prisoner petitions would thus alter the data.

[248] The publication rate for all non-"prisoner" petition civil appeals is higher than for other civil appeals because it excludes prisoner petitions since they are coded differently in the JURIS variable. This makes precise comparisons using this variable difficult. The FJC uses the term "prisoner" petitions in its codebook, and we have reproduced it here for the sake of precision. *See* FJC Appeals Codebook, FED. JUD. CTR., supra note 123, at 6.

19% of cases arose where the U.S. government was a party (coded as a different category from Federal Question in the civil cover sheet)—either the defendant (17%) or plaintiff (2%).[249]

4. *Outcomes and Forms of Opinion*

a. *Outcomes in Merits Terminations*

To better understand how nonpublication affects the development of the law, we looked at case outcomes. For example, one might expect reversals to be published more than affirmances, because reason-giving could be more beneficial when the appellate court disagrees with the reasons offered by the lower court. Publishing reversals would also play an instructive role for other lower courts in the circuit. Finding that most unpublished opinions are affirmances would give some credence to the theory that courts are using nonpublication to conserve time and limited resources when the law is clear and they agree with the lower court's reasoning.

Figure 16 shows the publication rate for six different types of outcomes.[250] The gray bar indicates the baseline percent of opinions that are published (17.4%) on the merits, as the outcome variable is only coded for that category.

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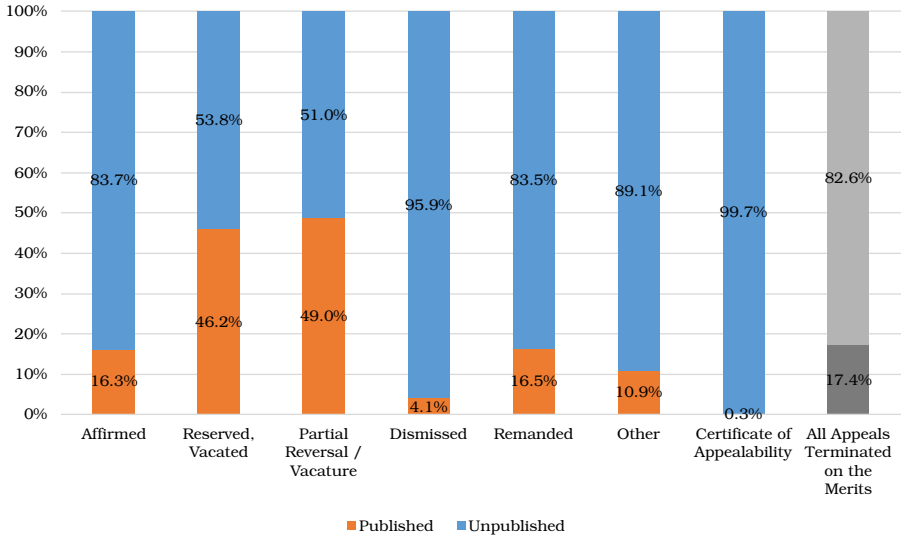
249 In the FJC Integrated Database, these categories correspond to the JURIS variable and are calculated through use of the JURIS and PUBSTAT variables. These statistics do not include eight cases based on local question (i.e., territorial) jurisdiction, not because these cases are unimportant, but rather due to their small volume. Since this variable is only coded for civil appeals, the 180,985 observations of non-civil appeals are excluded. Excluding the non-civil appeals, there were 10,091 entries with "missing" publication status that were also excluded.

250 Because OUTCOME is only coded for cases terminated on the merits, this analysis is filtered to include only DISP = 1 or 2. Unlike in the rest of the analysis procedural terminations after other judicial action (DISP = 4) are not included. Note that 2,561 of these entries had "missing" outcome fields. These are excluded from the figure but are included in calculating the average. The category of appeals that were "Dismissed" are defined in the Codebook as "Any disposition action where the court dismisses the appeal on the grounds that no genuine issue exists. Included in this category all appeals dismissed as 'moot', dismissed for lack of merit, or designated as frivolous." FJC Appeals Codebook, FED. JUD. CTR., *supra* note 230, at 10. This was a small category of appeals. The OUTCOME variable does include some denials of certificates of appealability.

FIGURE 16: PUBLICATION RATE BY OUTCOME IN CASES TERMINATED ON MERITS



By publishing significantly more reversals than affirmances, judges might be using nonpublication in a way that mitigates its negative impacts on the development of the law. However, this may still skew the law in certain ways. For example, the higher publication of reversals may result in better developed precedents addressing what a district cannot do (e.g., what is an abuse of discretion by the district court) than what a district court *can* do, or in better developed precedents about what protections law does not offer as opposed to where law extends. This is analogous to the "one-sided development of the law" that Gertner describes, where judges typically write detailed employment opinions only when a plaintiff loses.[251]

Moreover, in terms of absolute numbers, the vast majority of all appellate decisions were affirmances.[252] However, the fact remains that appellate courts issued *24,369 unpublished reversals or partial reversals* from 2008 to 2018.[253] In a system where currently over 87% of opinions go unpublished, courts will inevitably issue a large number of unpublished reversals.

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251 Gertner, *supra* note 149, at 110 (2012).

252 Out of the total 337,342 cases with publication status and outcome recorded, 210,370 were affirmances.

253 Opinions denying certificates of appealability are neither included in the affirmances or reversal rates in the FJC data.

b. *Dissents and Concurrences*

Finally, we used our coded sample to see how often unpublished opinions contain multiple opinions due to disagreement among judges. Dissents and concurrences are rare in unpublished opinions. In our coded sample, approximately 1% of unpublished opinions had a dissenting opinion and only 1.3% had a concurring opinion.[254] Moreover, even if the vast majority of unpublished opinions do not contain dissents or concurrences, the fact that some do suggests that unpublished opinions do not always resolve simple legal questions with only one indisputably correct answer.

Taking a closer look at the text, we found that the nature and length of these dissents and concurrences varied considerably. Some briefly indicated that the separately-writing judge either would affirm on different grounds or disagreed with the majority about the relevant law or facts.[255] However, other unpublished dissents offered extended analysis and suggested unsettled law. For example, in *Barber v. Encompass Indemnity Company,* a 2011 Ninth Circuit case, Judge Ikuta wrote a three-page dissent in which she strongly disagreed with the majority about whether an existing precedent governed the determination of the case.[256] Other unpublished dissents appear to have a largely expressive purpose. For example, in a dissent from the majority's affirmance of the BIA's denial of a motion to reopen, Judge Pregerson of the Ninth Circuit offered an extended critique of the government's immigration policies, writing that "I hope and pray that soon the good men and women who run our government will craft a system that will assure that applicants like Petitioner are represented by competent counsel in every case."[257] The irony, of course, is that this public appeal to policymakers occurred in an opinion that was unpublished and therefore less visible.

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254 Some circuits consider the presence of a dissent or concurrence as a factor in determining whether an opinion is published, perhaps partially explaining why so few unpublished opinions include separate writings. *See supra* Part I.C.2. There were 12 opinions with concurrences out of 931 opinions on the merits and 9 opinions with dissents.

255 *See, e.g.*, Cruz-Carbajal v. Holder, 428 F. App'x 759, 762 (9th Cir. 2011) (Bybee, J. concurring in part, dissenting in part) ("Because Petitioners cannot show that counsel's performance was constitutionally inadequate, it was not necessary for the BIA to address prejudice. I therefore would deny the petition for review with respect to the ineffective assistance of counsel claim.")

256 Barber v. Encompass Indem. Co., 458 F. App'x 617, 618–19 (9th Cir. 2011).

257 Pakasi v. Holder, Agency No. A078-020-366 at *4 (9th Cir. May 24, 2011).

What is puzzling about cases like those just referenced is that, in several circuits, including the Ninth Circuit, any one panel judge can request publication. Thus, in these cases of unpublished dissents it is possible no judge on the panel requested publication, dissent notwithstanding.

These data raise questions about the possibility that nonpublication may also be used as a "bargain[ing]" tool to reach consensus with other circuit judges.[258] Indeed, as Resnik has suggested, "[n]on-publication may . . . be a part of circuit judges' decision-making about whether to join opinions; some may agree with an outcome contingent on obscuring the legal principles that were the basis[.]"[259] Although this is not discernable from our data, if true, it might help explain why there are so few dissents in unpublished opinions; judges may agree to sign on to an opinion that they might have otherwise dissented to as long as the panel agrees not to publish it as a precedential decision. It would also uncover an entirely new function and purpose of nonpublication—one that was not held out as a reason for the practice at its inception and is not openly discussed today: consensus building.

5. *Length and Reason-Giving in Unpublished Opinions*

We also examined the text of unpublished opinions to better understand the level of reason-giving in these decisions—and by extension the impact they might have on the development of the law—as well as the dignity of individual litigants.

As a proxy for how much reasoning unpublished opinions contain, we started by examining the average length of unpublished opinions.[260] Figure 17 shows the mean word count of federal appellate opinions by disposition type over time from the Court Listener dataset of just under 600,000 federal appellate opinions from 1991 to 2017. The figure aggregates the opinions by year and shows the average number of words in the opinion.[261] Our findings show a significant gap in the mean

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258 Panel Discussion, *supra* note 23, at 19.

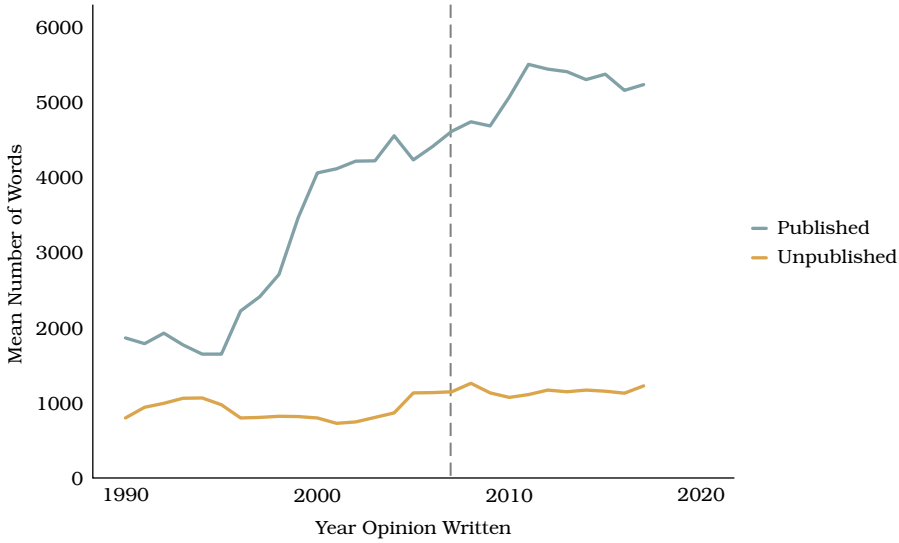
259 *Id.*

260 The word count of an opinion, of course, is only a rough proxy for whether an opinion is in fact "well-reasoned."

261 For the purposes of this analysis, we used the Court Listener dataset. Note that this analysis did not exclude extraneous text such as front matter, case name, docket number, or other forms of boilerplate that occurs in all opinions. As noted above, this analysis is not meant to be the final word, but rather to explore an area that was previously uncharted. Note that the graph does not show confidence intervals around the mean word estimates because the confidence intervals are no larger than a few dozen words. This is because of the large number of cases being represented here—the graph shows data for just under 600,000 federal

word count of published versus unpublished opinions, which has grown from a difference of less than 1,000 words in the 1990s to more than 4,000 words today. Interestingly, an increase in the average length of published opinions seems almost entirely responsible for this widening gap. The mean word count of published opinions has increased by more than 3,000 words over the past 30 years, while the mean word court of unpublished opinions has remained around 1,000 words. Note that mean word count for unpublished opinions may be shorter to the extent that many of them involve affirmances for dismissals based on procedural grounds, and those opinions tend to be shorter.

FIGURE 17: MEAN NUMBER OF WORDS OVER TIME BY PRECEDENTIAL STATUS



Data shown are the mean number of words, grouped by the year the case was decided.
Data are from the CourtListener dataset and represent all federal appellate cases for which there are opinions.
The grey dotted line indicates the date in which FRAP 32.1 became effective.

These findings debunk one of the central concerns raised by opponents of FRAP 32.1: that judges would have to write longer unpublished opinions if litigants could cite them.[262] Instead, it is published opinions that have become longer. In-

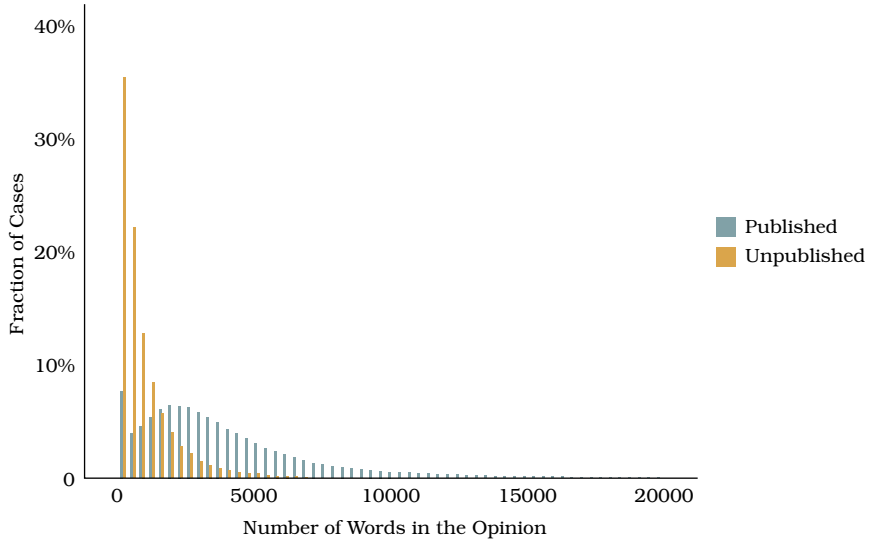
appellate opinions. The data also exclude opinions which were particularly small—less than fifty words including front matter like docket number, name, court information— due to the risk that these low numbers indicated an error in extracting the text from the document since with front matter opinions are generally over this length even if extremely brief.

[262] *See, e.g.*, Martin, *supra* note 44, at 196 (arguing that judges would have to spend additional time preparing unpublished opinions if they were to be cited as precedent).

deed, the increasing length of published opinions might help explain the judiciary's growing reliance on unpublished opinions; courts may be issuing more time-saving unpublished opinions because of the greater time they have chosen to spend on drafting published opinions.[263]

We also examined the distribution of word counts for published and unpublished opinions. The histogram in Figure 18 shows that published opinions have a significantly wider variance in the number of words per opinion, ranging up to nearly 20,000 words, while unpublished opinions have a distribution which peaks in the sub-500-word range and declines significantly as the number of words increases. This indicates that the vast majority of unpublished opinions have word counts below 1,000 words, with a small share over 2,500 words and a few outliers over 5,000.

FIGURE 18: HISTOGRAM OF WORD COUNTS BY PRECEDENTIAL STATUS



Data are for the years 1991-2017.
Data exclude opinions with particularly small word counts (generally less than about 50), which are likely to indicate errors in extracting the text from the document.

These findings show that the vast majority of unpublished opinions are significantly shorter than published opinions, supporting the widespread view that unpublished opinions typically provide only a fraction of the explanation and reasoning of published opinions. Accordingly, nonpublication may

263 *See* RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 6, at 5 ("[Published] opinions themselves have changed; in the past several decades, they have become significantly longer, more complex, more scholarly.").

offer courts real efficiency gains, especially when the opinions offer no reasoning beyond the common boilerplate: "we affirm for substantially the same reasons set out by the district court."[264] At the same time, however, our data show that a sizable share of unpublished opinions do contain substantially more than a handful of sentences, and some are well over a thousand words long. It is not the case that unpublished opinions are always less reasoned than published ones.

Reviewing the actual text of unpublished opinions over the course of our study reinforced these findings. To be sure, some unpublished opinions contain little to no reasoning beyond acknowledging that of the district court. These dispositions typically simply state the outcome of the appeal, without discussing the facts at issue or legal reasoning—sometimes in less than a handful of sentences.[265] For example, affirmances in the Eighth Circuit often take the form of one sentence stating the nature of the appeal followed by the lines: "After careful review of the record and the parties' arguments on appeal, we find no basis for reversal. Accordingly, we affirm."[266] In some instances they may just have the word "AFFIRMED" or "ENFORCED."[267] Similarly, in the Second Circuit, unpublished opinions, or "summary orders" as they are called in the Circuit, often include a brief, two- to three-sentence, summary of the facts and then a template paragraph affirming "for substantially the reasons stated by the district court," without stating

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264 *See, e.g.*, Garcia v. United States, 321 F. App'x 90 (2d Cir. 2009) (using the Second Circuit template paragraph to explain the Court's decision in unpublished opinions: "We have considered all of Garcia's arguments and conclude that they are without merit. We affirm for substantially the reasons stated by the district court in its thorough and well — reasoned decision."); Gonzalez v. New York City Transit Authority, 369 F. App'x 173 (2d Cir. 2010) ("[W]e affirm for substantially the same reasons set out in the court's thorough and well-reasoned opinion of March 31, 2008. We have considered all of Gonzalez's remaining arguments and find them to be without merit."); Sellers v. Royal Bank of Canada, 592 F. App'x 45 (2d Cir. 2015) ("We affirm for substantially the reasons stated by the district court in its thorough Decision and Order, dated January 8, 2014. We have considered all of Sellers's arguments and find them to be without merit."); Tsabbar v. Madden, 326 F. App'x 61, (2d Cir. 2009) ("[W]e affirm for substantially the reasons stated by the district court. . . . Finding no merit in Tsabbar's arguments, we hereby AFFIRM the judgment of the district court").

265 *See, e.g.*, Evans v. Tex. Dep't of Transp., 273 F. App'x at 391 ("The judgment of the district court, rejecting the Title VII claims of the plaintiff, is affirmed for the reasons given by that court in the careful and thorough order dated October 1, 2007."); Perez v. Midland Funding LLC, No. 10-17709 at *1 (9th Cir. Mar. 27, 2013) (reversing the district court in three-sentence opinion).

266 *See, e.g.*, Clayton v. DeJoy, 854 Fed. App'x 772, 772 (8th Cir. 2021); Rogers v. United States, No. 21-1455, 2021 WL 4955490 at *1 (8th Cir. Oct. 26, 2021).

267 8th Cir. Loc. R. 47B.

what those reasons were.[268] Meanwhile, the internal operating procedures for the Fourth Circuit state that unpublished opinions should provide the parties and the lower courts "a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court."[269] Thus unpublished opinions in the Fourth Circuit frequently take the form of a one sentence summary of the appeal followed by the sentences "We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process."[270]

Other unpublished opinions provide some explanation for the court's decision, albeit in an abbreviated form. For instance, the Ninth Circuit's general order on memorandum dispositions (how they classify unpublished opinions) states that they are "designed only to provide the parties and the district court with a concise explanation of this Court's decision [and] . . . need recite only such information crucial to the result." Thus, a memorandum opinion could be as short as "Defendant's statements were volunteered rather than made in response to police questioning and were therefore admissible. *United States v. Cornejo*, 598 F.2d 554, 557 (9th Cir. 1979). AFFIRMED."[271] Note that the aforementioned example is brief, but still reasoned. It gives the party a sense of which reason or reasons the appellate court relied on and reasoning from other courts, rather than simply stating that "no reversible error" was found or that the court would "affirm for the reasons stated by the district court."

It is prudent here to recall the Circuit rules that reference an opinion's "value . . . only to the parties" as one criterion for publication. Opinions without reasoning contain an implicit judgment that the "value" of the opinion to the litigants lies solely in the private *outcome*, rather than any particular declaration of rights or duties or the development of the law that could be useful for the general public. In so doing, these decisions arguably offer a cramped perspective on what the role of

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268 *See supra* note 264 (collecting cases that exemplify this template approach).

269 4th Cir. Loc. R. 36(b).

270 *See, e.g.*, United States v. Evans, 858 Fed. App'x 668 (4th Cir. 2021) (mem.); United States v. White, No. 21-6653, 2021 WL 4936215 (4th Cir. October 22, 2021).

271 9th Cir. Gen. Ord. 4.3a.

litigation is and when it serves ends beyond mere dispute resolution. Owen Fiss memorably wrote that our civil litigation system serves public values—not just, or even primarily, private ones: the judicial role, he wrote, is "not to maximize the end of private parties, not simply to secure peace," but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[272]

In other cases, courts engage in a deeper factual analysis. In one Fifth Circuit case, the court issued an eleven-page unpublished opinion reviewing the appropriateness of an Administrative Law Judge's (ALJ) determination that the appellant was not disabled within the meaning of the Social Security Act.[273] The court specifically clarified that the ALJ's refusal to order a consultative psychological evaluation to assess the appellants' intellectual limitations was not an error that prejudiced the process.[274] Similarly, an unpublished Ninth Circuit opinion held that the district court was correct on five grounds but wrong on three others, noting that the facts affecting whether "substantial evidence" "properly supported reasons for an adverse credibility determination" differed from those in "our only prior decision under relatively similar factual circumstances."[275] And in a Second Circuit case, the court wrote a two-page opinion affirming the dismissal of a Title VII claim but explaining that the plaintiff lost not for jurisdictional reasons, as the district court had concluded, but rather for substantive reasons.[276]

Finally, there are some unpublished opinions that seem to contain all the indicia of a published opinion but inexplicably have not been designated for publication. The Fourth Circuit's decision in *Doe v. Kidd* provides an example. In that dispute, the panel vacated the district court's decision in a thirty-four-page opinion that provided a new legal analysis of how best to account for co-counsel's time and time spent on unsuccessful claims in determining attorney's fees.[277] Even though the panel was evidently creating new law in the circuit, they nonetheless chose to designate the opinion as unpublished and

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272 Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1089 (1984); *cf* RICHMAN & REYNOLDS, *supra* note 6, at 27 (discussing theories of differentiation between the "dispute settling" and "law declaring" functions of appellate opinion).

273 Harper v. Barnhart, 176 F. App'x 562, 563 (5th Cir. 2006).

274 *Id.* at 566.

275 Schow v. Astrue, 272 F. App'x 647, 652 (9th Cir. 2008).

276 Cinotti v. Adelman, 709 F. App'x 39, 41 (2d Cir. 2017)

277 Doe v. Kidd, 656 F. App'x 643, 658 (4th Cir. 2016).

therefore nonprecedential. As noted, there are also unpublished reversals in which a member of the appellate panel dissented. For instance, in *Seminiano v. Xyris Enterprise*,[278] one judge wrote a lengthy dissent explaining that he would affirm the district court on different grounds, even though the Ninth Circuit panel reversed the district court's decision. Some of these decisions may be explained as the results of bargaining or perhaps the reluctance of a panel to make new law on certain issues—whether due to their complexity or other reasons.[279]

These findings counsel caution about characterizing unpublished opinions as a homogenous group. Instead, considerable variation exists among unpublished opinions, suggesting that any reforms could not be "one size fits all."

6. *Deliberation, Drafting, and Screening Practices*

The deliberation and drafting process for unpublished opinions also reveals how nonpublication limits access to judges, and specifically reason-giving from judges—as opposed to other court staff. Although practices vary across circuits,[280] some have instituted screening programs in which staff attorneys or Clerk's Office attorneys conduct an initial review of cases to determine whether they can be resolved without oral argument; if so, staff attorneys or Clerk's Office attorneys may draft a proposed disposition and explanatory memorandum for a three-judge panel to review.[281] In the D.C. Circuit, for exam-

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278 512 F. App'x 735, 736-38 (9th Cir. 2013) (Kleinfeld, J., dissenting).

279 *Cf.* Gulati & McCauliff, *supra* note 22, at 163-64 (examining the incentives to use Judgment Orders (which do not contain reasoning) in "the hardest cases or most difficult cases, . . . in which an opinion would have far-reaching effects in terms of influence.").

280 For a detailed examination of the use of staff attorneys across circuits, see Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 345–54 (2011), and POSNER, REFORMING THE FEDERAL JUDICIARY, *supra* note 10, at 50-61.

281 *See* Levy, *supra* note 280, at 345–46; POSNER, REFORMING THE FEDERAL JUDICIARY, *supra* note 10, at 6; Circuit Survey Results, *supra* note 99 (circuits described their screening procedures in a variety of ways including confirming that they use a screening program to identify appeals that are likely to be resolved by an unpublished opinion, although the program "focuses on whether argument is needed under FRAP 34(a)". Another Circuit explained that it used the "Clerk's [O]ffice to identify cases that are appropriate for screening" and noted that "[t]hose cases are [then] presented by staff attorneys to three-judge panels"; another circuit noted that they use a "screening process to determine whether cases will receive oral argument." *See also* Deanell Reece Tacha, *Tenth Circuit Procedure and Expectations*, 33 WASHBURN L. J. 43, 43-45 (explaining that "[e]ach case filed in the Tenth Circuit is assigned randomly to an individual judge sitting on an annually rotated three-judge screening panel" where the judge typically "divides cases into

ple, these appeals are discussed at special conferences for such cases, where the three-judge panel can dispose of dozens of cases at a time.[282] As one former federal judge put it, "there is simply no time or opportunity for the judges to fine-tune the language of the disposition, which is presented as a final draft by staff attorneys."[283] These decisions are almost always designated as unpublished.[284] Former Judge Richard Posner raised similar concerns related to "nonargued cases," which are also typically designated as unpublished:

> An insidious practice of a number of the federal courts of appeals is, in the nonargued cases, to dispense not only with the argument but also with the conference. A staff attorney writes a memo that is circulated to three judges, who vote on the case in sequence without meeting face to face or even talking on the telephone. The tendency to sign on the dotted line with little real consideration of the case must be great.[285]

Even in circuits without screening programs, judges sometimes rely on staff attorneys or Clerk's Office attorneys to produce a first draft of unpublished opinions.[286] Indeed, the seven circuits that responded to our survey with information about who drafts unpublished opinions confirmed that staff attorneys or Clerk's Office attorneys are sometimes involved in drafting unpublished opinions.[287] Some circuits have also created entirely different circulation practices for unpublished opinions.[288] In the Tenth Circuit, for instance, unpublished opinions are not necessarily circulated to the full court before being issued, while published opinions are.[289]

What is more, we also found that some circuits *categorically* treat certain types of appeals differently in their drafting and publication practices. For example, in the Second Circuit, all "pro se civil cases"[290] and cases that fall under Local Rule 34.2(a)(1)—which are almost exclusively "immigration" related

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one of three general categories: (1) those that are very simple; (2) those that have one complicated issue; and (3) those that have complicated, and thus publishable, resolutions"; the "simple cases" are typically resolved in "not precedential" unpublished opinions).

282 *See* Levy, *supra* note 280, at 346, 354 (describing the D.C. Circuit practices).

283 Letter from Alex Kozinski, *supra* note 219, at 5.

284 Levy, *supra* note 280, at 346.

285 POSNER, FEDERAL COURTS, *supra* note 44, at 162.

286 *See id.* at 152; Circuit Survey Results, *supra* note 99.

287 Circuit Survey Results, *supra* note 99.

288 *Id.*

289 *Id.*

290 *Id.* (quoting response to Survey from the Second Circuit) (responses on file with authors).

appeals[291]—are first "reviewed by the staff attorneys, who prepare a memo and draft summary order."[292] Because "summary order" is the Second Circuit's term for an unpublished opinion,[293] this means that, in the Second Circuit, all civil appeals with a self-represented party and many immigration-related appeals are first reviewed by staff attorneys who prepare draft unpublished opinions before the panel has even seen the case. For these cases, "[p]anels rely upon the draft summary order in varying degrees according to the case" and the panel may also choose to issue a precedential opinion drafted by one of its authors. "In all other cases a member of the panel drafts the decision."[294] Likewise, in the Eighth Circuit, circuit staff attorneys usually focus on self-represented cases when it comes to drafting unpublished opinions.[295] In the Seventh Circuit, "[a]s a general rule," all cases with counsel on both sides are set for oral argument and cases orally argued generate published opinions. Cases with self-represented litigants typically are not orally argued and so generally result in non-precedential orders, which staff initially draft, unless the panel makes an exception to the norm.[296] These rules and practices may explain some of the disproportionately high rates of nonpublication for these types of self-represented and immigration-related appeals that we found in our data.

While much could be said about these practices, at least four points bear particular relevance to our study of nonpublication. The first is that these new systems for processing appeals are highly path dependent. In circuits where an initial decision about oral argument at the screening stage not only leads to a presumption of nonpublication, but also a presump-

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291 Second Circuit Local Rule 34.2 governs the Non-Argument Calendar. The following classes of cases are placed on the Non-Argument Calendar, "unless the court orders otherwise": "(1) Immigration. An appeal or petition for review, and any related motion, in which a party seeks review of the denial of: (A) a claim for asylum under the Immigration and Nationality Act (INA); (B) a claim for withholding of removal under the INA; (C) a claim for withholding or deferral of removal under the Convention Against Torture; or (D) a motion to reopen or reconsider an order involving one of the claims listed above. (2) Other. Any other class of cases that the court identifies as appropriate for the NAC."

292 Circuit Survey Results, *supra* note 99.

293 *See supra* subpart I.C.1.

294 Circuit Survey Results, *supra* note 99 (quoting response to Survey from the Second Circuit).

295 *Id.*

296 Circuit Survey Results, *supra* note 99; *see also id.* ("[In the Seventh Circuit,] unpublished orders in cases that are not orally argued are often initially drafted by staff attorneys (also known as staff law clerks). Those draft orders are then modified and edited by the panel judge assigned as authoring judge."); POSNER, REFORMING THE FEDERAL JUDICIARY, *supra* note 10, at 5-6, 16-18, 36, 82-83.

tion of staff drafting and cursory review by judges, that first decision can have an enormous impact on the litigants' access to publication, and even access to judges themselves. Indeed, by tying these procedural shortcuts together, once that initial screening decision is made, it becomes very unlikely that the case will receive the same level of scrutiny as an "argument" case, or ever seriously be considered for publication.

Second, this path dependency means that the person effectively making the decision about publication for many, if not most, cases is not a judge, but rather the court staff who make the initial screening determination. Judges can, of course, override the initial "nonargument" and nonpublication determination, but there is a heavy thumb on the scale in favor of accepting that determination. This also means that, at least in circuits with screening programs, the rules that supposedly guide publication decisions may actually play less of a role in nonpublication than the initial screening decision, which is not necessarily guided by the same factors.

Third, the fact that some circuits rely on *categorical* rules to screen cases for argument means that we should not be surprised by substantially different publication rates for certain types of litigants and appeals, at least in those circuits—that differential treatment is built into the system. More surprising is the lack of public justification for these rules and transparency around their impact on drafting practices and publication. To be sure, there may be some cases that can be resolved without extensive deliberation, for instance, cases in which binding precedent clearly dictates the outcome. And there are likely certain categories of cases that more often fit that description. But current practice risks a system in which whole categories of cases are all but predestined for nonpublication, with ripple effects on certain areas of law as a result.

Finally, the fact that staff attorneys are responsible for drafting many unpublished opinions in some circuits raises questions about what difference nonpublication makes for litigants and development of the law. Does drafting by staff attorneys necessarily mean the opinions are less reasoned or less carefully crafted? Former-Judge Richard Posner argued as much, noting that judge-written opinions are generally superior in terms of explaining to the litigant "*why* the court ruled as it did. . . . Not only must the memo be sent to the [self-represented individual] with the court's decision order; it must

be written at a level and with the care that will make the memo informative to the recipient."[297]

7. *Unpublished Opinions Appealed and Granted Certiorari*

We also sought to learn what happens to unpublished opinions after they are issued. Because the FJC database does not include information on whether a party appeals a circuit court's decision, we relied on the results of the coding exercise for this section.[298] We found that over three-fourths (75.6%) of the cases in our sample were terminated after the courts of appeals issued its decision. However, a small number of cases were either appealed for rehearing (6.2%) or appealed for rehearing *en banc* (2.3%). And in a sizable share (15.8%), the losing party petitioned the Supreme Court for certiorari.

We also examined a number of questions surrounding Supreme Court review of unpublished opinions. When lawyers and legal scholars think about unpublished opinions, they often think of *Ricci v. DeStefano*.[299] In that case, a Second Circuit panel that included then-Judge Sonia Sotomayor famously issued a one-paragraph unpublished opinion that affirmed a district court's decision to rule against white and Hispanic New Haven firefighters who raised discrimination claims.[300] The Supreme Court subsequently reversed the decision.[301] Although the panel actually withdrew its unpublished order and replaced it with a published opinion containing nearly identical text before the Supreme Court reviewed the case,[302] *Ricci* nonetheless suggests the possibility that courts sometimes use unpublished opinions to shield controversial rulings from public, or appellate, view.[303] However, we can also view *Ricci* as a salutary example of how nonpublication

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297 *Id.* at 82-83.

298 As a result of the lack of post-decision data, we do not have comparative data on how these post-decision statistics compare for published opinions. There were 915 opinions in the coded sample coded for a cert petition, not appealed, appealed for rehearing *en banc*, or appealed for rehearing.

299 *See* Ben Grunwald, *Strategic Publication*, 92 TUL. L. REV. 745, 746 (2018); Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1342 (2010).

300 Ricci v. DeStefano, 264 F. App'x 106, 107 (2d Cir. 2008).

301 Ricci v. DeStefano, 557 U.S. 557, 593 (2009); *accord* Gulati & McCauliff, *supra* note 22, at 160 (explaining how unpublished opinions can have the effect of hiding certain cases).

302 Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).

303 *See, e.g.*, Grunwald, *supra* note 299, at 746–48 (2018) (noting that Second Circuit Judge Jose Cabranes "impl[ied] that the panel [in *Ricci v. DeStefano*] was trying to bury the case to insulate it from further judicial scrutiny."); McAlister,

does not prevent an opinion from receiving public attention and Supreme Court review. Either way, the *Ricci* saga raises several important questions about unpublished opinions and the Supreme Court. How often does the Supreme Court grant certiorari to unpublished opinions? What kinds of unpublished opinions receive Supreme Court review? And what happens to these opinions once they reach the Supreme Court?

To explore these questions, we identified 122 unpublished opinions to which the Supreme Court granted certiorari during the years 2001 to 2018.[304] The Supreme Court ruled on the merits in 115 of these cases.[305] This finding is important insofar as it demonstrates that unpublished opinions *are* sometimes reviewed, even if the vast majority of the cases reviewed by the Supreme Court are published opinions. More recent investigations into the share of certiorari grants from unpublished opinions in federal courts of appeals suggests a similar pattern. Resnik has highlighted that between 2018 and 2021, certiorari was granted on 31 unpublished federal appellate decisions (14% of cases granted certiorari from the federal courts).[306] Unpublished opinions continue to result in some prominent certiorari grants, including most recently a three-paragraph summary order of the Second Circuit reviewed by the Supreme Court during the 2021 Term under the case name *New York State Rifle & Pistol Association Inc. v. Bruen* on the question of states' ability to restrict the concealed carrying of guns for purposes of self-defense.[307]

Examining the text of the unpublished opinions we identified from 2001 through 2018, we found that, broadly speaking, the 115 unpublished opinions that the Court reviewed on the merits fall into four major categories: opinions in which the circuit court applied binding circuit precedent, opinions that made clear errors, opinions that summarily affirmed the district court or summarily denied a certificate of appealability,

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supra note 5, at 574 (suggesting that unpublished opinions may be intentionally used to "slip below the radar").

304 For information on the methodology we used to identify these cases, see Appendix 1. Every opinion in the set we identified is an unpublished opinion that was granted certiorari, but in some cases the Supreme Court reviewed that case along with another (or other) consolidated case(s). Additionally, there may be other unpublished opinions for which certiorari was granted during this time period that our analysis did not capture.

305 *See* Appendix 5.

306 Panel Discussion, *supra* note 23, at 19.

307 New York State Rifle & Pistol Association v. Beach, 818 F. App'x 99 (2d Cir. 2020), *cert. granted in part sub nom.*, New York State Rifle & Pistol Ass'n, Inc. v. Corlett, 141 S. Ct 2566 (2021).

and opinions that either addressed novel legal questions or applied existing law to materially different factual situations.[308] These different types of unpublished opinions implicate the values associated with judicial decision-making in different ways.

Unpublished Opinions Based on Clear Precedent: The largest category of unpublished opinions granted certiorari in our sample consists of the seventy-seven opinions in which the circuit court applied binding circuit precedent to the question before it. In seventy-five of these cases, the circuit court was applying its own clear, published precedent to the case,[309] while in the other two cases, the circuit court was applying binding Supreme Court precedent.[310] Thus, even though the Court was reviewing the facts of an unpublished opinion in these cases, it was effectively reviewing the holding of a prior published, reasoned opinion.

Unpublished Opinions Containing Clear Errors: The second category of unpublished opinions granted certiorari are those in which the court of appeals misapplied Supreme Court precedent or made other clear errors. We identified sixteen cases from 2001 to 2018, in which the Supreme Court either reversed or vacated the holding of an unpublished circuit court opinion while sharply criticizing the quality of the lower court's reasoning and legal analysis.[311] For example, in *Erikson v. Pardus*, after the Tenth Circuit affirmed the granting of a motion to dismiss, the Supreme Court granted certiorari on a petition brought by a self-represented party and declared, "The holding departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review. We vacate the court's judgment and remand the case for further consideration."[312] The posture of this case was unu-

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308 A small number of unpublished opinions granted certiorari involved unusual procedural postures and did not fit easily into any of the four categories. *See* Appendix 5.

309 For all cases in this category, see Appendix 5.

310 Alleyne v. United States, 570 U.S. 99, 104 (2013); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007).

311 For all cases in this category, see Appendix 5.

312 551 U.S. 89, 90 (2007); *see also, e.g.*, Woods v. Donald, 575 U.S. 312, 313 (2015) (per curiam) (citing United States v. Cronic, 466 U.S. 648 (1984)) (holding that the Sixth Circuit misapplied the federal habeas corpus standard, which allows federal courts to grant relief only "if the underlying state-court decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by' this Court" (quoting 28 U.S.C. § 2254(d)(1) (1996))); Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam) ("Because the Court of Appeals failed to afford due respect to the role of the jury and the state courts of Pennsylvania, we now grant certiorari and reverse the judgment below.").

sual as the petitioner was self-represented throughout the case and it was decided by the Court through a summary reversal.[313] Other similarly situated litigants that have received unpublished opinions, some with potentially clear error, may not bring cert petitions as they may be under-resourced, unsophisticated about legal issues, or lack access to counsel.

However, most cert petitions granted by the Supreme Court to review unpublished opinions are filed by counsel. And although it is not always clear why certiorari is granted on an unpublished rather than a published opinion, many of the grants involve circuit splits so in some instances it may be that an unpublished opinion happens to tee up the relevant issue at the right time.

Unreasoned Unpublished Opinions: A third category of unpublished opinions granted certiorari consists of those opinions in which the circuit court either summarily affirmed the district court's opinion or summarily denied a petition for a certificate of appealability. In other words, these are appellate court decisions that contained essentially no reasoning.

We identified four cases in this category, all of which the Supreme Court either reversed or vacated with full, signed opinions.[314] Even though these cases were few in number, they are worth noting. For instance, in *Benisek v. Mack*, a gerrymandering case, the appellate court simply held, "We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court."[315] The Supreme Court unanimously reversed, noting that the Fourth Circuit had "summarily affirmed in an unpublished disposition" even though "at least two other Circuits consider it reversible error for a district judge to dismiss a case under § 2284 for failure to state a claim for relief rather than refer it for transfer to a three-judge court."[316] Likewise, in *Cigna Corporation v. Amara*, the Supreme Court vacated a district court decision interpreting ERISA provisions, which had been af-

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313 Amy Howe, *More on Yesterday's Decision in No. 06-7317*, Erickson v. Pardus, SCOTUS BLOG (Jun. 5, 2007), https://www.scotusblog.com/2007/06/more-on-yesterdays-decision-in-no-06-7317-erickson-v-pardus/ [https://perma.cc/8VKP-SCA5].

314 *See* Appendix 5.

315 584 F. App'x 140, 141 (4th Cir. 2014), *reversed sub nom.*, 577 U.S. 39 (2015).

316 Shapiro v. McManus, 577 U.S. 39, 42, 54 (2015). Section 2284 requires that a three-judge district court be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a).

firmed by the Second Circuit in an unpublished opinion.[317] In reaching this decision, the Supreme Court noted that "[t]he Court of Appeals for the Second Circuit issued a brief summary order, rejecting all their claims, and affirming 'the judgment of the district court for substantially the reasons stated' in the District Court's 'well-reasoned and scholarly opinions.'"[318] The Supreme Court issued a 23-page opinion vacating the judgment of the district court and remanding the case. The Court's engagement with the reasoning below was almost entirely with that in the district court opinion.[319] Resnik has suggested some judges may even choose to designate an opinion as unpublished in the "hop[es] that . . . the case will not proceed to the Supreme Court."[320] Our data suggest that, while such instances may exist, they are likely rare.

Unpublished Opinions Addressing New Legal Issues or Factual Situations: The fourth major category of unpublished opinions granted certiorari that we identified consists of fifteen cases in which the circuit court offered a reasoned opinion that either addressed a novel legal question or applied existing law to a materially different factual situation.[321]

Notably, three of the unpublished circuit opinions that fall into this category contained a dissent. For instance, in *Ortiz v. Jordan*, a case about whether prison officials were entitled to qualified immunity, the dissenting judge declared, "Given the legal posture of this case and the strength of the evidence against defendants Bright and Jordan, the majority's decision to overturn the jury's verdict strikes me not just as an unfortunate result in this case, but as one that is thoroughly senseless."[322]

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317 563 U.S. 421, 434-35 (2011).

318 *Id.* at 435 (quoting 348 Fed. App'x 627 (2d Cir. 2009)).

319 Cigna Corporation v. Amara, 563 U.S. 421, 434-35 (2011).

320 Panel Discussion, *supra* note 23, at 19.

321 For all cases in this category, see Appendix 5.

322 316 F. App'x 449, 457 (6th Cir. 2009) (Daughtrey, J., dissenting); *see also* McWilliams v. Comm'r, 634 F. App'x 698, 718 (11th Cir. 2015) (Wilson, J., dissenting) ("Because the state court's resolution of McWilliam's *Ake* claim was an unreasonable application of *Ake* itself and this error had a substantial and injurious effect, I dissent."); Lett v. Renico, 316 F. App'x 421, 428 (6th Cir. 2009) (Forester, J., dissenting) ("Because I believe that the state supreme court's careful evaluation of whether the trial judge exercised 'sound discretion' when she determined that the jury was deadlocked was not an unreasonable application of federal law, I respectfully dissent from that portion of the majority's opinion.").

8. *Citations to Unpublished Opinions*

We also sought to understand how often federal courts and litigants cite unpublished opinions. Answering this question can shed light on how nonpublication affects both the development of the law and transparency. It also sheds light on whether FRAP 32.1 has actually had any effect. This section first examines how often other judicial opinions cite unpublished appellate decisions and then looks at how often appellate briefs cite unpublished opinions. Overall, both analyses suggest that unpublished opinions are occasionally, but relatively rarely, cited.

Circuit Court Citations: To understand citation practices within federal appellate opinions, we compiled a corpus of full-text opinions and then searched the text of these opinions for citations to federal appellate opinions that have been published (in West's Federal Reporter series) and also for citations to both the Federal Appendix and to Westlaw's database.[323] These last two citation formats generally indicate citation to an unpublished opinion, while citations to the Federal Reporter indicate citation to a published opinion.

Within this corpus of opinions, published opinions were cited 592,723 times while unpublished opinions were cited 19,843 times—a ratio of approximately thirty citations to a published opinion for every citation to an unpublished opinion. Looking at individual opinions, we found that the average opinion (both published and unpublished) includes about 1.9 citations to an appellate published opinion and about 0.06 citations to an unpublished opinion.[324] The average published opinion has 5.8 citations to other appellate published opinions and about 0.2 citations to unpublished opinions.

Citations in Appellate Briefs: By examining a sample of a year's worth of federal appellate briefs from each circuit available on Westlaw, we were able to determine the frequency with which appellate litigants cite to unpublished opinions.[325] Be-

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323 The corpus consists of full-text opinions available online on Court Listener as of 2017. The searches were done using regular expressions, which are a set of flexible pattern-matching algorithms.

324 Note that this number does *not* indicate the number of citations in an opinion to *any* form of legal authority. Instead, we are solely concerned with citations to federal appellate opinions, whether published or not. In particular, the figures in this section do not include citations to statutes, Supreme Court opinions, regulations, or relevant state law.

325 For information on our methodology, see Appendix 1. According to a Westlaw reference librarian, attorney editors generally select briefs that deal with substantive areas of law of interest to Westlaw users, but there is not an algorithm

cause we reviewed only briefs published on Westlaw, our sample is limited by the facts that many briefs may not be added to the site or that the type of briefs on the site may be skewed in some way that would affect how often they would cite to unpublished opinions. It is also possible that some duplicate briefs may be included.

The Second Circuit had the highest share of appellate briefs that cited to unpublished opinions: 68.3%. In the Sixth, Tenth, and Eleventh Circuits, more than 40% of briefs filed in a twelve-month period between April 2018 and April 2019 and available on Westlaw cited to unpublished opinions, including more than half the briefs filed in the Sixth Circuit.[326] In the Fourth, Seventh, Eighth, and Ninth Circuits, 30% or fewer of briefs filed during this period cited to unpublished decisions.[327] And, in the Third Circuit, only about 26% of briefs cited to an unpublished opinion.[328]

The circuit with the lowest rate was the D.C. Circuit: fewer than 20% of briefs filed in the twelve-month period cited to an unpublished opinion. However, the low rate of citation to unpublished opinions in the D.C. Circuit may result from the unusually high rate at which that court publishes its opinions—it published 47.2% of its opinions during the twelve-month period ending in September 2017, by far the most of any circuit, and it published its opinions at a similarly high rate during the five preceding years.[329] Overall, the variation among circuits as to how many opinions are published and how readily accessible those unpublished opinions are—both on court

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to select which are most relevant. The selection process is the same across circuits and so there is no reason to think there is variation across circuits in the subject matter of briefs available. This analysis is just a starting off point and a more robust analysis could be done using briefs pulled from PACER.

326 The Sixth Circuit permits the citation of any unpublished disposition without limitation, and the First, Tenth, and Eleventh Circuits allow parties to cite as persuasive authority unpublished opinions issued on any date. *See* Appendix 2.

327 These four circuits all only allow citation to unpublished opinions issued on or after January 1, 2007. *See* Appendix 2.

328 The Third Circuit "by tradition does not cite to its not precedential opinions as authority." *See* Appendix 2.

329 For data on the twelve-month period ending in September 2017, see *Type of Opinion or Order Filed in Cases Terminated on the Merits, Table B-12*, U.S. CTS. (Sept. 30, 2017), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2017.pdf [https://perma.cc/A9U8-Q2G8]. For data on the preceding twenty years, see McAlister, *supra* note 5, at 595. The D.C. Circuit published opinions at a higher rate than any other circuit in each of these years. The Circuit's high publication rate makes sense, given the specialized nature of the Circuit's docket, especially the comparative lack of criminal cases, sentencing appeals, and immigration appeals in that court.

websites and Westlaw or Lexis—are likely factors in differences between citation rates.

These rates of citations to unpublished opinions in appellate opinions and appellate briefs demonstrate that some unpublished opinions are sufficiently reasoned to be useful to litigants and courts. Despite being non-precedential, parties do in some instances cite to unpublished opinions as the primary authority for specific holdings as though the cases were in fact precedent.[330] In other instances, unpublished opinions may be cited for their reasoning or because they present comparable facts. For example, in some immigration cases the similarity of factual circumstances is key to establishing a claim and an unpublished opinion may be the best fit for the relevant facts.[331] Litigants and judges do draw on unpublished opinions to guide future cases, which mitigates some potential concerns relating to nonpublication's impact on the development of the law. On the other hand, to the extent these unpublished opinions have an important influence on the development of the law, the question arises as to whether they *should*—in other words whether those opinions were given sufficient attention by the original panel, which assumed that the decisions would not be used to drive caselaw development. For instance, Brian Soucek has highlighted the potential risks that may attend the frequent citation of certain unpublished opinions that were not drafted with the expectation of later citation.[332]

Further exploration into whether some unpublished opinions are cited with especially high frequency would be valuable. We probed this question only shallowly. Using Westlaw's "most cited" function we identified unpublished opinions that had been cited particularly often in federal and state courts.[333] For example, over 1,600 opinions cite to *Brown v. Matauszak*,[334] in

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330 *See, e.g.*, Schow v. Astrue, 272 F. App'x 647 (9th Cir. 2008) which has been cited numerous times in the Ninth Circuit and elsewhere for a specific holding on when an ALJ can reject testimony in Social Security cases.

331 *See, e.g.*, Diaz v. Holder, 459 F. App'x 4 (1st Cir. 2012) citing to Socop v. Holder, 407 F. App'x 495 (1st Cir. 2011) for proposition that "gang opposition" did not provide the basis for a particularized social group in asylum case.

332 Soucek, *supra* note 181, 166-68.

333 To search for unpublished cases we used the search terms "F.Appx" or "F.App'x" or "Fed.App'x" or "Fed.Appx" or ("F.3d" +5 "unpublished") or ("F.2d" +5 "unpublished") for all federal courts of appeal excluding the Federal Circuit and further filtered for unreported opinions. We then filtered the results by "most cited." This search was conducted on January 31, 2022, and citing references are current as of that date.

334 415 F. App'x 608 (6th Cir. 2011).

which the Sixth Circuit held in an unpublished opinion that the district court abused its discretion in dismissing a self-represented incarcerated litigant's § 1983 civil rights claim and remanded to give the appellant a chance to amend. There were 484 citations to another case from the Sixth Circuit, *Jackson v. Madery*,[335] affirming the lower court's grant of summary judgment for corrections officers in a case brought under the First, Fifth, Eighth, and Fourteenth Amendments by a self-represented prisoner. Indeed, the Sixth Circuit had the most unpublished opinions with high volumes of citations, but the Second, Fourth, Fifth, Tenth, and Eleventh all also had at least one unpublished opinion that was cited over 100 times in other opinions.[336] Given the limitations earlier discussed with respect to unpublished opinions available on Westlaw and the potential that our search terms may have filtered out some highly cited cases, a more robust analysis is necessary. However, even this initial foray into which unpublished opinions are cited to suggests that there are some that have taken on particular significance.

On the other hand, these citation rates also demonstrate that some litigants are indeed able to find unpublished opinions in their research, perhaps lessening some of the transparency concerns around nonpublication.

IV
WHAT IS PUBLICATION FOR?

This Part begins to develop an analytical framework for assessing the costs and benefits of nonpublication based on our empirical findings. First, we aim to unbundle the four procedural features of judicial opinions that are particularly relevant to unpublished opinions: precedent, reason-giving, citation, and public dissemination. These features each bring different benefits (and costs) to the system. We then analyze the ways that these features interact with six values of the judicial system: development of the law, equality, dignity,

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335 158 F. App'x 656 (6th Cir. 2005).

336 Smith v. Berryhill, 740 F. App'x 721, 722 (2d Cir. 2018) (social security case cited in 182 other opinions); Crabill v. Charlotte Mecklenburg Bd. of Educ., 423 F. App'x 314, 316 (4th Cir. 2011) (ADA employment case cited in 160 other opinions); De Franceschi v. BAC Home Loans Servicing, L.P., 477 F. App'x 200, 202 (5th Cir. 2012) (property and contract case cited in 145 other opinions); United States v. Saldana, 807 F. App'x 816 (10th Cir. 2020) (appeal by self-represented incarcerated individual cited in 331 other opinions); Mama Jo's Inc. v. Sparta Ins. Co., 823 F. App'x 868, 870 (11th Cir. 2020) (insurance case cited in 105 other opinions).

transparency, efficiency, and legitimacy of the courts. Our goal is to offer a more holistic way of thinking about whether, how, and to what extent nonpublication both furthers and impedes the justice system's ultimate purposes.

We also advance some discrete recommendations for constructive reforms, recognizing that completely eliminating nonpublication is neither practical nor desirable.

A. Four Key Features of Unpublished Judicial Opinions

"Publication" has generally been used in a monolithic sense. But, in fact, inherent in any decision to publish an opinion is a choice about the value of at least four actions: creating precedent, giving reasons, encouraging future citation, and disseminating ideas to the public. These features need not always be paired together. For example, the benefits of reason-giving do not necessarily depend on an opinion being precedential, citable, or published. Individual litigants may view even privately conveyed reasons for a decision as legitimizing judicial authority. In the following subsection, we briefly define these four actions and the values they commonly serve, and then consider the publication process in light of them.

Precedent: Frederick Schauer defines precedent as creating an "obligation to follow [an] . . . earlier decision solely because of its existence," even if the judge "believes [it requires her to make] the wrong decision."[337] By limiting the options available when a subsequent case deals with similar issues,[338] precedent not only constrains judicial decision-making and makes decision-making more efficient; it also provides stability and continuity that is "presumptively desirable" in a judicial system.[339] As Justice Lewis Powell observed, adhering to precedent is also critical to the "preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights," since judges are not seen as frequently changing their positions.[340] After all, "a decisionmaker constrained by precedent will sometimes feel compelled to make a decision

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337 Frederick Schauer, *Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy*, 3 PERSP. ON PSYCHOL. SCI. 454, 457 (2008).

338 Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 602 (1987).

339 Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 585 (2001) (arguing that "it would overwhelm Court and country alike to require the Justices to rethink every constitutional question in every case on the bare, unmediated authority of constitutional text, structure, and original history").

340 Lewis F. Powell, Jr. Remarks, *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289–90 (1990).

contrary to one she would have made had there been no precedent to be followed."[341]

Nonpublication obviously reduces the number of precedential decisions. Under current practice, moreover, panels of judges are permitted to make individualized decisions about *when* to create precedent, as they do through nonpublication. It is true that, in addition to the constraining value of precedent, precedent also serves efficiency values, compensates for lack of specialization,[342] and provides a common vocabulary—"a quick means of communicating with counsel and fellow jurists."[343] Ironically nonpublication may also serve those goals, albeit in an entirely different way. But there is also a concern about ambiguity when it comes to the legal status of unpublished opinions, or the notion that some opinions might be viewed as "quasi" precedential. For example, unpublished opinions may retain a limited precedential effect when it comes to the law of that particular case. The Ninth Circuit, for instance, recently held on a question of preclusion, in the context of a multi-decade, multi-court dispute involving John Steinbeck's heirs, that "whether a prior disposition is published or unpublished is of no consequence—unpublished decisions have the same preclusive effect."[344]

Reason-giving: "Reason-giving" is a foundational component of the American judicial system. It refers to the act of justifying a ruling in a written opinion—an important deviation by American courts from its English progenitor.[345] American courts do not just dictate the result; they "explain[] to litigants, higher courts, the public, and history how it reached the result it did."[346]

Reason-giving is linked to precedent, especially in a common law system. Coordinate and lower courts can only determine whether a prior holding applies to a new case if judges

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341 Schauer, *supra* note 338, at 599.

342 *See* Schauer, *supra* note 338, at 599; Edward K. Cheng, *The Myth of the Generalist Judge*, 61 Stan. L. Rev. 519, 557 (2008) (arguing that "under a well-established and mature system of opinion specialization, . . . nonexperts may hew more closely to existing precedent, take smaller steps, and write narrower holdings").

343 McCuskey, *supra* note 136, at 549.

344 Kaffaga v. Est. of Steinbeck, 938 F. 3d 1006, 1014 (9th Circ. 2019).

345 English judges "historically issued the majority of their judgments orally from the bench at the conclusion of oral argument." Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1163 (2004).

346 Mary Whisner, *Exploring Precedent*, 107 L. LIBR. J. 605, 606 (2015).

have explained the reasoning behind past decisions.[347] Reason-giving also enables higher courts to evaluate whether a holding is sound or should be reversed. Reason-giving allows us to have a system in which precedent has weight but can also be limited or overruled because it enables judges to distinguish past decisions as necessary.[348]

But reason-giving also serves other ends, which could be furthered even without precedential status. Reason-giving constrains judicial decision-making in a way that legitimizes the judicial system. Positivists like Henry Hart[349] and Herbert Wechsler argue the legitimacy of the judicial system is founded on its ability to give reasons: "The virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees . . . ."[350] Similarly, Joseph Raz maintains that, by definition, legal systems have authority because they give parties and the public preemptive or exclusionary reasons for action.[351] Raz also argues that public reason-giving constrains judges by forcing them to publicly articulate the justifications for their decisions[352] and that parties accept the court's holding to the extent that they find that the court's reason is, in fact, better.[353] In this sense, reason-giving is intimately linked to the system's legitimacy, and perceptions of procedural justice.[354]

Part III detailed how our findings with respect to word counts suggest that most unpublished opinions contain much less reasoning than published opinions. Unreasoned opinions, such as affirmances based only on the reasons stated by the district court, do little to further the traditional benefits of reason-giving—both the benefits associated with precedent and

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347 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960) (describing choice of precedent as a "steadying factor" in the judicial system).

348 *Id.* at 62 (describing the "leeways" of precedent as a powerful judicial tool).

349 Henry M. Hart, Jr., *The Supreme Court, 1958 Term–Foreword: The Time Chart of Justices*, 73 HARV. L. REV. 84, 99 (1959) (contending that "only opinions which are grounded in reason and not on mere fiat or precedent can . . . carry the weight which has to be carried by the opinions of a tribunal which, after all, does not in the end have the power either in theory or in practice to ram its own personal preferences down other people's throats").

350 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19–20 (1959).

351 *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 195–204 (1994); *see also* JOSEPH RAZ, PRACTICAL REASONS AND NORMS 151–52 (Princeton U. Press 1990) (1975).

352 RAZ, PRACTICAL REASONS AND NORMS, *supra* note 350, at 18.

353 *See* JOSEPH RAZ, MORALITY OF FREEDOM, (Oxford U. Press, Inc. 1988) (1986), at 55–59; Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1012–20 (2006).

354 Tyler, *supra* note 159, at 6.

the benefits separate from it. Some scholars have also suggested that nonpublication further undermines the quality of reasoned opinion-giving by shifting more lawmaking to the district courts, which "tend to be specialists in trial management not in opinion writing or lawmaking."[355] Judges may also feel that their reasons are subject to less scrutiny if an opinion is not associated with a particular judge as the author but rather issued per curiam, as many unpublished opinions are. However, one question to consider is whether some litigants would nonetheless prefer a quicker decision to a more heavily reasoned one issued months later. Recognizing that these choices are often tradeoffs, it is possible that some may view a faster decision as one revealing a legal system that is in fact more responsive and legitimate.

Limited reason-giving may also lead to different case outcomes. Gulati and McCauliff's study of unreasoned opinions in the Third Circuit suggests that, "Two judges inclined to reverse in a close case might agree to affirm without opinion when the third judge threatens to dissent from a published opinion ordering reversal; on the other hand, the third judge may agree to vote for an affirmance if only a nonprecedential JO is used."[356] As such, it is possible that the option of using an unpublished opinion as a bargaining tool to reach panel consensus "can change the outcome of close cases."[357]

Citation: Having a system of "citation" means that decisions are indexed under a uniform notation, such that future actors can reference and access a decision later. This system enables future litigants and judges to refer to and build on earlier decisions in subsequent cases. The ability to cite a case in favor of one's argument bolsters the argument and lends implicit credibility to the underlying decision cited. A court system may not be bound by a decision as precedent but still can cite it.[358] In this sense, a system of citation can spread new legal norms vertically and horizontally across a federated system like ours, in which sister courts are not bound by one another's decisions but the development of the law still often occurs nationwide.

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355 Gulati & McCauliff, *supra* note 22, at 188.
356 *Id.* at 204.
357 *Id.*
358 *See* Patti Ogden, *Mastering the Lawless Science of Our Law: A Story of Legal Citation Indexes*, 85 L. LIBR. J. 1, 8–9 (1993).

Scholars and judges used to actively debate whether unpublished opinions should be citable at all.[359] This question has since declined in importance after the passage of FRAP 32.1.[360] As discussed earlier, litigants and courts now do cite to unpublished opinions for a variety of purposes, including relying on them for certain specific holdings almost as though the opinions were precedential. Unpublished opinions may also in some instances provide the most readily available or recent instance of a Court of Appeals applying a proposition that has been established by an earlier precedent. Citations to unpublished opinions are also not limited to other unpublished appellate opinions and appear in published opinions and district court opinions.

However, the question of how frequently unpublished opinions should be cited remains, since they are cited at much lower rates in appellate opinions and briefs than published opinions are (*see supra* subsection III.C.8). This is likely a combination of the fact that unpublished opinions are nonprecedential and they are often shorter and less robustly reasoned—offering less detail to cite. They are thus usually most helpful in certain factually similar situations. There may also be some ongoing stigma surrounding citations to such opinions.

Public dissemination: Public dissemination makes decisions accessible to the practicing bar and bench. It also serves the much broader democratic function of transmitting to the community a (*reasoned)* decision about who the law protects and why. For some litigants, public dissemination also has an important reputation function, as an official statement of who was "right" and who was wronged. Take the example of U.S. Supreme Court justices delivering some opinions from the bench. Their *opinions* are reasoned, citable, and precedential without oral delivery, but the act of *public* delivery serves to highlight the decisions importance to a broader, and often different, audience.

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359 *See, e.g.*, Stephen R. Barnett, Essay, *From* Anastasoff *to* Hart *to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 25 (2002) (arguing that unpublished opinions should be citable even if they are not binding precedent); Kozinski, *supra* note 172, at 42 (arguing against citation of unpublished opinions); Michael B.W. Sinclair, Anastasoff *Versus* Hart*: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 741–42 (2003) (arguing that unpublished opinions need not be precedential but should be citable).

360 *See supra* Part I.

Currently "unpublished" opinions are in fact fairly widely disseminated as they frequently appear in the Federal Appendix and for a fee, on Westlaw and Lexis.[361] But nonpublication still limits public access to opinions; some circuits do not host all of their unpublished opinions on their websites, and the Federal Appendix does not publish them all either.[362]

B. Values of the Judicial System that Intersect

We focus in this section on six values of the judicial system—development of the law, equal treatment, dignity, transparency, efficiency, and perceived legitimacy—and how they relate to different features of nonpublication.

1. *Development of the Law*

In the American legal system, the law must have the freedom to develop over time yet be constrained enough to maintain stability.[363] Precedent clearly plays an important role in law development. The question is the amount of precedent that a legal system requires—or, asked differently, the amount that is ideal. The answer depends in part on what aspect of "development of the law" is the focus. On the one hand, the more precedents that are available, the more analogies a judge can draw on when confronting novel factual scenarios or legal questions. But on the other hand, an overabundance of precedent may muddy the waters with confusing or contradictory precedent. For example, limiting the precedential force of "messy" cases might maintain the law's clarity.[364] Likewise, excessive precedent could easily overwhelm the judicial system's participants—not only judges deciding cases but also litigants trying to understand the state of the law and members of the public attempting to evaluate judicial decisions.[365]

Thus, the ability to issue non-precedential opinions might offer courts a tool for promoting the development of the law by ensuring that there is an optimal amount of precedent. If used excessively, however, this tool could leave judges and litigants

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361 *See* Letter from Alex Kozinski, *supra* note 219, at 7. *Cf.* Judith Resnik, *Whose Judgment?, Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1497-1500 (1994) (noting that vacated opinions left on Lexis and Westlaw still are often used by future litigants to inform their cases).

362 *See* McAlister, *supra* note 3, at 1103-06.

363 *See* K. N. Llewellyn, *American Common Law Tradition, and American Democracy*, 1 J. LEGAL & POL. SOC. 14, 18 (1942).

364 RICHMAN & REYNOLDS, *supra* note 6, at 9; Martin, *supra* note 44, at 191.

365 *See supra* subparts I.A.?B.

without adequate guidance on particular questions or areas; often early cases in an area are complex or appear novel and out of the mainstream. Recalling the work of Brooke Coleman, it is the aggregation of such cases over time that can move the law in new directions.[366] Moreover, if courts issue non-precedential opinions more frequently in certain subject areas than others, these practices could cause the law to develop in a lopsided manner[367] and make it more difficult for certain types of litigants to make persuasive arguments to the court. Indeed, the availability of nonpublication could "create a bias toward the development of precedent in the areas of law that the judges find important and away from those areas in which they have little interest."[368] This can have a particularly prominent effect on certain doctrines. For example, nonpublication interacts with the requirement in qualified immunity doctrine that, for immunity to be pierced, an officer must have violated a "clearly established" right. When opinions that might so establish a violation are unpublished, this creates an additional hurdle for litigants who can identify only an unpublished, but not a published, opinion that would satisfy their burden and thus cannot prevail on their claims despite a court having previously found a similar violation to the one the plaintiff experienced.[369] This interaction highlights why understanding the areas of the law in which unpublished opinions occur most frequently is so essential.

By that same token, if certain circuits (or certain judges within a circuit) publish opinions at higher rates, they may have more influence over the development of the law, as Gulati and McCauliff have suggested.[370] And at least with respect to circuits, we know that nonpublication rates vary dramatically from a low of 60.9% in the D.C. Circuit to a high of 93.9% in the Fourth Circuit in 2018.[371] Thus, nonpublication has the po-

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366 *See* Coleman, *Vanishing Plaintiff*, *supra* note 130, at 526–28 (discussing how plaintiffs' claims "reinforce and push the development of laws," particularly for marginalized groups who may be unable to change law through legislation).

367 *See* Schauer, *supra* note 337, at 457.

368 *See* Gulati & McCauliff, *supra* note 22, at 204 (discussing this issue in the context of the use of Judgment Orders in the Third Circuit).

369 *See* Norris v. Hicks, No. 20-11460, at 15 n.9 (11th Cir. May. 5, 2021) (noting in an unpublished opinion that the Plaintiff relied on "an unpublished, non-binding case that he argues establishes that [one of the Defendants] violated clearly established law. But [Plainitff] cannot rely on this case to meet his burden" because the Circuit looks "only to binding precedent to determine clearly established law").

370 *See id.* at 200-202.

371 McAlister, *supra* note 5, at 551 & Figure 2.

tential to create disparities in development of the law in multiple ways—across circuits, across judges, and across areas of law within a circuit.

As noted earlier, the non-precedential status of unpublished opinions may also enable and encourage judges to use nonpublication as a "bargain[ing]" tool to reach consensus.[372] If a judge thinks that an unpublished decision will receive less public scrutiny, she might decide the case or at least write the opinion differently than she would otherwise.[373] Some judges may even sign on to opinions that they would otherwise have dissented from contingent on the opinion being designated as unpublished.[374] In this manner, unpublished opinions could be having a much more significant impact on development of the law than commonly assumed. Such an impact would be impossible to measure through aggregate data about decisions that do not capture the negotiations that went into them.

The relative lack of reasoning in unpublished opinions may also impede the development of the law. As numerous scholars and judges have argued, the process of writing out the reasons for a decision may lead to better decision-making, as it both restrains judicial bias and forces judges to justify their decisions to the litigants, the public, and other judges.[375] A judge

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372 Panel Discussion, *supra* note 23, at 20.

373 *See* Law, *supra* note 141, at 820 (finding, based on a case study of Ninth Circuit asylum cases, that votes on merits and publication often interconnected).

374 *Id.* at 19; *cf.* Gulati & McCauliff, *supra* note 22, at 204 (discussing how "the use of [Judgment Orders ("JO") in the Third Circuit] increases the opportunity for strategic judicial behavior" and noting that "[t]wo judges inclined to reverse in a close case might agree to affirm without opinion when the third judge threatens to dissent from a published opinion ordering reversal; on the other hand, the third judge may agree to vote for an affirmance if only a nonprecedential JO is used. The option of using a JO, therefore, can change the outcome of close cases.").

375 *See*, *e.g.*, United States v. Massachusetts, 781 F. Supp. 2d 1, 15 (D. Mass. 2011) ("[W]hen subjected to the salutary discipline of written analysis, I came to the dawning realization that granting summary judgment to the Commonwealth on prong two on January 28, 2011 was clearly erroneous."); Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH. L. REV. 869, 873 (1993) (noting that [m]isconceptions and oversights of fact and law are discovered in the process of writing."); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 511-14(2015*)* (arguing that writing a decision may allow a judge to "discover[ ] that she cannot find an appropriate legal justification, leading her to reconsider her initial ruling and make a more accurate determination."); Ehrenberg, *supra* note 345, at 1164 (arguing that "writing is essential to the development of both legal rules and legal reasoning."); Frederick Schauer, *Giving Reasons*, 42 STAN. L. REV. 633, 652, 657–58 (1995) (noting that "[u]nder some circumstances, the very time required to give reasons may reduce excess haste and thus produce better decisions" and that a "reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.").

pressed to write a reasoned opinion in a case involving novel claims might reach a different decision than one who can quickly resolve the case via unpublished disposition. And even if not, the act of working through the arguments develops the law for future cases.

However, some scholars have suggested that law may best develop through limited reason-giving. Mathilde Cohen has noted that "[r]eason-giving is a typically modern idea. There have been historical moments when it was deemed valuable *not* to give . . . reasons. . . . To this day, reason-giving is discouraged or even prohibited in a number of decision-making contexts, such as those involving juries, voters, clemency decisions, or national-security affairs."[376] Further, Schauer points out that "the advantages of giving reasons come at a price" because it focuses on generalization and is "in tension with and potentially a check on maximal contextualization, on case-by-case determination, and on recognition of the power of the particular."[377]

Historically, nonpublication also affected development of the law through no-citation rules. Those rules might have impeded doctrinal development by preventing litigants from even mentioning certain cases— even if they arose from nearly identical contexts—in their briefing. Although related to questions of precedent, this lack of citation is subtly different because, before FRAP 32.1, it removed a set of cases from sight entirely and may have disadvantaged less-informed litigants who did not know which cases were fair game. Now that litigants can freely cite unpublished opinions, nonpublication—at least in theory—no longer affects the development of the law in this manner, since citing an unpublished opinion may be persuasive, even if not binding on the court. In practice, however, unpublished opinions continue to be cited to at lower rates in appellate opinions and thus likely have a lesser effect on the law's development. To the extent one believes that unpublished opinions are not good candidates on which to build the law—whether because they are drafted quickly, or by staff, or may be the result of bargaining by judges assuming the decision is low stakes—then allowing citation of such opinions is a negative feature.[378]

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376 Cohen, *supra* note 375, at 486–88 (internal citations omitted).

377 Schauer, *Giving Reasons*, *supra* note 375, at 658.

378 *Cf.* Soucek, *supra* note 181, at 166 (2012) ("Copy-paste precedent originate in unpublished opinions and perpetuates itself through other unpublished opinions. Thus, it differs from ordinary precedent in two troubling ways: It arises unintentionally, and it operates surreptitiously. Those writing unpublished opin-

Finally, choices about the dissemination and formal publication of opinions might shape development of the law by focusing the public's attention—including the attention of other courts and government officials—on some cases rather others. This might affect the future of legal theories that initially lose in court. Even if such theories may eventually garner support in the judiciary if they first gain public support, the public cannot support legal theories that it does not know even exist. In this way, increasing public consciousness of certain grievances may move legal claims from "off the wall" to "on the wall."[379]

There are some fairly obvious minimum factors that might guide publication to address these concerns. For example, opinions might be published when they: (1) establish a new rule of law; (2) alter an existing rule of law; (3) create or resolve a conflict of authority either within the circuit or between circuits; (4) are accompanied by a concurrence or dissent; (5) reverse the district court; or (6) are decided *en banc*.[380] But this does not solve the problem of giving airtime to emerging theories of rights or litigants who, at the time, appear to be presenting novel claims.

2. *Equality*

Fiss has argued that equality in adjudication results not from equality of outcome but rather from ensuring that the process of adjudication does not aggravate the "imbalances of power [that] can distort judgement."[381]

Many scholars have shown that procedure itself can create or reinforce inequities in the judicial system, and our discussion of the data in Part III makes clear that nonpublication raises serious concerns about equal treatment across both class of litigants and types of cases.[382] Even where claims

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ions have no way of knowing in advance that their text might get reused, eventually acquiring the influence of regular precedent.")

379 For a discussion of this concept in the context of constitutional rights claims, see Jack M. Balkin & Reva B. Siegel, *Introduction: The Constitution in 2020*, *in* THE CONSTITUTION IN 2020 1, 1–7 (Jack M. Balkin & Reva B. Siegel eds., 2009).

380 See discussion in Subsection I.C.2, *supra*, for circuit rules that include these elements.

381 *Id.* at 1077.

382 Coleman, *supra* note 10, at 1008 (arguing that civil litigation in federal courts is governed by "one percent procedure"—rules and procedures that are largely created by and for a small, unrepresentative, group of elite practitioners whose procedural interests do not represent those of most litigants); *see also* RICHMAN & REYNOLDS, *supra* note 6, at 110 (discussing how "[t]he inevitable result of the developments in appellate decision-making procedures in the past half century has been the creation of two completely separate tracks for justice,"

brought by economically and socially marginalized plaintiffs representing themselves make it past the stringent pleading burdens that characterize modern jurisprudence, nonpublication can inflict a similar harm by making these cases nonprecedential and as a result perhaps unknown."[383] And if fewer precedential opinions exist in certain areas of law, then that area of the law will develop more slowly, and litigants will find themselves more constrained in the types of arguments that they can make.

One of the most salient aspects of our findings is the implication that courts systematically treat certain types of litigants or certain subject matters differently.[384] As discussed above, some circuits' procedures systematically screen certain types of litigants or cases, diverting them from the textbook model of appellate litigation, making them presumptively not-for-publication, and/or delegating them to non-judicial staff. These practices exacerbate concerns about equality. Cases that are likely to be well-lawyered or perceived as weightier—such as corporate cases or ones in which the U.S. is the underlying plaintiff—are published at higher rates. These same problems are further aggravated by the lack of consistency among circuits' rules regarding unpublished opinions. Similarly, as noted, reason-giving itself helps to ensure that judicial decisions are not idiosyncratic or driven by bias.[385]

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wherein a litigant "represented by serious counsel . . . on Track One will receive first-class treatment from the courts of appeals," while "[a] litigant who is poor, without counsel, and with a boring, repetitive problem . . . can expect only the second-hand treatment that is available on Track Two"); Reinert, *supra* note 10, at 2123 (highlighting the inequality "between individual litigants on the one hand and corporate and governmental entities on the other"); Vladeck & Gulati, *supra* note 10, at 1668–69 (noting that there are "two separate and unequal tracks by which cases are considered," with some cases "resolved in a carefully crafted opinion" and others that are "disposed of in brief, unpublished, and unsigned opinions").

383 McCuskey, *supra* note 136, at 548.

384 *See* Cleveland, *Overturning*, *supra* note 158, at 147, 155 ("The discrimination that occurs in a regime of nonprecedential opinions is that similarly situated litigants, indeed even the same litigant in the same factual setting, may be treated differently by the courts.").

385 *See* Schauer, *supra* note 375, at 641 ("*[T]o provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself* . . . To provide a reason in a particular case is thus to transcend the very particularity of that case."); Richman & Reynolds, *Elitism*, *supra* note 10, at 282–83 (explaining that when courts issue unreasoned decisions, "neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin").

The public's difficulty in accessing unpublished opinions may also mean that not all litigants will have equal access to opinions. The responsibility for ensuring equal access to unpublished opinions naturally should fall on the courts themselves, since many litigants, particularly those proceeding without representation, cannot afford access to legal research databases, and thus can only access non-precedential dispositions through court websites.[386] Courts should take steps to make these opinions easier to find and search for on their website.

But the existence of non-precedential, unpublished opinions might also *serve* equal treatment in some ways. Increasing the amount of precedent would make legal research more expensive by expanding the pool of cases that litigants need to review. And an overwhelmed system could lead to further constraints on access to courts, oral argument, and other judicial functions, perhaps even prodding the bench to be more aggressive about dismissing cases at early stages to ease an overwhelmed docket.

3. *Dignity*

Respect for the dignity of individuals is a distinct and vital value in the American legal system. Our system recognizes that "process itself matters" because, as Jerry Mashaw has written, we recognize "process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons."[387]

One conceptualization of dignity recognizes a positive right to a certain baseline level of treatment. The second form turns on an individual's subjective experience of a process, particularly on their belief in its fairness. As Tyler has shown, "People obey the law because they believe that it is proper to do so . . . and in evaluating the justice of their experiences they consider factors unrelated to outcome, such as whether they

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386 However, other actors also have roles to play in promoting access to and transparency around unpublished opinions. In particular, Westlaw and LexisNexis should redesign their websites to make it easier for untrained litigants to distinguish between precedential and non-precedential opinions.

387 Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B. U. L. REV. 885, 888 n.16 (1981) (citing Paul v. Davis, 424 U.S. 693, 734–35 (1976) (Brennan, J., dissenting) ("I have always thought that one of [the Supreme Court's] most important roles is to [protect] the legitimate expectations of every person to innate human dignity and sense of worth." (quoting 424 U.S. at 734–35 (Brennan, J., dissenting)).

have had a chance to state their case and been treated with dignity and respect."[388]

The non-precedential status of unpublished opinions may lead litigants to feel disrespected because they perceive the court to view their legal claims as relatively unimportant and uninstructive for future cases. Additionally, because the "decision itself is the most meaningful touchpoint in the process" for most appellate litigants,[389] the titles and disclaimers included in the text of unpublished opinions may shape parties' perception of the respect that the legal system offered to them—or even the strength of the ruling itself. For instance, many circuits place disclaimers at the top of unpublished opinions, stating prominently (and sometimes in all capital letters) that the decision "DO[ES] NOT HAVE PRECEDENTIAL EFFECT."[390] These are often the first words a party reads. Even the terminology that courts use to refer to unpublished opinions—including "summary orders," "orders," "nonprecedential opinions," "memorandum dispositions," and, of course, "unpublished opinions"—may inflict dignitary harm by causing litigants to wonder why their case received something less than a "normal" treatment. These harms might increase if a party knew that claims like hers were almost always disposed of through unpublished opinions—or that opinions on claims like hers were always written by staff and presumptively marked unpublished before being seen by any Article III judge. She might conclude all people like her were being given shorter shrift, turning what may have at first been perceived as an insult about her individual case into an insult tied to her identity.

It is possible that some of this labeling also trickles into how judges treat litigants. Judge Posner noted that when judges view certain types of cases, such as those in which a party is self-represented, as typically burdensome and frivolous and speak about them that way with their colleagues, they may unintentionally treat those appeals with less care. This could result in less concern for the dignity of individual litigants bringing those types of claims.

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388 TYLER, *supra* note 160, at 178.

389 McAlister, *supra* note 5, at 583.

390 *See, e.g.*, Martins v. Pidot, 663 F. App'x 14, 14 (2d Cir. 2016) (exemplifying Second Circuit practice); Goncalves v. United States, 584 F. App'x 451, 452 n. ** (9th Cir. 2014) ("This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-–3.").

An opinion without reasons may compound such dignitary harms. After expending significant time and resources on district court proceedings and an appeal, a litigant receiving a disposition with little or no explanation might not only feel personally affronted, but also question the fairness of the entire process. As Lon Fuller has argued, absent reasoned opinions, "the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments."[391] By contrast, explaining the decision to the litigants through opinion-writing validates their sense of participation in the process.[392] In this way, "giving reasons becomes a way to bring the subject of the decision into the enterprise" and acts as a sign of respect.[393]

The combination of a nonprecedential label and a lack of reasons may send an especially strong signal to the litigant about the perceived low value of her case. The nonprecedential aspect signals that the value of her case is confined to the parties—the case does not have purchase for the wider world. But the additional lack of reason-giving tells the litigant something more—namely, that only the *outcome* matters; the particulars of her harms or defenses are unimportant. If the opinion is then inaccessible on public databases or even a court website, those affronts may be exacerbated.

4. *Legitimacy*

We have already discussed the ways that nonpublication can lead parties to view the decision-making process around their case—and therefore, perhaps the broader legal system—as illegitimate. Some scholars suggest that legitimacy is threatened only where nonpublication is used to decide diffi-

391 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978).

392 *See* E. ALLANA LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 8, 69-70 (1988) (discussing studies addressing participation in decision-making processes); *id.* at 80–81, 104–06 (showing that procedures are viewed as fairer when they vest process control or voice in those affected by a decision).

393 Schauer, *Giving Reasons*, *supra* note 375, at 658; *see also* Mashaw, *supra* note 387, at 901–02 (describing a system in which the litigants are left without understanding how decisions are made as "implicitly defin[ing] the participants as objects, subject to infinite manipulation by 'the system'"); Cohen, *supra* note 375, at 506 ("Social psychology studies have found the perception that the decision maker has given 'due consideration' to the 'respondent's views and arguments' is crucial to individuals' acceptance of both the decision and the authority of the institution that imposes the decision.").

cult cases.[394] Yet for the individual litigant the harm is personal and may be perceived regardless of the difficulty of the decision.[395] Moreover, when categories of similar "easy" cases are systemically resolved through nonpublication the litigant may perceive the harm not only to herself but to a broader class of litigants in the system.

A lack of information regarding when and how judges decide when to make an opinion precedential contributes to the legitimacy problem, as does the significant discretion given to panels to decide when to publish. Resnik has expressed similar concerns about judges defining for themselves what cases are important or interesting enough to be "befitting" of elite federal courts. Further, she argues, modern judicial posture, in which judges view themselves at least partially as administrators, results in dangerous "programmatic judging, undertaken by a judiciary taking too much responsibility for the long-term shape of its docket through both administrative and adjudicative means and thereby undermining both the legitimacy of adjudication and the constitutional allocation of authority among branches of governance."[396]

The counterargument to this, frequently made by judicial proponents of nonpublication, is that nonpublication can help protect the legitimacy of the judicial system by fostering clarity and coherence in their circuit's law.[397] Otherwise, too many precedential opinions with detailed reasoning might increase intra-court disagreement, which in turn could create instability.

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394 *See* Gulati & McCauliff, *supra* note 22, at 195-96 (describing how failure to give reasons or make precedent in cases where both sides present strong arguments can lead public to view decisions as illegitimate).

395 McAlister also engages with Tyler's arguments on legitimacy in the context about how an individual will experience procedural fairness in unpublished opinions and identifies four considerations of Tyler's that she considers most relevant to the perceived legitimacy of the process: : "(1) how much voice and opportunity to be heard the party believes she has experienced, (2) neutrality of the forum, (3) the trustworthiness of the decisionmaker, and (4) the degree to which the individual has been treated with dignity and respect." See McAlister, *supra* note 5, at 563 (quoting Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134, 135 (2011), who is in turn discussing Tyler's work).

396 Resnik, *supra* note 21, at 1029.

397 *See, e.g.*, Martin, *supra* note 44, at 192 ("[Federal appeals court judges] are creating a body of law. There is value in keeping that body cohesive and understandable, and not muddying the water with a needless torrent of published opinions."); Sykes, *supra* note 172, at 586 ("The ability to decide some or most cases by unpublished, nonprecedential—and noncitable—disposition is essential to managing the court's extremely heavy caseload and to maintaining the uniformity, clarity, and quality of circuit case law.").

5. *Transparency*

Transparency refers to the ability of the public, the parties, and other legal officials to monitor judicial proceedings and outcomes. In the United States, "[p]ublic confidence in the judiciary" has resulted in large part from the "high degree of transparency and openness" that characterizes judicial proceedings and decisions.[398] Arbitration has been criticized in part because it operates antithetically to this value.

In the federal judicial system, transparency is tied to the dissemination of reason-giving; since federal judges are unelected, "their accountability stems from the reasoned explanations they produce."[399] Requiring judges to publish reasoned opinions helps avoid a perception that judges are "hiding" in unpublished opinions some of their controversial decisions—for example, those that create a circuit split or garner a dissent.[400]

The ways in which judges decide whether to designate an opinion as unpublished also lacks transparency. As noted, in many circuits, judges have wide discretion over which decisions to designate as unpublished. The panel need not explain its decision not to publish, and no higher court will ever review it. Having an across-the-board requirement that certain types of opinions be published or that the panel provide an explanation for why that particular disposition need not be published could help address this issue.

A more standardized nomenclature—instead of the confusing grab bag of terms courts use to refer to unpublished opinions—would also make the process more transparent by making it easily determinable what the status of an opinion was no matter where the case occurred. It would also make it easier to categorically study these dispositions across circuits. Further, the most widely used term, "unpublished opinion," is a misnomer, since these opinions are in fact frequently published on Westlaw, Lexis, and court websites.[401]

Finally, the judiciary should make information regarding aggregate trends in nonpublication practices publicly accessi-

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398 Scott Dodson, *Accountability and Transparency in U.S. Courts*, in ACCOUNTABILITY AND TRANSPARENCY IN CIVIL JUSTICE 273, 8 (Daniel Mitidiero ed. 2019).

399 Cohen, *supra* note 375, at 507.

400 See, for example, the dispute over the Second Circuit's *Ricci* opinion and whether it was hidden.

401 *See* Kozinski, *supra* note 172, at 39 (explaining that unpublished dispositions "are public records and are widely available through Westlaw, Lexis and other databases. They can be read, examined, discussed, criticized and, on occasion, overturned by the Supreme Court on certiorari").

ble. The FJC and AO only publish statistics on publication rates by circuit and over time.[402] These published statistics do not reflect many of the trends our study reveals that suggest unequal treatment across cases.

For starters, either the FJC or AO could publish data regarding nonpublication rates for categories of litigants and types of appeals across the different circuits. The FJC and AO already collect and compile these data for the Judicial Business Tables; to do this they would have to run the nonpublication rate analyses across different categories of litigants and appeals—as we have in this Article—and then publish their findings alongside the other statistics that they already put out annually. The circuits themselves could also do this, as the FJC and AO receive reports from the circuits; the FJC and AO do not even themselves hold the data from the opinions, leaving the circuits as perhaps the best suited entity to publish more information. Such information would enable researchers to monitor aggregate trends in nonpublication practices and might incentivize judges to either address or explain the unequal treatment revealed by the data.[403]

While the FJC Integrated Database offers some information on the level of reasoning in an opinion, it is difficult to know what "unreasoned" or "reasoned" means without looking at examples of the opinions themselves, especially since that categorization is provided by the courts for any given opinion. As documented in Section III.B.2, we encountered substantial barriers in compiling even a sample database of the underlying text of over 1,400 unpublished opinions. Without a way to examine patterns in the text of unpublished opinions at any large scale, researchers are limited in their ability carry out a

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402 The Judicial Business Tables published by the AO show nonpublication rates by circuit, but they do not break it down further by type of litigant or case. Data on the type of appeal and litigant is only available separately. *See Judicial Business Tables for 2018*, U.S. CTS. https://www.uscourts.gov/statistics-reports/judicial-business-2018-tables [https://perma.cc/NYR7-R5N4].

403 The FJC should also implement consistent quality checks across their data. According to the FJC's Integrated Database Research Guide, data quality concerns "are more likely to affect specific fields related to under-served populations," such as information "regarding pro se litigants, in forma pauperis (IFP) status, and class action allegations." FED. JUD. CTR., *supra* note 174, at 4. The Research Guide offers no explanation for this gap. Extending data quality checks across all the data—rather than leaving out key fields related to "under-served populations"—will make monitoring and accountability efforts more effective.

nuanced analysis of how nonpublication impacts the development of different substantive areas of the law.[404]

6. *Efficiency*

When viewed through the lens of efficiency and "resource allocation," procedural burdens imposed on judges for the sake of legal development, equality, dignity, and transparency will not only cost taxpayers money, but also increase the time litigants must wait to receive a decision.[405] As detailed earlier, nonpublication was introduced in response to the caseload crisis of the 1960s and 70s.[406] Indeed, proponents of unpublished opinions frequently tout their time-saving benefits.[407] Judges writing unpublished opinions can spend less time carefully phrasing their analysis, since they ostensibly believe the words will not function as binding precedent in the future, although this belief may have waned somewhat following the introduction of FRAP 32.1. Judges can also reduce their drafting time to the extent they limit their reason-giving or rely on staff attorneys to submit drafts for their approval.[408] These features of unpublished opinions make them one of the most significant efficiency tools of the federal appellate judiciary today.[409]

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404 The currently available data limit researchers' ability to study the way in which nonpublication impacts the development of various substantive areas of the law because it does not categorize cases in a particularly granular way.

405 Brooke Coleman has criticized how the predominant conception of efficiency in the civil litigation context emphasizes making litigation cheaper to the detriment of other arguably relevant factors. As part of her critique she points to the shift from how the original drafters of the Federal Rules of Civil Procedure conceptualized efficiency—"as a way to unburden civil litigation of needless administrative distraction"—to the now-prevalent conception emphasizing "assessing the raw cost of each litigation moment without much regard for other potentially more nuanced costs that should be considered." Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1788 (2015). She argues that the civil litigation system should reconceptualize efficiency to account for more difficult-to-quantify costs and benefits, rather than merely "cheapness." *Id.*

406 *See supra* subpart I.A.

407 *See, e.g.*, Kozinski & Reinhardt, *supra* note 91, at 43 (explaining that "a memdispo can often be prepared in a few hours" whereas an opinion "generally takes many days (often weeks, sometimes months) of drafting, editing, polishing, [and] revising"); Martin, *supra* note 44, at 190 (stating that"[s]elective publication significantly enhances the courts' productivity"); POSNER, FEDERAL COURTS, *supra* note 44, at 168–69

408 Sykes, *supra* note 172, at 590; *see also* Circuit Survey Results, *supra* note 99 (confirming that staff attorneys are sometimes involved in drafting unpublished opinions); RICHMAN & REYNOLDS, *supra* note 6, at 34 (discussing use of staff attorneys and sometimes truncated review by screening panels).

409 *See* Levy, *Judicial Attention*, *supra* note 38, at 415–16 (summarizing the caseload management tools of the courts of appeals); *see also* Richman & Reynolds, *Elitism*, *supra* note 10, at 278–93 (detailing the "shortcuts to cope with the

Additionally, by designating only certain opinions as published, judges perform a sorting function and identify significant cases for future litigants.[410] This makes the litigation process more efficient to the extent that there is less for the parties—particularly those with fewer resources—to sift through.

That said, proponents of nonpublication should be careful not to rely too heavily on efficiency to justify the practice. Since 2005, judicial caseloads in terms of filings have actually declined from 65,418 in 2005,[411] to 49,363 in 2018.[412] During that same time, appellate opinions issued annually (both published and unpublished) plateaued between 30,000 and 39,000.[413] Yet nonpublication rates continued to rise from 81.6% in 2005 to 88.2% in 2018.[414] And, as McAlister recently documented, "caseload volume [by circuit] appears to have a weak correlation, if any, with unpublication rates," and the "circuits that issue the most unpublished decisions are not necessarily the busiest courts."[415] As such, the judiciary's increasing reliance on nonpublication cannot necessarily be explained (or justified) by a corresponding need for greater efficiency.

Unpublished opinions could also undermine efficiency if used excessively. After all, precedent allows for more efficient argumentation; a settled body of precedent decreases the number of sources that litigants and judges must review in making arguments and deciding cases.[416] A body of unpublished opinions may likewise create inefficient uncertainty for lawyers, as Ricks has observed; lawyers may be unsure of the strength of their claims if they do not know whether judges will follow nonprecedential opinions, especially to the extent unpublished

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rising volume: [judges] hear fewer oral arguments, publish fewer opinions and rely more heavily on law clerks and staff attorneys").

410 As the Fifth Circuit states in its local rules, "publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes . . . needless . . . burdens on the legal profession." 5th Cir. R. 47.5.1.

411 *U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2004 and 2005*, U.S. CTS., https://www.uscourts.gov/sites/default/files/statistics_import_dir/B00mar05.pdf [https://perma.cc/3GQ8-SPP7].

412 *Judicial Caseload Statistics 2018*, U.S. CTS., *supra* note 36 (recording 49,363 appeals filed in the regional courts of appeals in 2018).

413 *See supra* note 74, Figure 2, and accompanying text.

414 *Id.*

415 McAlister, *supra* note 5, at 554.

416 *See* Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001).

opinions within a circuit are inconsistent with one another or with a published opinion.[417]

Precedent also provides judges with ready-made, reliable analyses on settled issues that can jumpstart the process of drafting opinions and allow for short-hand communication between judges and litigants.[418] The abbreviated reasoning that often appears in unpublished opinions may make the adjudication of future cases posing similar issues less efficient, if judges deciding those cases are unable to rely on the reasoning of previous cases and are forced to start from scratch.

* * *

We posed, at the beginning of this section, the question: What is publication for? Many scholars and some judges have long called for the judiciary to bring an end to the practice of nonpublication.[419] Our discussion has aimed to highlight the various elements tied up in the concept of nonpublication and the values they implicate. Sometimes these implications weigh in favor of publication and sometimes they weigh against, which complicates any potential solution.

C. Towards a Better System of Publication

Completely abolishing nonpublication is neither feasible nor desirable. Both practical realities and a careful consideration of the competing values of the legal system underlie our conclusion that nonpublication cannot be eliminated wholesale. However, that does not mean the system cannot be improved.

Over the five-and-a-half decades from 1960 to 2015 the number of federal appeals increased over 1,200%, although caseloads subsequently began to plateau.[420] In 2015, 167 regional federal circuit judges had to handle 52,698 cases—315 filings per judge on average.[421] To give a rough estimate, as-

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417 Ricks, *supra* note 4, at 234-35.

418 *See* McCuskey, *supra* note 136, at 549.

419 *See, e.g.*, Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 623 (2009) (explaining that the use of unpublished opinions "allows judges to disregard the proper precedential effect of prior cases, and furthermore, it allows them to pick and choose which cases will receive binding precedential effect and which will not"); *see, e.g.*, Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 687 (2018) (contending that "the existence of invisible adjudication" generates "doubt" that "is not healthy for our legal system, which depends on transparency and the expectation of consistency").

420 *See supra* notes 34–36 and accompanying text.

421 *Id.*

suming that judges can draft and issue an unpublished opinion around six times faster than they can draft a published one, as some judges have suggested,[422] and knowing that 87% of all federal appellate opinions published in 2015 were unpublished, judges would have needed to nearly quadruple the amount of time they spent on writing opinions overall if they published every opinion.[423] Thus, assuming that federal judges are currently operating at or near their full capacities, we would need to dramatically expand the size of the federal judiciary to require judges to write every opinion with the same level of care that they currently reserve for published opinions. Such a proposal seems unrealistic.[424] Although this calculation is surely inexact, the point remains that, assuming no major changes to opinion-drafting practices, publication of every opinion would require a dramatic expansion of the federal judiciary.[425]

Additionally, as detailed in Part III, some of our empirical findings may quell some normative concerns we have raised. Our qualitative analysis of a sample of unpublished opinions found that not all are "unreasoned"—many simply contain abbreviated legal reasoning and factual and procedural summaries, and a few even contain extensive reasoning, complete with concurrences or dissents.[426] We also found that decisions reversing or partially reversing the lower court were published at much higher rates than those affirming the lower court's ruling.[427]

Nonetheless, some discrete reforms may be a start to improving the nonpublication system. The reforms we have al-

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422 *See* Kozinski & Reinhardt, *supra* note 91.

423 If judges spent six times as long writing the eighty-seven percent of opinions that were unpublished in 2015, they would have needed to spend 3.63 times as long writing opinions in total.

424 *See, e.g.*, Jon O. Newman, *1,000 Judges – The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993) (arguing against a significant expansion of the federal judicial as to preserve the quality of decisionmaking).

425 *See* POSNER, FEDERAL COURTS, *supra* note 44, at 168–69. Some have also argued that if we dramatically expand the ranks of the Article III judiciary, federal judges will lose their elite status, and consequently the country's best lawyers will lose their interest in becoming judges. *See* Antonin Scalia, *An Address by Justice Antonin Scalia, United States Supreme Court*, 34 FED. B. NEWS & J. 252, 252-54 (1987). Thus, opinion quality might go down even if we were to create enough new judgeships so that every opinion could be published.

426 *See supra* section III.C.4.

427 Of course, the fact that more than half of reversals and partial reversals are unpublished remains cause for concern, given that the correct legal outcome was not clear to at least one judge below. However, in a system where around 87 percent of all opinions are unpublished, a forty-six to forty-nine percent publication rate is notable.

ready suggested are more targeted than system-changing, including developing new, more consistent judicial rules and norms regarding publication—such as publishing all opinions that alter an existing rule of law or are accompanied by a concurrence or dissent. McAlister's suggestion of instituting a "minimum reason-giving expectation for most unpublished decisions"[428] is another suggestion in this vein that merits further exploration and could address some of the dignitary and legitimacy harms raised in the preceding discussion. Still another is our recommendation that closer scrutiny be paid to circuit screening practices that systematically skew a particular class of cases or litigants toward unpublished dispositions; at a minimum, the circuits should justify this practice.

We also suggest making unpublished opinions more accessible to litigants and third-parties, including scholars. More data and more affordable access to the text of unpublished opinions would allow for more careful analysis of whether nonpublication furthers or undermines the legal system's core values, including equal treatment. This Article took six years to write. Much of that time was spent merely attempting to gather data on unpublished opinions because the currently available data are simply too limited for comprehensive analysis.

The changes we recommend are merely a jumping off point, and, indeed, some of the reforms may even surface yet-to-be identified issues. Our goal has been to provide a framework for thinking about unpublished opinions that better recognizes the practical realities of the federal appellate system and the competing values at stake in any choice about reforming publication practices. And, although we have taken a first pass at uncovering the unseen costs of nonpublication based on the available data, much more research is needed to better understand the uses and effects of unpublished opinions.

CONCLUSION

Courts, scholars, and the public do not have much information when it comes to nonpublication. The judiciary has not established any comprehensive system for monitoring its publication practices, and particularly how, in the aggregate, those practices differentially treat certain litigants and claims. This Article aims to bring new data and theoretical considerations to bear in the ongoing debate over how the federal courts of ap-

428 McAlister, *supra* note 5, at 583; *see also id.* at 592.

peals use unpublished opinions in practice and how the public experiences those practices.

Our analysis of a federal database of over 400,000 appellate decisions issued from 2008 to 2018, a sample of over 1,400 coded cases, and citations in and word counts of full-text opinions available online, reveals extremely low publication rates for certain types of litigants and areas of law. The impact falls disproportionately on disadvantaged parties and claims typically associated with those groups. These disparities suggest that the judiciary's current nonpublication practices might contribute to an unequal system of justice, as some critics have suggested. Such a system could inflict dignitary harms and stunt the development of certain areas of law.

However, our study also provides some reassurance that the nonpublication system may be working as intended in some respects. For instance, appellate courts are significantly more likely to publish an opinion when they disagree with the reasoning of the court below. Additionally, there is evidence that judges are exercising discretion to publish cases where they believe the stakes are higher or where the legal questions seem weightier, for instance in habeas cases involving the death penalty. These findings paint a more nuanced picture of nonpublication and its impact on core judicial values than previous scholarly accounts.

Ultimately, our analysis only scratches the surface of the issues implicated. We were able to isolate appeals initiated by self-represented and incarcerated litigants, but other types of parties may also be differentially treated by the nonpublication system. Perhaps employees suing employers or private individuals suing corporations? We also would like to see more granular subject matter analyses of unpublished opinions. Commercial matters and cases involving the United States as a plaintiff are published at higher rates. How about different types of employment cases? Different kinds of criminal cases? Do publication rates vary based on the statute that creates the underlying cause of action? And what are the causal factors driving both the trends that we observed and those that future scholars might find? Answers to such questions are necessary if we are to understand the true impact that nonpublication has on the legal system. Moreover, this Article has considered only federal courts; the number of cases in state courts dwarfs

that of federal courts, and nonpublication in that context remains even less explored.[429]

Our aim here is to help start the conversation. We hope that, going forward, more data will be readily available to—and widely used by—judges, scholars, and the public. Only by first understanding current publication practices can the nonpublication system be reformed in ways that maximize the benefits of unpublished opinions while guarding against threats to the legal system's core values.

We particularly urge judges to enter this conversation. Today's practices are the product of decades of accretion. More deliberative thought on our current practices of publication will help make meaningful progress towards a better system.

429 *See* JUDICIAL COUNCIL OF CALIFORNIA, 2021 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 2010–11 THROUGH 2019–20 (2021), https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf [https://perma.cc/WD4Z-LMF6]. at Figure 30 (18% of majority opinions statewide in civil appeals published, which is similar to the federal average). Indeed, the National Center for State Courts recommended to the State of Washington that they "publish fewer cases" in 2016. NATIONAL CENTER FOR STATE COURTS, STATE OF WASHINGTON APPELLATE COURTS OPERATIONAL & PROCEDURAL REVIEW (June 2016) at 38.

Appendices to Is Unpublished Unequal?

APPENDIX 1: METHODOLOGY

FJC Integrated Database: We used the FJC "Appeals Data" dataset, which includes all federal appellate cases filed, terminated, and pending from fiscal year 2008 to the present. The version of the dataset we used includes cases from fiscal year 2008 to September 30, 2019. The full dataset includes 710,124 appellate cases. We analyzed cases where the court had entered a decision, either published or unpublished, between January 1, 2008, and December 31, 2018. To do this, we filtered out cases that were still pending or decided earlier than 2008 (since the data begins in fiscal year 2008) or after 2018. We also filtered out cases that were terminated "without judicial action," because the court did not publish any opinion—either published or unpublished—in these cases. For example, this category includes cases where the parties settled before the court rendered judgment. As a result, this subset of cases was not relevant for our analysis.

Additionally, we excluded cases that were labeled as "original proceeding[s]" in the FJC data set. Original proceedings are comprised of: (1) writs of prohibition; (2) writs of mandamus; (3) other extraordinary writs; and (4) applications for second or successive habeas claims.[430] We chose to exclude these cases from our analysis because they are not appeals from district court decisions. In the FJC data set, there were 49,081 original proceedings adjudicated from 2008 to 2018. With the aforementioned filters, our dataset contained 419,784 cases in total.

Within the subset of FJC data that we analyzed, we found a small subset of cases where the publication status was listed as "missing." All of these cases fell in the "procedural termination" disposition category, meaning "the decision is not based on the merits of the case and the appeal is not an original proceeding," for instance cases that were dismissed due to lack of jurisdiction.[431] These "procedural termination" cases with

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430 FJC Appeals Codebook, Integrated Data Base Appeals Documentation FY 2008 – Present, FED. JUD. CTR., 1, 3-4 (hereinafter "FJC Appeals Codebook") https://www.fjc.gov/sites/default/files/idb/codebooks/Appeals%20Codebook%202008%20Forward%20rev%2002102021.pdf [https://perma.cc/XU3X-7DYT].

431 *Id.* at 9. According to FJC data administrators, filling in the publication status is "optional" for cases that fall in the "procedural termination" disposition category. The category of procedural termination is comprised of six primary subcategories: cases that were terminated due to (1) jurisdictional defect; (2) voluntary dismissal under Federal Rule of Appellate Procedure ("FRAP") 42; (3) procedural default; (4) denial certificate of probable cause denial under FRAP

"missing" publication status comprised only 12.8% of the cases in our dataset and were excluded from our analysis. For the analysis of case outcome, we also excluded cases in which the outcome was missing, which similarly comprised a small share of cases.[432]

Although the AO and FJC dataset is the most comprehensive dataset on federal judicial appeals available—and therefore the dataset typically used by scholars studying the judiciary[433]—it has a number of notable limitations. First, although data quality control measures exist for many of the fields, especially those published in the Judicial Business Reports, some fields may have fewer data quality checks. For example, according to the FJC's Integrated Database Research Guide, data quality concerns "are more likely to affect specific fields related to under-served populations," such as information "regarding pro se litigants, in forma pauperis (IFP) status, and class action allegations."[434] Second, although the vast majority of information included in the data is input by docket clerks,[435] some variables are input by attorneys or the filing

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22(b); (5) denial of certificate of appealability under FRAP 22(b); and (6) transfer to another court of appeals. *Id.* at 10-11. In total, there were 53,921 cases with "missing" publication status out of 419,784 total. Out of an abundance of caution, in each of our analyses we have noted the number of cases with "missing" publication status. Notably, none of the cases with a "termination on the merits," rather than a "procedural termination," had a "missing" publication status.

432 The data on the outcome of the case (e.g., affirmed, reversed, dismissed) for cases terminated on the merits also included some "missing" data labels. Out of the 385,575 total cases in that analysis, 48,233 cases had a "missing" outcome label. However, given that there were still 337,342 published and unpublished cases with the outcome recorded, and given no indications that there were any systematic reasons why some of the case outcomes were not recorded, we chose to include this data in our analysis. As with the publication status data, we have noted the number of cases with "missing" outcome data in our charts. Importantly, the AO publishes data on publication status and the outcome of cases terminated on the merits in its annual Judicial Business Reports. Judicial Business of the United States Courts, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts [https://perma.cc/GT5Q-FNXT].

433 *See, e.g.*, WILLIAM REYNOLDS & WILLIAM RICHMAN, INJUSTICE ON APPEAL, 3, 38, 89, 157 (2013) (citing Judicial Business Tables produced by the Administrative Office of the U.S. Courts based on the AO and FJC dataset); Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 535-36, 543, 550-60 (2020) (same and relying on Judicial Business Tables for empirical analyses); 169 U. PA. L. REV. 1101, 1120-21 (2021) (explaining use of "*Judicial Business* reports" (i.e., the Judicial Business Tables), and specifically Table B-12 which includes publication status, produced by the Administrative Office of the U.S. Courts in methodology).

434 *The Integrated Database: A Research Guide*, FED. JUD. CTR., https://www.fjc.gov/research/idb [https://perma.cc/87JJ-5YKS].

435 These clerks have a variety of titles across the circuits: *e.g.*, "docket clerk," "intake/court support," "case administrator." Email from Federal Judicial Center

party. For instance, in civil cases, the attorney or filing party fills out the "Nature of Suit" variable at the time of filing before the district court.[436] The filing system provides a detailed description of the Nature of Suit Codes;[437] however, this data is likely to contain more variability, since data inputting is not centralized. Due to this limitation, we sought to mainly use Nature of Suit variables that the Administrative Office of the U.S. Courts has chosen to publish in its annual Judicial Business Tables.[438]

Coded Sample: There were a number of steps to creating the survey instrument that the research assistants used to code the cases. The survey instrument was initially created using Microsoft Word. This "paper" survey instrument was then converted into an XForm format, which was uploaded to SurveyCTO's online survey platform. An XForm is an Extensible Markup Language (XML) specification for collecting user input from electronic forms. XML is a means of attaching semantic information to content, much the way a website (which uses Hypertext Markup Language (HTML) and is itself a narrower form of XML) dictates whether a piece of content should be a header, a paragraph, a hyperlink, or some other form of content. SurveyCTO provides a commercial implementation of XForms in a user-friendly interface, along with tools to build and validate the form. The various versions of the form went through significant testing in order to ensure that the survey tool was capturing the information desired, that various data-quality features (such as automatically skipping irrelevant questions, ensuring that certain questions could receive one or multiple answers, and that certain questions were required to be answered) were functioning properly, and that the case lists and the means of accessing various opinion documents were accurate. The full survey can be found in Appendix 3.

We also took a number of steps to ensure the accuracy of the data and test interrater reliability. First, all research assistants coding the surveys participated in two training workshops. The research assistants then participated in a pilot

(Kristin) to co-authors Jade Ford and Rachel Brown (May 3, 2021) (on file with authors).

436 *Id.*

437 *Id.*; Civil Nature of Suit Code Descriptions, Admin. Office of the U.S. Courts (Apr. 2021), https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf.

438 *See, e.g.*, *Judicial Business Tables for 2015: Table B-1A*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS., https://www.uscourts.gov/sites/default/files/jb_na_app_0930.2018.pdf.

version of the survey, which helped to identify ambiguities in the language of the survey questions, answer questions about how to code certain items, identify possible answers or options that had not been present on the first version of the survey, and prune unnecessary or confusing questions from the survey instrument. Each research assistant completed ten pilot questionnaires. These questionnaires were used for training and survey refinement purposes only and were excluded from the final analysis. Approximately 20% of the surveys were coded by two independent research assistants to test the inter-rater reliability of the survey questions. The 20% figure is an appropriate balance between demonstrating high data quality and achieving statistical precision, while also keeping the workload and cost of the project manageable. On average, the questions in the survey have high inter-rater reliability. For a discussion of the results of the inter-rater agreement analysis, see Appendix 4.

Unpublished Opinions Granted Certiorari: Information on unpublished opinions reviewed by the Supreme Court is not readily available, and the difficulty we faced in identifying these opinions provides another example of the transparency issues surrounding unpublished opinions. To compile this sample of unpublished opinions reviewed by the Supreme Court, we started with the U.S. Supreme Court database, which gave us a list of docket entries where the Supreme Court has granted certiorari.[439] We then wrote a script to enter the docket numbers into the Supreme Court website's docket search function, which contains information on cases filed since the beginning of the 2001 term.[440] The script pulled the circuit court name and docket number from each result. We then cleaned up the docket numbers and merged the results with the FJC's dataset of appellate opinions, which contains information on whether a disposition was published or not. We kept all the cases that the FJC indicated were unpublished (cases where PUBSTAT = 1, 3, 5, or 7) and that also had a match in the Supreme Court dataset. This process created a dataset containing 400 Supreme Court cases. However, in many of these cases, an intermediate appeal was disposed of through an unpublished opinion, but the final decision was published. When we manu-

439 *See The Supreme Court Database: Online Codebook*, WASH. U. L., http://scdb.wustl.edu/documentation.php?var=docket [https://perma.cc/C8HX-RYH2].

440 *See Docket Search*, U.S. SUP. CT., https://www.supremecourt.gov/docket/docket.aspx?Search=& type=docket [https://perma.cc/TS53-RHDG].

ally checked those 400 Supreme Court cases, it turned out that only 122 were reviewing a case in which the final opinion was unpublished. For the full list of the cases we analyzed, see Appendix 5.

Citations to Unpublished Opinions in Appellate Briefs: To determine the frequency with which appellate litigants cite to unpublished opinions, we identified the rate at which briefs in the various circuits cite to unpublished opinions using the universe of appellate briefs available on Westlaw and filed in the twelve-month period ending on either April 5 or 7, 2019, when we conducted the searches. To identify unpublished opinions we used the search string: "adv: "F.Appx" or "F.App'x" or "Fed.App'x" or "Fed.Appx" or ("F.3d" +5 "unpublished") or ("F.2d" +5 "unpublished"). This search attempts to capture all variations in possible citations to the Federal Appendix (F.Appx, F.App'x, Fed.App'x, Fed.Appx) as well as citations to the list of unpublished cases included in the back of the Federal Reporters by using ("F.3d" +5 "unpublished") and ("F.2d" +5 "unpublished"). To find the denominator of total briefs in a circuit for a given year we used the search string: "adv: DA(aft 04-07-2018)" within the pages for each circuit. We structured the search this way to capture the total number of all briefs in the last twelve months within that circuit. However, the results may contain some duplicates or omit certain briefs from that circuit in the given time period. Our analysis assumes that Westlaw data for appellate briefs across circuits is likely to be fairly consistent, although this may not be the case. Using this approach allowed us to provide an initial take on measuring citations to unpublished opinions in appellate briefs given the current sources available.

APPENDIX 2: RULES REGARDING UNPUBLISHED OPINIONS FOR EACH CIRCUIT

Circuit	Publication Rule	Citation Rule
First	**1st CIR. LOCAL R. 36.0(b)(1)**: In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. **1st CIR. LOCAL R. 36(b)(2)(C)**: When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published.	**1st CIR. LOCAL R. 32.1.0**: An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent. **1st CIR. LOCAL R. 36.0(c)**: While an unpublished opinion of this court may be cited to this court in accordance with Fed. R. App. P. 32.1 and Local Rule 32.1.0, a panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion.
Second	**2nd CIR. IOP 32.1.1(a)**: When a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order.	**2nd CIR. IOP 32.1.1(b)**: Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. **2nd CIR. LOCAL R. 32.1.1(b)(1)**: In a document filed with this court, a party may cite a summary order issued on or after Jan-

Circuit	Publication Rule	Citation Rule
		uary 1, 2007. **2nd CIR. LOCAL R. 32.1.1(b)(2)**: In a document filed with this court, a party may not cite a summary order of this court issued prior to January 1, 2007, except: in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata; or when a party cites the summary order as subsequent history for another opinion that it appropriately cites.
Third	**3rd CIR. I.O.P. 5.3**: An opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential and unless otherwise provided by the court, it is posted on the court's internet website. A not precedential opinion may be issued without regard to whether the panel's decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief.	**3rd CIR. I.O.P. 5.7**: The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.
Fourth	**4th CIR. LOCAL R. 36(a)**: Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication: It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or It involves a legal issue of	**4th CIR. LOCAL R. 32.1**: Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the

Circuit	Publication Rule	Citation Rule
	continuing public interest; or It criticizes existing law; or It contains a historical review of a legal rule that is not duplicative; or It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit. The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication. **4th CIR. LOCAL R. 36(b)**: Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court.	case. If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met.
Fifth	**5th CIR. R. 47.5.1**: The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it: Establishes a new rule of law, alters, or modifies an	**5th CIR. R. 47.5.3**: Unpublished opinions issued before January 1, 1996, are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a). **5th CIR. R. 47.5.4** (footnote omitted): Unpublished opinions issued on or after January 1, 1996, are not precedent, except under

Circuit	Publication Rule	Citation Rule
	existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked; Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule; Explains, criticizes, or reviews the history of existing decisional or enacted law; Creates or resolves a conflict of authority either within the circuit or between this circuit and another; Concerns or discusses a factual or legal issue of significant public interest; or Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court. An opinion may also be published if it: Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds. **5th CIR. R. 47.5.2**: An opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or any party so requests the panel will reconsider its decision not to publish an opinion. The opinion will be published if, upon reconsideration, each	the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a).

Circuit	Publication Rule	Citation Rule
	member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason, and the panel issues an order to publish the opinion.	
Sixth	**6th Cir. I.O.P. 32.1(b)(1):** When determining whether a decision will be published in the Federal Reporter, panels consider whether the decision: Establishes a new rule of law, modifies an existing rule of law, or applies an established rule to a novel factual situation. Creates or resolves a conflict of authority within this circuit or between this circuit and another. Discusses a legal or factual issue of continuing public interest. Is accompanied by a concurring or dissenting opinion. Reverses the decision below, unless: the reversal was because of an intervening change in law or fact; or the reversal is a remand to the lower court or agency - without further comment - of a case reversed or remanded by the United States Supreme Court; Addresses a published lower court or agency decision; or Has been reviewed by the United States Supreme Court. **6th Cir. I.O.P. 32.1(b)(2):**	**6th Cir. R. 32.1**: The court permits citation of any unpublished opinion, order, judgment, or other written disposition. The limitations of Fed. R. App. P. 32.1(a) do not apply.

Circuit	Publication Rule	Citation Rule
	Any panel member may request that a decision be published. The court may also publish on motion.	
Seventh	**7th Cir. R. 32.1(a)**: It is the policy of the circuit to avoid issuing unnecessary opinions.	**7th Cir. R. 32.1(b)**: The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents. Every order bears the legend: "Nonprecedential disposition. To be cited only in accordance with Fed. R. App. P. 32.1." **7th Cir. R. 32.1(d)**: No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding.
Eighth	**8th Cir. I.O.P. IV(B)**: The panel determines whether the opinion in the case is to be published or unpublished. Unpublished opinions may be cited only in accordance with FRAP 32.1 and 8th Cir. R. 32.1A. Counsel may request, by motion or letter to the clerk, that an unpublished opinion be published.	**8th Cir. R. 32.1A**: Unpublished opinions are decisions a court designates for unpublished status. They are not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines

Circuit	Publication Rule	Citation Rule
		of res judicata, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this court or another court would serve as well.
Ninth	**9th Cir. R. 36-1**: Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam." All opinions are published; no memoranda are published; orders are not published except by order of the court. **9th Cir. R. 36-2**: A written, reasoned disposition shall be designated as an OPINION if it:	**9th Cir. R. 36-3(a)**: Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion. **9th Cir. R. 36-3(b)**: Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1. **9th Cir. R. 36-3(c)**: Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances. They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion. They may be cited to this Court or by any other courts in this circuit for factual purposes, such as

Circuit	Publication Rule	Citation Rule
	Establishes, alters, modifies or clarifies a rule of federal law, or Calls attention to a rule of law that appears to have been generally overlooked, or Criticizes existing law, or Involves a legal or factual issue of unique interest or substantial public importance, or Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or Is a disposition of a case following a reversal or remand by the United States Supreme Court, or Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.	to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case. They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.
Tenth	**10th Cir. R. 36.1**: The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.	**10th Cir. R. 32.1(A)**: The citation of unpublished decisions is permitted to the full extent of the authority found in Fed. R. App. P. 32.1. Unpublished decisions are not precedential, but may be cited for their persuasive value. They may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion. **10th Cir. R. 32.1(C)**: Par-

Circuit	Publication Rule	Citation Rule
		ties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule.
Eleventh	**11th CIR. R. 36-2**: An opinion shall be unpublished unless a majority of the panel decides to publish it. **11th CIR. R. 36-3**: At any time before the mandate has issued, the panel, on its own motion or upon the motion of a party, may by unanimous vote order a previously unpublished opinion to be published. **11th CIR. R. 36, I.O.P. 5**: The policy of the court is: The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions. Judges of this court will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.	**11th CIR. R. 36-2**: Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. **11th CIR. R. 36, I.O.P. 2**: Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result. **11th CIR. R. 36, I.O.P. 6**: Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. The court will not give the unpublished opinion of another circuit more weight than the decision is to be given in that circuit under its own rules. Parties may request publication of an unpublished opinion by filing a motion to that effect in compliance with FRAP 27 and the corresponding circuit rules. **11th CIR. R. 36, I.O.P. 7**: The court generally does not cite to its "unpublished" opinions because they are not binding precedent. The court may cite to them where they are specifically relevant to de-

Circuit	Publication Rule	Citation Rule
	11th Cir. R. 36, I.O.P. 6: A majority of the panel determine whether an opinion should be published. Opinions that the panel believes to have no precedential value are not published.	termine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case.
D.C.	**D.C. Cir. R. 36(c)(1)**: It is the policy of this court to publish opinions and explanatory memoranda that have general public interest. **D.C. Cir. R. 36(c)(2)**: An opinion, memorandum, or other statement explaining the basis for the court's action in issuing an order or judgment will be published if it meets one or more of the following criteria: with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this court; it alters, modifies, or significantly clarifies a rule of law previously announced by the court; it calls attention to an existing rule of law that appears to have been generally overlooked; it criticizes or questions existing law; it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit; it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from	**D.C. Cir. R. 32.1(b)(1)(A)**: Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant. **D.C. Cir. R. 32.1(b)(1)(B)**: All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent. **D.C. Cir. R. 32.1(b)(2)**: Unpublished dispositions of other courts of appeals and district courts entered before January 1, 2007, may be cited when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished dispositions of other courts of appeals entered before January 1,

Circuit	Publication Rule	Citation Rule
	those set forth in the district court's published opinion; it warrants publication in light of other factors that give it general public interest. All published opinions of the court, prior to issuance, will be circulated to all judges on the court; printed prior to release, unless otherwise ordered; and rendered by being filed with the clerk. **D.C. CIR. R. 36(d)**: The court may, while according full consideration to the issues, dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by order of a decision or judgment of a court or administrative agency, a judgment of affirmance or reversal, containing a notation of precedents or accompanied by a brief memorandum. **D.C. CIR. R. 36(f)**: Any person may, by motion made within 30 days after judgment or, if a timely petition for rehearing is made, within 30 days after action thereon, request that an unpublished opinion be published.	2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1. **D.C. CIR. R. 36(e)(2)**: While unpublished dispositions may be cited to the court in accordance with FRAP 32.1 and Circuit Rule 32.1(b)(1), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.
Federal	**Fed. CIR. R. 32.1(b)**: An opinion or order which is designated as nonprecedential is one determined	**Fed. CIR. R. 32.1(c)**: Parties are not prohibited or restricted from citing nonprecedential dispositions

Circuit	Publication Rule	Citation Rule
	by the panel issuing it as not adding significantly to the body of law. **Fed. Cir. R. 36**: The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value: the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous; the evidence supporting the jury's verdict is sufficient; the record supports summary judgment, directed verdict, or judgment on the pleadings; the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or a judgment or decision has been entered without an error of law. **Fed. Cir. I.O.P. 10(1)**: The workload of the appellate courts precludes preparation of precedential opinions in all cases. Unnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort. **Fed. Cir. I.O.P. 10(2)**: The purpose of a precedential	issued after January 1, 2007. This rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, and the like based on a nonprecedential disposition issued before that date. **Fed. Cir. R. 32.1(d)**: The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent. The court will not consider nonprecedential dispositions of another court as binding precedent of that court unless the rules of that court so provide.

Circuit	Publication Rule	Citation Rule
	disposition is to inform the bar and interested persons other than the parties. The parties can be sufficiently informed of the court's reasoning in a nonprecedential opinion. **Fed. CIR. I.O.P. 10(3)**: Disposition by nonprecedential opinion or order does not mean the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law or would otherwise fail to meet a criterion in paragraph 4. Nonprecedential dispositions should not unnecessarily state the facts or tell the parties what they argued or what they otherwise already know. It is sufficient to tell the losing party why its arguments were not persuasive. Nonprecedential opinions are supplied to the parties and made available to the public. **Fed. CIR. I.O.P. 10(4)**: The court's policy is to limit precedent to dispositions meeting one or more of these criteria: The case is a test case. An issue of first impression is treated. A new rule of law is established. An existing rule of law is criticized, clarified, altered, or modified. An existing rule of law is applied to facts significantly different from those to	

Circuit	Publication Rule	Citation Rule
	which that rule has previously been applied. An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued. A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved. A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth. A new interpretation of a Supreme Court decision, or of a statute, is set forth. A new constitutional or statutory issue is treated. A previously overlooked rule of law is treated. Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise. The case has been returned by the Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court. A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part. **Fed. Cir. I.O.P. 10(6)**: An election to utilize a Rule 36 judgment shall be unanimous among the judges of a panel. An election to issue a precedential opinion shall be by a majority of the panel, except that, when	

Circuit	Publication Rule	Citation Rule
	the decision includes a dissenting opinion, the dissenting judge may elect to have the entire opinion issued as precedential notwithstanding the majority's vote. These election rights may be made at any time before issuance of an opinion. **Fed. Cir. I.O.P. 10(8)**: Nothing herein shall be interpreted as impeding the right of any judge to write a separate opinion. **Fed. Cir. R. 32.1(e)**: Within 60 days after any nonprecedential opinion or order is issued, any person may request, with accompanying reasons, that the opinion or order be reissued as precedential. . . . The request will be considered by the panel that rendered the disposition.	

APPENDIX 3: CODER QUESTIONS[441]

Question Number	**Question Name**	**Question Text**
Q1	Coder ID	Enter your Coder ID
Q2	Year	Enter the year the case was decided
Q3	Circuit	Enter Circuit Number *Use 12 for the D.C. Circuit*
Q4	Appellate Docket Number	Enter the docket number for the Appellate Court case *This will often be in the form YY-#####.*
Q5	District Court	Enter the district in which this case originated. *Please use the format {N|S|M|E|W}DSS, where SS is the abbreviation for the state. Some districts encompass entire states, so N, S, M, E, or W is unnecessary at the beginning. Please see the coding manual for a full list of district court codes.*
Q6	Case Name	Enter the case name as it appears on the document
Q7	Ruling on a motion versus opinion	Is this document a ruling on a motion or an opinion? *0 – Ruling on a motion* *1 – Opinion* *Rulings on a motion do not review a lower court ruling. Rulings on motions ordinarily **grant** or **deny** a motion by the parties--things like asking for attorneys' fees, extensions of time, or rehearings. Opinions review a district court's opinion on a particular matter and then either **affirm, reverse** or remand that ruling. Just because something is procedure does not mean it is a motion. When the Second Circuit reviews a district court ruling on a motion to dismiss that is still a Second Circuit **opinion** because it is review-*

441 Questions that we did not ultimately use in the study have been excluded.

Question Number	Question Name	Question Text
		ing a final decision from the district court. *Note that in many cases, unpublished opinions may be called "orders," even though they are opinions that review a district court's ruling. Sometimes rulings on motions are also called orders.* *If the document is an **opinion**, skip Q8.*
Q8	Dispositive ruling reason	Please explain why you believe this document is a ruling on a motion and not an opinion.
Q9	Per curiam	Is this case issued per curiam? *0 – Named author* *1 – Per curiam*
Q10	En banc	Was this case heard en banc? *0 – 3-judge panel* *1 – En banc*
Q14	Concurrence	Does this case have a concurring opinion? *0 – No concurrence* *1 – Concurrence*
Q15	Dissent	Does this case have a dissent? *0 – No dissent* *1 – Dissent*
Q17	Plaintiff	Who is the named plaintiff in the **original district court case**? *Plaintiff refers to the individual or entity that initiated the action in the **district** court. **DO NOT ASSUME THAT THE APPELLANT IS THE PLAINTIFF.***
Q19	Plaintiff on Appeal	Is the plaintiff the appellant or the appellee in this appeal? *0 – Plaintiff is appellant* *1 – Plaintiff is appellee* *2 – Plaintiff and defendant cross-appealed*
Q20	Pro Se Plaintiff	Was the plaintiff represented by counsel in this appeal?

Question Number	Question Name	Question Text
		0 – Plaintiff did not have counsel *1 – Plaintiff represented by counsel*
Q21	Defendant	Who is the named defendant in this case? *Defendant refers to the individual or entity that did not initiate the action in the **district** court.*
Q23	Pro Se Defendant	Was the defendant represented by counsel in this appeal? *0 – Defendant did not have counsel* *1 – Defendant represented by counsel*
Q33	Outcome	What was the ultimate outcome of this case? *The ultimate outcome refers not to individual questions, but to the overall disposition. Often, the court will state the outcome explicitly* *1 – Affirmed* *2 – Reversed* *3 – Affirmed in part, reversed in part*
Q34	Remanded	Was this case remanded to the lower court? *0 – Case was not remanded* *1 – Case was remanded*
Q37	Available on Westlaw	Is this case available on Westlaw? *0 – Not available* *1 – Available*
Q38	Available on Lexis	Is this case available on Lexis? *0 – Not available* *1 – Available*
Q39	District Docket Number	Enter the docket number for the District Court case. *Please use the format YY-{CR|CV|MC}-#####. If, due to a procedural irregularity, there is no lower court case, then leave this blank.*
Q41	Reporter Citation	If this case was printed in the Federal Reporter or the Federal Appendix, please include the citation here. *Please use the proper Bluebook format of ### F.[2d|3d] ### (# Cir. YYYY) or ### F. App'x. [|2d] ### (# Cir. YYYY).*

Question Number	Question Name	Question Text
Q42	Appeal	Was this decision appealed? *0 – Case was not appealed* *1 – Case was appealed for rehearing* *2 – Case was appealed for rehearing en banc* *3 – Case was appealed to the Supreme Court*
Q43	Supreme Court Certiorari	Did the Supreme Court grant certiorari? *0 – Certiorari not granted.* *1 – Certiorari granted*
Q44	Procedural irregularities	Please describe any irregularities in this case.
Q45	Other notes	If there is anything about this case that might be of note but has not been captured, please indicate this here.

APPENDIX 4: DATA QUALITY CALCULATIONS FROM THE CODING EXERCISE

This section discusses the data quality from the coding exercise, as shown by interrater agreements. Approximately 20% of the surveys from the coding exercise were coded twice by independent research assistants. The table below shows the results of comparing the two coding exercises. The table contains both the average percent agreement as well as Gwet's AC measure of interrater agreement.

Overall, the survey results showed relatively high levels of agreements between independent coders. The mean agreement in the survey answers for questions we used in our study was approximately 96%, and the mean Gwet AC was approximately 0.94, which is considered relatively high.

The following table presents the full list of results for questions amenable to this type of analysis.

Question Number	Question Description	Agreement %	Gwet's AC	Gwet's AC 95% CI
Q1	Circuit	100%	1.00	(0.88, 1)
Q7	Ruling on a motion	83%	0.78	(0.67, 0.89)
Q9	Whether opinion was issued per curiam	97%	0.97	(0.82, 1)
Q10	Whether opinion was issued en banc	99%	0.99	(0.84, 1)
Q14	Whether a concurrence was written	99%	0.98	(0.83, 1)
Q15	Whether a dissent was written	99%	0.99	(0.84, 1)
Q19	Whether plaintiff appealed	91%	0.88	(0.73, 1)
Q20	Whether plaintiff was pro se	97%	0.95	(0.79, 1)
Q23	Whether defendant is pro se	86%	0.82	(0.67, 0.97)
Q33	Affirmed	94%	0.91	(0.76, 1)
Q33	Reversed	97%	0.97	(0.82, 1)
Q33	Affirmed in part, reversed in part	96%	0.96	(0.81, 1)
Q33	Dismissed	97%	0.96	(0.81, 1)
Q33	Vacated	96%	0.95	(0.8, 1)
Q33	COA Granted	99%	0.99	(0.84, 1)
Q34	Whether case was remanded	100%	1.00	(0.85, 1)
Q37	Whether the case is available on Westlaw	95%	0.94	(0.79, 1)
Q38	Whether the case is available on Lexis	94%	0.93	(0.78, 1)
Q42	Case was not appealed	92%	0.86	(0.71, 1)
Q42	Case was appealed for rehearing	94%	0.93	(0.78, 1)
Q42	Case was appealed for rehearing en banc	99%	0.98	(0.83, 1)
Q42	Case was appealed to the Supreme Court	97%	0.96	(0.8, 1)
Q43	Whether certiorari was granted	100%	1.00	(0.58, 1)

APPENDIX 5: UNPUBLISHED CIRCUIT OPINIONS GRANTED CERTIORARI, 2001-2018

Circuit Opinion Reviewed on the Merits

	Clear Precedent	Clear Errors	Summary Decisions	Novel Legal/ Factual Issues	Unusual Procedural Postures	Total
Total	77	16	4	15	3	115
Reversals/ Vacations	61 (79.2%)	16 (100%)	4 (100%)	13.5 (90%)	2.5 (83.3%)	97 (84.3%)
Dissents	35 (45.5%)	4 (25%)	0 (0%)	7 (46.7%)	2 (66.7%)	48 (41.7%)

Circuit Opinion Based on Clear Precedent

SCOTUS Docket	Case Name	Circuit Split?	Outcome	Other Opinions
07-1090	Republic of Iraq v. Beaty	No	Reversing	None
16-424	Class v. U.S.	No	Reversing and remanding	Alito, Kennedy, and Thomas dissented
12-729	Heimeshoff v. Hartford Life & Accident Ins. Co.	Yes	Affirming	None
16-373	California Public Employees' Retirement System v. ANZ Securities, Inc.	Yes	Affirming	Ginsburg, Breyer, Sotomayor, and Kagan dissented
03-9627	Pace v. DiGuglielmo	Yes	Affirming	Stevens, Souter, Ginsburg, and Breyer dissented
09-1476	Borough of Duryea, Pa. v. Guarnieri	Yes	Vacating and remanding	Thomas concurred in judgement; Scalia concurred in the judgement in part and dissented in part
10-6549	Reynolds v. U.S.	Yes	Reversing and remanding	Scalia and Ginsburg dissented
11-10362	Millbrook v. U.S.	Yes	Reversing and remanding	None

SCOTUS Docket	Case Name	Circuit Split?	Outcome	Other Opinions
16-1371	Byrd v. U.S.	Yes	Vacating and remanding	Thomas and Gorsuch concurred; Alito concurred
06-6330	Kimbrough v. U.S.	No	Reversing and remanding	Scalia concurred; Thomas dissented; Alito dissented
06-5754	Rita v. U.S.	Yes	Affirming	Stevens and Ginsburg concurred; Scalia and Thomas concurred in part and concurred in judgement; Souter dissented
09-448	Hardt v. Reliance Life Ins. Co.	No	Reversing and remanding	Stevens concurred in part and concurred in judgement
11-9335	Alleyne v. United States	No (unpublished opinion had applied clear SCOTUS precedent)	Vacating and remanding	Sotomayor, Ginsburg, and Kagan concurred; Breyer concurred in part and concurred in judgement; Roberts, Scalia, and Kennedy dissented; Alito dissented
13-9026	Whitfield v. U.S.	No	Affirming	None
06-480	Leegin Creative Leather Products, Inc. v. PSKS, Inc.	No (unpublished opinion had applied clear SCOTUS precedent)	Reversing and remanding	Breyer, Stevens, Souter, and Ginsburg dissented
06-571	Watson v. U.S.	Yes	Reversing and remanding	Ginsburg concurred in judgement
06-1181	Dada v. Mukasey	Yes	Reversing and remanding	Scalia, Roberts, and Thomas dissented; Alito dissented
09-7073	Abbott v. U.S.	Yes	Affirming	None

SCOTUS Docket	Case Name	Circuit Split?	Outcome	Other Opinions
09-9000	Skinner v. Switzer	No	Reversing and remanding	Thomas, Kennedy, and Alito dissented
11-10189	Trevino v. Thaler	No	Vacating and remanding	Roberts and Alito dissented; Scalia and Thomas dissented
12-562	U.S. v. Woods	Yes	Reversing	None
14-1095	Musacchio v. U.S.	Yes	Affirming	None
14-8913	Molina-Martinez v. U.S.	Yes	Reversing and remanding	Alito and Thomas concurred in part and concurred in judgement
14-185	Mata v. Lynch	Yes	Reversing and remanding	Thomas dissented
16-6219	Davila v. Davis	No	Affirming	Breyer, Ginsburg, Sotomayor, and Kagan dissented
02-9065	Muhammad v. Close	Yes	Reversing and remanding	None
05-7142	Jones v. Bock	Yes	Reversing and remanding	None
05-7058	Jones v. Bock	Yes	Reversing and remanding	None
04-885	Central Virginia Community College v. Katz	No	Affirming	Thomas, Roberts, Scalia, and Kennedy dissented
05-983	Winkelman ex rel. Winkelman v. Parma City School Dist.	Yes	Reversing and remanding	Scalia and Thomas concurred in part and dissented in part
09-10245	Freeman v. U.S.	No	Reversing and remanding	Sotomayor concurred in judgement; Roberts, Scalia, Thomas, and Alito dissented

SCOTUS Docket	Case Name	Circuit Split?	Outcome	Other Opinions
11-5721	Dorsey v. U.S.	Yes	Vacating and remanding	Scalia, Roberts, Thomas, and Alito dissented
14-9496	Manuel v. City of Joliet, Ill.	Yes	Reversing and remanding	Thomas and Alito dissented
08-108	Flores-Figueroa v. U.S.	Yes	Reversing and remanding	Scalia, Thomas, and Alito concurred in part and concurred in judgement
13-7120	Johnson v. U.S.	No	Reversing and remanding	Kennedy and Thomas concurred in judgement; Alito dissented
04-1538	Kane v. Garcia Espitia	Yes	Reversing and remanding	Per curiam
04-593	Domino's Pizza, Inc. v. McDonald	No	Reversing	None
02-1794	U.S. v. Flores-Montano	No	Reversing and remanding	Breyer concurred
03-878	Clark v. Martinez	Yes	Affirming	O'Connor concurred; Scalia and Rehnquist dissented
05-9222	Burton v. Stewart	No	Vacating and remanding	Per curiam
05-1429	Travelers Cas. And Sur. Co. of America v. Pacific Gas and Elec. Co.	Yes	Vacating and remanding	None
06-84	Safeco Ins.Co. of America v. Burr	Yes	Reversing and remanding	Stevens and Ginsburg concurred in part and concurred in judgement; Thomas and Alito concurred
05-1629	Gonzales v. Duenas-Alvarez	No	Vacating and remanding	Stevens concurred in part and dissented in part

SCOTUS Docket	Case Name	Circuit Split?	Outcome	Other Opinions
06-989	Hall Street Associates, L.L.C. v. Mattel, Inc.	No	Vacating and remanding	Stevens, Kennedy, and Breyer dissented
08-1371	Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez	No	Affirming and remanding	Stevens and Kennedy concurred; Alito, Roberts, Scalia, and Thomas dissented
10-694	Judulang v. Holder	Yes	Reversing and remanding	None
09-996	Walker v. Martin	No	Reversing	None
11-9540	Descamps v. U.S.	Yes	Reversing	Kennedy concurred; Thomas concurred in judgement; Alito dissented
10-1543	Holder v. Martinez Gutierrez	No	Reversing and remanding	None
10-1542	Holder v. Martinez Gutierrez	No	Reversing and remanding	None
10-283	Douglas v. Independent Living Center of Southern California., Inc.	No	Vacating and remanding	Roberts, Scalia, Thomas, and Alito dissented
10-5400	Tapia v. U.S.	Yes	Reversing and remanding	Sotomayor and Alito concurred
12-5196	Law v. Siegel	Yes	Reversing and remanding	None
13-1074	U.S. v. Kwai Fun Wong	Yes	Affirming	Alito, Roberts, Scalia, and Thomas dissented
14-15	Armstrong v. Exceptional Child Center, Inc.	No	Reversing	Sotomayor, Kennedy, Ginsburg, and Kagan dissented
12-1173	Marvin M. Brandt Revocable Trust v. U.S.	Yes	Reversing and remanding	Sotomayor dissented

SCOTUS Docket	Case Name	Circuit Split?	Outcome	Other Opinions
04-1203	U.S. v. Georgia	No	Reversing and remanding	Stevens and Ginsburg concurred
03-583	Leocal v. Ashcroft	Yes	Reversing and remanding	None
04-1618	Northern Ins. Co. of New York v. Chatham County, Ga.	No	Reversing	None
06-9130	Ali v. Federal Bureau of Prisons	Yes	Affirming	Kennedy, Stevens, Souter, and Breyer dissented
09-520	CSX Transp., Inc. v. Alabama Dept. of Revenue	No	Reversing and remanding	Thomas and Ginsburg dissented
10-1195	Mims v. Arrow Financial Services, LLC	Yes	Reversing and remanding	None
11-1347	Chafin v. Chafin	No	Vacating and remanding	Ginsburg, Scalia, and Breyer concurred
13-301	U.S. v. Clarke	Yes	Vacating and remanding	None
13-1487	Henderson v. U.S.	Yes	Vacating and remanding	None
15-8544	Beckles v. U.S.	Yes	Affirming	Kennedy concurred; Ginsburg and Sotomayor concurred in judgement
14-163	Bank of America, N.A. v. Caulkett	No	Reversing	None
13-1421	Bank of America, N.A. v. Caulkett	No	Reversing	None
14-723	Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan	Yes	Reversing and remanding	Ginsburg dissented

SCOTUS Docket	Case Name	Circuit Split?	Outcome	Other Opinions
15-7250	Manrique v. U.S.	No	Affirming	Ginsburg and Sotomayor dissented
17-21	Lozman v. City of Riveria Beach, Fla.	No	Vacating and remanding	Thomas dissented
16-1150	Hall v. Hall	No	Reversing and remanding	None
06-1595	Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee	Yes	Reversing and remanding	Alito and Thomas concurred in judgement
13-193	Susan B. Anthony List v. Driehaus	No	Reversing and remanding	None
12-1117	Plumhoff v. Rickard	No	Reversing and remanding	None
15-375	Kirtsaeng v. John Wiley & Sons	Yes	Vacating and remanding	None
06-5247	Fry v. Pliler	Yes	Affirming	Stevens, Souter, Ginsburg, and Breyer concurred in part and dissented in part
Totals:	**77 Cases**	**42 Circuit Splits**	**61 Reversing/ Vacating (79.2%)**	**35 Dissents (45.5%)**

Circuit Opinion Contained Clear Errors

SCOTUS Docket	Case Name	Outcome	Other Opinions
11-1053	Coleman v. Johnson	Reversing and remanding	Per Curiam
08-5657	Nelson v. U.S.	Reversing and remanding	Per curiam; Breyer and Alito concurred in judgement
08-10914	Wilkins v. Gaddy	Reversing and remanding	Per curiam; Thomas and Scalia concurred in judgement

SCOTUS Docket	Case Name	Outcome	Other Opinions
05-8400	Salinas v. U.S.	Vacating and remanding	Per curiam
03-1200	Holland v. Jackson	Reversing and remanding	Per curiam; Stevens, Ginsburg, Souter, and Breyer would deny the petition for certiorari
14-618	Woods v. Donald	Reversing and remanding	Per curiam
04-8384	Dye v. Hofbauer	Reversing and remanding	Per curiam
14-6873	Christeson v. Roper	Reversing and remanding	Per curiam; Alito and Thomas dissented
06-605	Los Angeles County, California v. Rettele	Reversing	Per curiam; Stevens and Ginsburg concurred in judgement
10-797	Felkner v. Jackson	Reversing and remanding	Per curiam
06-7317	Erickson v. Pardus	Vacating and remanding	Per curiam; Scalia would have denied cert; Thomas dissented
05-379	Ash v. Tyson Foods, Inc.	Vacating and remanding	Per curiam
14-419	Luis v. U.S.	Vacating and remanding	Thomas concurred in judgement; Kennedy, Alito, and Kagan dissented
10-9995	Wood v. Milyard	Reversing and remanding	Thomas and Scalia concurred in judgement
07-499	Negusie v. Holder	Reversing and remanding	Scalia and Alito concurred; Stevens and Breyer concurred in part and dissented in part; Thomas dissented
07-1315	Knowles v. Mirzayance	Reversing and remanding	None
Totals:	**16 Cases**	**16 reversing/ vacating (100%)**	**4 dissents (25%)**

Circuit Opinion Ruled Summarily

SCOTUS Docket	Case Name	Outcome	Other Opinions
09-804	CIGNA Corp. v. Amara	Vacating and remanding	Scalia and Thomas concurred in judgement
14-990	Shapiro v. McManus	Reversing and remanding	None

SCOTUS Docket	Case Name	Outcome	Other Opinions
07-6984	Jiminez v. Quarterman	Reversing and remanding	No
02-954	National Archives and Records Admin. v. Favish	Reversing and remanding	None
Totals:	**4 Cases**	**4 reversing/ vacating (100%)**	**No dissents**

Circuit Opinion Addressed Novel Legal/Factual Issues

SCOTUS Docket	Case Name	Outcome	Other Opinions
02-428	Dastar Corp. v. Twentieth Century Fox Film Corp.	Reversing and remanding	None
10-1265	Martel v. Clair	Reversing and remanding	None
06-531	Sole v. Wyner	Reversing and remanding	None
09-337	Krupski v. Costa Crociere S. p. A.	Reversing and remanding	Scalia concurred in part and concurred in judgement
13-483	Lane v. Franks	Affirming in part, reversing in part, and remanding	Thomas, Scalia, and Alito concurred
13-1174	Gelboim v. Bank of America Corp.	Reversing and remanding	None
02-8286	Banks v. Dretke	Reversing and remanding	Thomas and Scalia concurred in part and dissented in part
13-7211	Jennings v. Stephens	Reversing	Thomas, Kennedy, and Alito dissented
15-8049	Buck v. Davis	Reversing and remanding	Thomas and Alito dissented
09-737	Ortiz v. Jordan	Reversing and remanding	Thomas, Scalia, and Kennedy concurred in judgement
09-338	Renico v. Lett	Reversing and remanding	Stevens, Sotomayor, and Breyer dissented
10-209	Lafler v. Cooper	Vacating and remanding	Scalia, Thomas, and Roberts dissented; Alito dissented
13-6827	Holt v. Hobbs	Reversing and remanding	Ginsburg and Sotomayor concurred
16-5294	McWilliams v. Dunn	Reversing and remanding	Alito, Roberts, Thomas, and Gorsuch dissented

SCOTUS Docket	Case Name	Outcome	Other Opinions
07-1309	Boyle v. U.S.	Affirming	Stevens and Breyer dissented
Totals:	**15 Cases**	**13.5 reversing/ vacating (90%)**	**7 dissents (46.7%)**

Circuit Opinion Had Unusual Procedural Posture

SCOTUS Docket	Case Name	Outcome	Other Opinions
15-6418	Welch v. U.S.	Vacating and remanding	Thomas dissented
12-1268	Utility Air Regulatory Group v. EPA[442]	Affirming in part and reversing in part	Breyer, Kagan, Sotomayor, and Ginsburg concurred in part and dissented in part; Alito and Thomas concurred in part and dissented in part
04-1244	Scheidler v. National Organization for Women, Inc.	Reversing and remanding	None
Totals:	**3 Cases**	**2.5 reversing/vacating (83.3%)**	**2 dissents (66.7%)**

Circuit Opinions Not Reviewed on the Merits

SCOTUS Docket	Case Name	Outcome	Other Opinions
06-637	Board of Educ. Of City School Dist. of New York v. Tom F.	Judgement affirmed by an equally divided court	None
07-1223	Bell v. Kelly	Writ of certiorari dismissed as improvidently granted	Per curiam
05-7664	Toledo-Flores v. U.S.	Writ of certiorari dismissed as improvidently granted	Per curiam
14-915	Friedrichs v. California Teachers Ass'n	Judgement affirmed by an equally divided court	None
08A1096	Indiana State Police Pension Trust v. Chrysler LLC	Stay vacated	Per curiam

442 The Supreme Court appears to have granted certiorari in this case on the denial of rehearing en banc in case 10-1073 in the D.C. Circuit, which was unpublished, although the underlying merits opinion was published.

SCOTUS Docket	Case Name	Outcome	Other Opinions
09A648	Hollingsworth v. Perry	Stay granted	Per curiam; Breyer, Stevens, Ginsburg, and Sotomayor dissented
13-113	Ford Motor Co. v. U.S.	Vacating and remanding	Per curiam
Totals:	**7 Cases**	**N/A**	**N/A**

APPENDIX 6: CIRCUIT SURVEY

We asked the following questions in the survey sent to the chief judge and circuit executive of each circuit in December, 2020, with follow-ups as needed in early 2022:

1. In your circuit, who decides whether an opinion will be published?
2. Below is a description of what we understand your Circuit's practices to be. It also uses the terminology we believe your Circuit uses to refer to unpublished opinions—the terminology varies across the circuits. Is the description accurate? [See Appendix 2 for description of their practices.]
3. If the description is not accurate, please describe why. What needs to be changed?
4. What criteria or norms are used to decide whether to publish?
5. Who drafts unpublished opinions in your circuit?
6. How does the process for drafting unpublished opinions differ from the process for drafting published opinions (if at all)?
7. Does your circuit use a screening program of any kind to identify appeals that are likely to be resolved by an unpublished disposition? If yes, please describe.
8. In your circuit, what is the relationship between the decision to hear oral argument in a case and the decision to publish the opinion?
9. Will your circuit issue an unpublished opinion even if there is a dissent?
10. Are all unpublished opinions published on your court's website? If not, how is it decided which ones to publish on the website?

The responses received are on file with the authors.