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Judicial Triage: Reflections on the Debate over Unpublished Opinions

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Judicial Triage: Reflections on the Debate over Unpublished Opinions

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I. Introduction

The debate played out in the pages of this symposium is a critical and timely one. The ongoing effort by the Advisory Committee on Appellate Rules to promulgate a rule to forbid circuit courts from prohibiting the citation of unpublished opinions has unleashed a charged debate over the publication practices of our federal courts of appeals.¹ Before wading into this controversy, it is important to put it in context.

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1. Professor Schiltz, the reporter for the Advisory Committee on Appellate Rules, has described the drama over the proposed rule in two recent articles. See Patrick Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished*

Over the past three decades, the dockets of our federal courts of appeals have skyrocketed.² To manage their burgeoning caseloads, courts have increasingly resorted to docket-management tools that have resulted in a bifurcation of how cases are considered and resolved by federal appeals courts. This bifurcation appears to be complete. There are now two separate and unequal tracks by which cases are considered and resolved in our federal appellate courts. We call these Track One (or the "Learned Hand" track) and Track Two (or the "black box" track).³

"Track One" cases bear all of the traditional hallmarks of our appellate justice system. Each case is reviewed by three Article III judges; they read the briefs, study the record, hear oral argument, and deliberate with their colleagues to reach a decision. Each case is resolved in a carefully crafted opinion identifying the author and the concurrence (or dissent) of the other participating judges. In most courts, draft opinions are circulated to all judges to ensure

Opinions, 62 WASH. & LEE L. REV. 1429 (2005) [hereinafter Schiltz, *Explaining the Sturm Und Drang*] (questioning the controversy surrounding the proposed rule); see also Patrick Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeal*, 74 FORDHAM L. REV. (forthcoming 2005). For other recent treatments of the controversy over citation rules, in addition to the articles in this symposium and another recent one forthcoming in the *Fordham Law Review*, see generally Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555 (2005); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002).

2. The number of cases brought before courts of appeals annually has jumped from around 11,000 cases in 1970 to around 60,000 in 2002. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 76 tbl.4 (1996) [hereinafter LONG RANGE PLAN] (charting the historical and projected appeals filed); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS FOR 2002, <http://www.uscourts.gov/cgi-bin/cmsa2002.pl> (last visited Sept. 29, 2005). Concerns about the exploding caseloads of the federal courts are not new. See, e.g., THOMAS E. BAKER, JUSTICE RESEARCH INST., RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 31-43 (1994) (summarizing previous studies of increased appellate caseloads); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME, 7-9 (1974) (discussing the radical increase in volume of appellate caseloads).

3. The terms Track One and Track Two are not terms of art used by Court Process Studies scholars. We use the terms as a shorthand way of summarizing the two paths that are currently used by the courts of appeals to resolve cases on the merits. Others have used the same terminology. See, e.g., William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290, 1291 (1996) [hereinafter Reynolds & Richman, *Studying Deck Chairs*] (using Track-Two terminology to describe a "decision without oral argument in a brief, unpublished opinion drafted by staff attorneys"); see also 11TH CIR. R. 34-3(a) (2001) ("The court maintains a two-calendar system for consideration and decision of appeals in the interest of efficient and appropriate use of judicial resources, control of the docket by the court, minimizing unnecessary expenditure of government funds, and lessening delay in decisions.").

consistency within the circuit. Only then is a published opinion formally issued. There are few questions about accountability or transparency in the handling of Track One cases. Losing lawyers and litigants may be disappointed with the result, but they can make no plausible claim that they were shortchanged by the judicial process.

As caseloads have exploded and judges have delegated increasing amounts of their tasks to their law clerks and other assistants, the validity of the idealized model of appellate judging—sometimes dubbed the "Learned Hand model"—and the resulting reasons for concern have become a frequent topic of discussion among commentators studying court processes.⁴ Our contention in this Article is that there exists a second set of cases for which the Learned Hand model is not merely fraying at the edges. Instead, the traditional model has been abandoned in these cases. This second set of cases warrants greater attention from researchers. Track Two cases are disposed of in ways that appear cursory. These cases are culled early in the appellate process (sometimes even before briefing) for disposition without argument. Many are processed by staff attorneys or court-employed legal assistants rather than Article III judges. Although Article III judges oversee the process, review recommendations, and ultimately "decide" the cases, our sense is that, in general, judges do not read the briefs, review the record, or independently research the law. Instead, they rely on staff assistants to provide them with both an even-handed, balanced appraisal of the case and a proposed disposition.⁵ Although few statistics are available, evidence suggests that judges rarely disagree with proposed dispositions.⁶ As a result, litigants and their lawyers have no appreciable contact with the court, and no judge is personally accountable for the court's disposition. Track Two cases are generally disposed of in brief, unpublished, and unsigned opinions. The opinions are drained of any precedential value by circuit rule and, in most circuits, are consigned to a

4. See, e.g., William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 299–300 (1996) [hereinafter Richman & Reynolds, *New Certiorari*] (discussing judicial opposition to creating additional judgeships); Hon. Richard J. Cardamone, *Foreword: How an Expanding Caseload Impacts Federal Appellate Procedures*, 65 BROOK. L. REV. 281, 281 (1999) (reflecting on the features of appellate judging); JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURT OF APPEALS 222* (2002) (expressing less concern about the effects of increased loads and more confidence than other commentators about the abilities of the courts to adjust effectively to the increased caseloads).

5. For a description of the role of staff attorneys in culling cases in the Ninth Circuit, see J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT'L L. 187, 192, 197–98 (2005).

6. See *infra* note 122 (citing authorities).

jurisprudential "Neverland," where litigants are either forbidden or discouraged from citing them. Losing parties in these cases, we suspect, wonder whether they have received second-class justice.⁷ Because the Track Two process is largely invisible and poorly understood by litigants and their counsel, we believe it is fair to dub it the "black box" process.

Were Track Two cases the exception rather than the rule, there would be no controversy about the publication practices of our appellate courts. But they are not the exception; they are the norm. At present, fewer than 20% of appellate cases decided on the merits are resolved in written, published opinions.⁸ And that percentage is dwindling.⁹

Not surprisingly, given that unpublished dispositions now comprise over 80% of the output of our appellate courts, few defend the practice by arguing

7. The history of the use of unpublished, nonprecedential, and uncitable opinions to dispose of merits cases in the courts of appeals is catalogued in Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1442–83 (2004). Professor Pether's account is in accord with that reported by other scholars. See, e.g., David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1141–47 (2002) (chronicling the rise of nonpublication policies). Much of the scholarship in this area builds on the foundation laid by Professors William L. Reynolds and William M. Richman in a trilogy of articles. See Richman & Reynolds, *New Certiorari*, *supra* note 4, at 281–86 (noting the radical changes in federal circuit caseload over the past quarter century; arguing that these changes, in effect, transform the circuit courts into courts of certiorari; and discussing the negative effects of such changes, particularly on those with limited resources); 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, 575–84 (1981) [hereinafter Reynolds & Richman, *Price of Reform*] (presenting an empirical assessment of the publication plans of the eleven circuits during the 1978–1979 reporting year and analyzing their effect on judicial productivity and responsibility); 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, 1168–72 (1978) [hereinafter Reynolds & Richman, *Non-Precedential Precedent*] (discussing the history of citation and publication rules in the different circuit and "examining closely their content").

8. According to the most recent statistics made available to the public by the Administrative Office of the U.S. Courts, for orders filed in cases terminated on the merits during the twelve-month period ending on September 30, 2004, 81% were terminated in unpublished opinions. See LEONIDAS RALPH MECHAM, JUDICIAL BUS. OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (2004) [hereinafter 2004 JUDICIAL BUSINESS] (listing the percentage of each circuit's dispositions made by unpublished opinions by circuit), available at <http://www.uscourts.gov/judbus2004/tables/s3.pdf>. There are, of course, a substantial number of appeals that are dismissed for procedural reasons. See *id.* at tbl.B-5A (listing data for procedural terminations such as jurisdictional defects, defaults, and certiorari appealability), available at <http://www.uscourts.gov/judbus2004/appendices/b5a.pdf>.

9. Compare *id.* at tbl.S-3 (reporting the percentage of unpublished opinions to be 81.0% in 2004) with LEONIDAS RALPH MECHAM, JUDICIAL BUS. OF THE U.S. COURTS, 1998 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (2004) (reporting the percentage of unpublished opinions to be 74.9% in 1998), available at <http://www.uscourts.gov/dirprt98/s03sep98.pdf>.

that Track Two cases are too insignificant to warrant greater attention. Based on our experiences, we find it hard to imagine that anyone with even passing familiarity with federal appellate practice would see the matter otherwise.¹⁰ Thus, to the extent that the practice can find defenders (and there are many, including prominent court of appeals judges), it is justified mainly on the grounds of necessity—that is, that our appellate courts are so overburdened that judges cannot produce thoughtful, thorough, and well-reasoned opinions in anything but a small fraction of the cases they review.¹¹ The purpose of this symposium was to bring together judges, academics, and practitioners to render a normative judgment on the practice of appellate courts disposing of cases in ways that, by definition, limit transparency and accountability. The task we were assigned by the symposium organizers was to provide an overview of the papers critiquing the restrictive publication practices of the circuit courts and to address areas of possible reform. That task in mind, we focus our remarks on three points.

First, like most of our symposium colleagues, we join the chorus of those who contend that the practice of resolving the vast majority of appellate cases in unpublished, nonprecedential, and uncitable opinions is a stain on our appellate justice system.¹² We are mindful of the workload burdens cited by the defenders of the practice. Nonetheless, publication rules that forbid even the citation of court opinions stifle the development of the law, fuel suspicions that courts are not scrupulously obeying the rule of law, and give both judges

10. See, e.g., Hon. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 224 (1999) ("Many cases with obvious legal importance are being decided by unpublished opinions."); accord Hon. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2d 17, 18–22 (2000) (stating that "it seems clearly wrong to say that courts should decide whether or not to publish opinions . . . based on their perceived general 'precedential significance'" and noting that "plenty of unpublished decisions have been accepted for review and reversed by the Supreme Court").

11. See Wallace, *supra* note 5, at 189, 192 (stating that few parties are fortunate enough to have their disputes resolved in "published, fully reasoned" decisions and noting that the "Ninth Circuit might have collapsed under the weight of its ever-increasing caseload had it not developed innovative ways to allocate its limited resources"); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions in the Ninth Circuit*, CAL. LAW., June 2000, at 43 (stating that writing an opinion is much more time consuming than writing a "memorandum disposition," and noting that the Ninth Circuit writes opinions in only 15% of cases and may have to reduce that number).

12. See Pether, *supra* note 7, at 1441 (stating that the practice of issuing unpublished opinions "sacrifice[s] principled decisionmaking, . . . imperil[s] the legitimacy of the judicial system, . . . [and] corrupt[s] the operation of the courts and the administration of justice"); Richman & Reynolds, *New Certiorari*, *supra* note 4, at 275 (stating that the tradition of writing a fully reasoned opinion for publication has been "sadly truncated," and opining that the changes in the appellate court system have had "deplorable effects").

and lawyers incentives to engage in strategic game-playing.¹³ Even if judges and lawyers refrain from engaging in this sort of strategic behavior—and there is evidence to suggest that judges act strategically to further their goals at least some of the time (that lawyers act strategically goes without saying)¹⁴—the opportunity for such abuse is reason enough to discontinue the practice.

Our second point flows from the first. This symposium has been myopic in one key respect. It fails to engage the question of what causes the unpublication problem; the focus has instead been on the symptoms of the problem. Engaging the question of causes, however, is crucial if we are to design solutions. If the cause of the unpublication problem is the overburdening of judges, then the optimal solution is likely an increase in judicial resources. If the problem is a function of judges failing to work hard enough or focusing their energies on the wrong pool of cases, then the solution may be to provide them with better or more finely tuned incentives to work harder or smarter. Unfortunately, the empirical research to answer the foregoing questions has not been done. Our sense, based on our experiences with the courts, is that the key cause of the unpublication problem is the caseload explosion—in other words, a resource problem. But even if we are correct that the primary causal factor is a resource deficit, that does not mean

13. As we explain below, though we are troubled by the universal determination of the circuits to label their unpublished decisions "non-precedential," our main concern goes to circuit rules forbidding or discouraging even the *citation* of unpublished opinions. Many, but not all, of our concerns about the current publication practices of the courts would be addressed by the adoption of a rule, like that proposed by the Advisory Committee on Appellate Rules of the United States Judicial Conference, forbidding circuits from imposing and enforcing no-citation prohibitions. See *infra* notes 35–37 and accompanying text.

14. Social scientists, particularly those in the fields of economics and political science, have long argued that judges need to be understood as agents who behave strategically to further their policy and other private goals. See, e.g., Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 584 (2001) (exploring whether judges vote in accord with their political preferences); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 12–25 (2002) (outlining various reasons behind judicial policymaking); Michael J. Gerhardt, *Judicial Decisionmaking: Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1734–63 (2003) (reviewing Segal and Spaeth's revised attitudinal model, discussed *supra*, and suggesting future research to perfect the model); FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* 149 (2000) (concluding that preferences alone do not dictate the choices Supreme Court Justices make, but stating that their decisions do result from the "pursuit of their policy preferences within constraints endogenous the Court"). Indeed, the model of judges as strategic actors seeking to further policy goals has become so dominant in political science that it has sparked a pushback from some scholars asserting that judges do also care about process values and deciding cases consistently with what they perceive to be "law." See e.g., DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEAL* 138 (2002) ("A far more interesting implication of the study is that legal goals, too, have a real effect on judges' decisions.").

that existing judicial incentives should not be fine-tuned in order to improve judicial performance.¹⁵

For purposes of our comments, we assume that the reason for the unpublication crisis is that the federal circuit courts are overburdened (in other words, we will put aside the question of fine-tuning judicial incentives). Judges' workloads have grown exponentially while the number of judges has remained relatively static. As a consequence, courts are so overwhelmed that they are engaged in judicial triage. To cope with workload constraints, courts have implemented a tracked system that gives the closest judicial attention to those cases that warrant it because of their likely precedential value; that relegates the remaining cases (those that appear to be "routine" in that they involve the application of settled law to the facts of the case) to judicial assistants, whom the judges supervise. As noted, current court of appeals judges have the time to give full judicial attention, including hearing argument and preparing signed opinions, to only about 20% of their cases.¹⁶

The debate over publication and citation practices will not ebb until the root problem of the workload of our appellate courts is better understood and addressed. Unless structural changes are made to address the growing burden on the courts of appeals, the prospects of real reform are a mirage. As caseloads rise, an ever-smaller percentage of cases will be decided by published opinions. And the time may soon come when published, precedential opinions are a statistical anomaly.¹⁷ That prospect is daunting. It is time to pay as much

15. Although there is not a large volume of literature on the topic, the existing research suggests that judges, like the rest of us, do respond to incentives. See Russell Smyth, *Do Judges Behave as Homo Economicus and, If So, Can We Measure Their Performance? An Antipodean Perspective on a Tournament of Judges*, 32 FLA. ST. U. L. REV. 1299 (2005). For suggestions as to incentive systems, see Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 458–87 (2004) (discussing impeachment, recusal, disqualification, mandamus, liability, discipline procedures, electoral reforms, executive appointments, quality ratings, peremptory challenges, and panel exclusion).

16. Judge Posner has noted:

Given the workload of the federal courts of appeals today, 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. It is a choice, in other words, between giving the parties reasons for the decision of their appeal and not giving them reasons even though the appeal is not frivolous.

RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 168–69 (1996); see also Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 196 (1999) (arguing that limited citation is a "de facto cap on any precedential value an unpublished opinion might have").

17. Any doubt about this acceleration in the percentage of cases disposed of in

attention to the workload problem that lies at the core of this debate as we do to the symptoms of publication practices.

This brings us to our third point. The seismic shift in the way courts of appeals consider and decide cases raises questions for the judiciary. For one thing, there are many embedded questions of procedure and structure that should be, but have not been, addressed. For instance, at present, 80% of federal appellate cases are disposed of in a "black box" process that is all but invisible to outsiders. Should courts be more transparent and openly acknowledge that we now have two distinct and very different tiers of appellate justice in the United States? Is it right that judges now heavily rely on staff counsel and other judicial assistants to do the heavy lifting in deciding cases? As some circuits acknowledge, the behind-the-scenes judicial work in these Track Two, black box cases is being done in the main by an army of law clerks, staff counsel, and other judicial assistants, with varying degrees of oversight by Article III judges. Should we move to a system that acknowledges explicitly the limited, supervisory role judges play in the disposition of these cases? Should we require that the names of the staff attorneys and other secondary staff who do the primary work on these opinions appear publicly, at least as secondary authors?

Perhaps a more critical inquiry is whether the burdens on appellate courts have reached the point where Congress should consider structural changes?¹⁸ Should Congress consider whether to authorize the

unpublished opinions should be dispelled by the statistics. In 1979, when Professors Reynolds and Richman finished the first study of circuit publication practices, they found that the courts of appeals were publishing 38.3% of their opinions. Reynolds & Richman, *Price of Reform*, *supra* note 7, at 587. Twenty-five years later, the percentage of opinions that are published has fallen to half of that number (19%). LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES: MULTI-YEAR STATISTICAL COMPILATION OF FEDERAL COURT CASELOAD THROUGH FISCAL YEAR 2004 tbl.1.6 (2005) [hereinafter JUDICIAL FACTS AND FIGURES], available at www.uscourts.gov/judicialfactsfigures/alljftables.pdf.

18. Because they are far afield from the focus of this symposium, we put aside structural modifications fraught with political implications but not directly relevant to publication practices, such as increasing substantially the number of Article III appellate judges, limiting the jurisdiction of the courts of appeals, or creating specialized courts to handle appeals in cases raising certain statutory claims.

Even as we suggest structural reforms to the court system, we note that calls for major structural reforms to the court system have been made by commentators and committees at least since the late 1960s—many of them expressing concerns deriving from the workload—but those reform proposals have fallen on deaf ears. See Paul D. Carrington, Checks and Balances: Congress and the Judiciary n.183 (unpublished draft, on file with the Washington & Lee Law Review); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 602–05 (2005) (noting that the rising demand for adjudication has changed the context in which judging takes place and requires that the methods for choosing judges be increased).

appointment of "appellate" magistrate judges who could assist the court and hear cases in which the parties agree to a reference to magistrate judges (as happens in the district courts)? Or perhaps courts could direct that "routine" cases be considered in the first instance by appellate magistrate judges? Such an approach could relieve some of the caseload pressures on Article III judges, avert calls for dramatically expanding the corps of Article III appellate judges, ensure that cases are resolved in an open and transparent way, and avoid the confirmation battles that often mark the appointment of circuit judges.

There are also questions of outcomes. We start with the understanding that the professional staff attorneys who review and propose these dispositions are competent, committed to justice, and dedicated to ensuring that all litigants get a fair hearing. And we recognize that the premise of this system is that the use of staff attorneys to assist the court should not affect outcomes. But is that so? We know little about staff attorneys and other judicial assistants and how they perform their work. Is it not time that changed? If judges are going to delegate increasing amounts of responsibility to these secondary actors, should they not correspondingly reveal greater amounts of information about the involvement of these actors? These disclosures would produce at least some measure of accountability; they would enable researchers to test claims, for example, that these secondary actors do a good job, are unbiased in their dispositions, are adequately supervised, and are not subject to conflicts of interest.

There is a separate issue, with regard to outcomes, that should be addressed as well: Most cases decided without argument in unpublished and non-citable opinions affirm lower court rulings.¹⁹ Does the high affirmance rate demonstrate that the system works, as it effectively screens out those cases that do not require the close attention of judges because the disposition below is so clearly correct? There are two less benign explanations: 1) the affirmance rate is high because staff attorneys have heavy caseloads and may not see an error in the disposition below unless the error is glaring; or 2) there exists a self-serving default rule to affirm because otherwise there would be more work, which would require the commitment of scarce judicial resources. These possibilities need to be considered, yet thus far, they have not been systematically explored.²⁰

19. See *infra* note 133 (providing statistics of summarily dismissed cases by the Second, Seventh, and Tenth Circuit Courts of Appeals).

20. For a recent treatment of the question of why affirmance rates are so high in the federal circuit courts, see generally Tracey E. George & Chris Guthrie, *The Futility of Appeal*:

II. *The Problems with Unpublished, Nonprecedential, and Uncitable Opinions*

The rising tide of unpublished, nonprecedential, and often uncitable dispositions in appellate cases is a cause of concern. Courts administer justice. The sine qua non of justice is the transparent and consistent administration of the rule of law. If like cases are not decided in a like manner in an open and public process, it is a danger signal that perhaps justice is not being done.²¹ And if courts conceal their dispositions from litigants, or forbid litigants from relying on them or even citing them, it suggests that the "danger signal" may not be a false alarm. We recognize, and address in Part II, the severe resource limitations facing the appellate courts. But resource limitations, no matter how severe, cannot justify the imposition of strict rules that forbid even the citation of opinions issued by federal courts—even if the court deems the opinion unworthy of citation.

Here, we 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. At present, four circuits—the Second,²² Seventh,²³ Ninth,²⁴ and Federal Circuits²⁵—impose outright prohibitions on the citation of unpublished opinions (except in related cases). Five other circuits—the Fourth,²⁶

Disciplinary Insights into the "Affirmance Effect" on the U.S. Courts of Appeals, 32 FLA. ST. U. L. REV. 357 (2005). Unfortunately, for our purposes, George and Guthrie, while noting that the affirmance rates for unpublished opinions are significantly higher than those for published opinions, do not explore the causal reasons for this difference. *See id.* at 362 (noting only that "we can infer that [the affirmance rate of unpublished opinions] is much higher" but failing to offer causal reasons).

21. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987) (discussing the virtue of precedential constraint).

22. *See* 2D CIR. R. 0.23 ("Since these statements [in unpublished opinions] do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court."); FED. CIR. R. 47.6 ("Any opinion or order so designated [as nonprecedential] must not be employed or cited as precedent.").

23. *See* 7TH CIR. R. 53(e) (stating that unless used to support a claim of res judicata or claim preclusion, "no unpublished opinion or order of any court may be cited in the Seventh Circuit if citation is prohibited in the rendering court").

24. *See* 9TH CIR. R. 36-3(b) (stating that "[u]npublished dispositions and orders of this Court may not be cited to or by the courts of this circuit except" in circumstances going to issue or claim preclusion, for factual purposes (double jeopardy), or in a request for publication).

25. *See* FED. CIR. R. 47.6 ("Any opinion or order so designated [as nonprecedential] must not be employed or cited as precedent.").

26. *See* 4TH CIR. R. 36(c) (stating that citation of unpublished opinions is "disfavored,

Fifth,²⁷ Sixth,²⁸ Eighth,²⁹ and Tenth³⁰ Circuits—affirmatively discourage citation of unpublished opinions by saying that their citation is "disfavored" or that unpublished opinions should not "generally" or "normally" be cited because they carry no precedential weight. Only four circuits—the First,³¹ Third,³² Eleventh,³³ and D.C.³⁴ Circuits—neither prohibit nor openly discourage the citation of unpublished opinions, although each of these circuits, like their sister circuits, admonish litigants that unpublished opinions have no precedential value.

The firestorm over circuit court publication practices was ignited by an August 2003 proposal by the Advisory Committee on Appellate Rules of the United States Judicial Conference Committee.³⁵ The Committee proposed to amend the Federal Rules of Appellate Procedure by adding a new provision, Rule 32.1, that would bar the courts of appeals from enacting rules forbidding the citation of unpublished opinions for their persuasive value or for any other reason.³⁶ Nothing in the proposed rule would force the circuits to abandon their uniform position that "unpublished" opinions are nonprecedential.³⁷

except for the purpose of establishing *res judicata*, estoppel, or the law of the case").

27. See 5TH CIR. R. 47.5.3 ("[A]n unpublished opinion should normally be cited only when the doctrine of *res judicata*, collateral estoppel, or law of the case is applicable.").

28. See 6TH CIR. R. 28(g) (stating that citation of unpublished opinions is "disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case").

29. See 8TH CIR. R. 28A(i) ("Unpublished opinions . . . are not precedent and parties generally should not cite them.").

30. See 10TH CIR. R. 36.3(B) ("Citation of an unpublished decision is disfavored.").

31. See 1ST CIR. R. 36(c) (stating that "a panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion").

32. See 3D CIR. I.O.P. 5.7 (stating that unpublished "opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing").

33. See 11TH CIR. R. 36-2 (stating that "unpublished opinions are not considered binding precedent").

34. See D.C. CIR. R. 36(c)(2) (stating that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition"). Although the D.C. Circuit does not forbid citation of its unpublished opinions, it does not post them on its website, making it difficult for litigants and researchers to find these opinions. The court does permit the publication of its nonprecedential opinions in the Federal Appendix. See, e.g., *Westine v. Sawyer*, 48 Fed. Appx. 794 (D.C. Cir. 2002) (*per curium*) (appearing in the Federal Appendix despite nonprecedential status).

35. For a summary of the comments received, see generally Memorandum from Patrick J. Schiltz, Reporter, Advisory Committee on Appellate Rules, to Advisory Committee on Appellate Rules (Mar. 18, 2004) [hereinafter Schiltz Memorandum] (on file with the Washington and Lee Law Review).

36. See *id.* at 30 (setting forth the complete text of proposed Rule 32.1).

37. See *id.* (stating that circuits may not restrict or forbid citation to unpublished opinions but failing to address the precedential value of such opinions).

Nonetheless, the Committee's Reporter, Professor Patrick Schiltz of St. Thomas Law School, remarked at a Committee hearing that the proposal is "very controversial, and rules that are very controversial rarely take the quickest path."³⁸ As is detailed in Professor Schiltz's contribution to this symposium, he, if anything, underestimated the intensity of the opposition to the proposal, spearheaded by court of appeals judges, especially those in the Ninth Circuit.³⁹ Even though the Advisory Committee voted seven to two in favor of the amendment at its April 2004 meeting, the Committee's action was greeted with intense objection from circuit judges. Because of the opposition, the Committee agreed to put off further consideration of the issue pending a thorough study by the Federal Judicial Center of the objections.⁴⁰ The Center issued a preliminary report on April 14, 2005, concluding that the proposed rule would not have the adverse effects on judicial efficiency critics feared.⁴¹ On the basis of the report, in April 2005, the Committee once again voted seven to two to approve the proposed rule.⁴² In June 2005, the Committee on Rules and Practice of U.S. Courts (commonly referred to as the "Standing Committee") voted to approve the amendment as well.

That, of course, is not the end of the process. Under the Rules Enabling Acts,⁴³ the amendment must surmount numerous hurdles before it can take effect. One hurdle, approval by the Judicial Conference of the United States, was overcome at the Conference's meeting on September 20, 2005.⁴⁴ The next step in the process is referral to the Supreme Court, which has the statutory authority to prescribe rules of procedure for the federal courts.⁴⁵ Assuming

38. Pether, *supra* note 7, at 1471 (quoting Stephanie Francis Cahill, *Don't Issue Citations for Citations*, A.B.A. J. EREPORT, Dec. 13, 2002, available at 1 No. 47 ABAJEREP 1 (Westlaw)).

39. See Schiltz Memorandum, *supra* note 35, at 1 (stating that approximately 80% of the comments opposed to proposed Rule 32.1 were received from judges, clerks, and lawyers in the Ninth Circuit).

40. See *id.* at 89 (reporting the vote); see also How Appealing, <http://legalaffairs.org/howappealing/> (Apr. 14, 2004, 16:04 EST) (noting the action taken by the Committee).

41. TIM REAGAN ET AL., FED. JUDICIAL CTR., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT (2005) [hereinafter FJC PRELIMINARY REPORT], available at [http://www.fjc.gov/public/pdf.nsf/lookup/Citatio2.pdf/\\$File/Citatio2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Citatio2.pdf/$File/Citatio2.pdf).

42. See Draft Minutes of the Spring 2005 Meeting of the Advisory Committee on Appellate Rules (Apr. 18, 2005), available at <http://legalaffairs.org/howappealing/AppellateRulesCmteApr2005DraftMinutes.pdf>.

43. Rules Enabling Acts, 8 U.S.C. §§ 2071, 2075, 2077 (2000).

44. Judicial Conference Approves Rule Changes on E-Discovery, Unpublished Opinion Citation, 74 U.S.L.W. 2168 (Sept. 27, 2005).

45. See 28 U.S.C. § 2072(a) (2000) ("The Supreme Court shall have the power to

Supreme Court approval, the amendment then must survive a "report and wait" procedure that gives Congress at least seven months to reject, modify, or defer the amendment.⁴⁶ Even if the road ahead is clear for passage of the amendment, the earliest it can take effect is December 1, 2006.⁴⁷ It remains to be seen, however, whether the fierce judicial opposition that delayed the Advisory Committee's action on the proposal will place additional roadblocks in the amendment's path.⁴⁸

Meanwhile, the academic community has long criticized the restrictive publication practices of appellate courts, and the criticism intensified once the Committee issued its proposal.⁴⁹ These scholars contend that, in Track Two

prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."). Under 28 U.S.C. § 2073, advisory committees forward their recommendations to the Committee on Rules of Practice and Procedure, commonly referred to as the Standing Committee. *See id.* § 2073(b) (2000) (stating that "[s]uch standing committee shall review each recommendation of any other committee so appointed"). The Standing Committee meets to determine whether to approve proposed amendments to the rules. *See id.* (stating that the "standing committee shall . . . recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee"). Amendments that are approved, with or without revision, are then sent to the Judicial Conference of the United States. *Id.* If approved by the Conference, the amendments are transmitted to the Supreme Court, which has the authority to prescribe the federal rules, subject to a statutory waiting period. *See id.* § 2074 (2000) ("The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law."). In other words, amendments approved by the Supreme Court are then transmitted to Congress by May 1 under a "report and wait" procedure that provides that if Congress does not enact legislation to reject, modify or defer the rules, the amendments take effect on December 1. For a detailed discussion of this process, see ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL RULEMAKING: THE RULEMAKING PROCESS (2004), <http://www.uscourts.gov/rules/procedure/sum.htm>.

46. *See* 28 U.S.C. § 2074 (2000) (describing "report and wait" procedures).

47. *See id.* (establishing a timeline for congressional approval).

48. Before the Rules Committee made its proposal, this battle was also played out in the courts, with both the Eighth and Ninth Circuits entertaining claims that restrictions on publication and citation violated the First Amendment. The Eighth Circuit initially held its noncitation rule unconstitutional. *See Anastasoff v. United States*, 223 F.3d 898, 905 (8th Cir. 2000) (holding unconstitutional an Eighth Circuit rule that provided that an opinion marked unpublished is not precedent). However, it later vacated that opinion as moot. *See Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000) (stating that constitutionality of the noncitation rule is an open question because an earlier opinion concerning the rule was vacated for mootness). The Ninth Circuit found its noncitation rule constitutional. *See Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (concluding that 9TH CIR. R. 36-3, which declares that unpublished opinions are not binding precedent and are not to be cited in briefs before the court, is constitutional).

49. There are some commentators who think that critics overstate the problem of unpublished opinions and the potential for judicial misbehavior. *See, e.g.*, Stephen L. Wasby,

cases, the courts have largely abandoned the cornerstones of appellate decision-making: full consideration of all issues raised on appeal, adequate oral argument and briefing opportunities, well-reasoned published dispositions, and direct involvement of Article III judges in every stage of the process.⁵⁰ Critics argue—and we largely agree—that in abandoning these safeguards the courts have (1) created "secret law" or at least inaccessible law, (2) unleashed a corresponding erosion of judicial precedent as a foundation of the common law, (3) sacrificed the quality of judicial analysis in not-for-publication cases, (4) undermined the accountability of appellate courts to the bar and the public, and (5) engaged in a host of First Amendment, Due Process, and Equal Protection violations by barring citation.⁵¹

We will not repeat those objections in detail here. We write to emphasize concerns about accountability that have not been explained fully in the past or do not stand out in more far-reaching attacks on citation and publication restrictions. In our view, the signal defect in the practice of disposing of cases in unpublished, nonprecedential opinions is that it provides incentives for strategic game-playing by appellate courts and sophisticated appellate lawyers, and that fact alone counsels against the practice. We will begin with the courts.

A. *The Courts and Strategic Behavior*

To us, the main vice of noncitation rules is that they allow courts to engage in ad hoc decision-making and avoid accountability for so doing. The widespread use of unpublished, nonprecedential opinions provides incentives to appellate judges to insulate from en banc and Supreme Court review decisions that are controversial, unpopular, deviate from or even conflict with circuit precedent, or are inconsistent with the judge's ideological views. In other

Unpublished Decisions in the Federal Courts of Appeal: Making the Decision to Publish, 3 J. APP. PRAC. & PROCESS 325, 336 (2001) (suggesting that the proper use of guidelines for when and when not to publish tempers much of the criticism of the decision not to publish an opinion); Stephen L. Wasby, *Unpublished Decisions in the Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 123–24 (2004) (arguing that the process through which an opinion becomes unpublished answers many of the objections of critics of nonpublication). However, our impression is that they are few in number.

50. For a discussion, see generally other pieces in this Symposium.

51. See, e.g., Richman & Reynolds, *New Certiorari*, *supra* note 4, at 281–86 (describing the important functions that published opinions perform and the corresponding negative consequences of nonpublication); Pether, *supra* note 7, at 1483–1528 (arguing that nonpublication creates more problems than it solves); Greenwald & Schwarz, *supra* note 7, at 1155–59 (arguing that "the exposition and refinement of the law that occur through the issuance of reasoned opinions have significant and potentially long-lasting public benefits").

words, the rules remove an important check on Article III appellate judges who are subject to few meaningful constraints on their power. A key assumption that we make here, as does almost everyone else at this symposium, is that precedent actually constrains judges.⁵² If, however, precedent does not impose meaningful constraints on judges—as an extreme realist position would suggest—then all of this chest beating over the designation of opinions as citable or uncitable is beside the point.

The extreme realist position aside, there is little question that unpublished decisions are largely immune from further review. After all, at least in theory, these opinions are not published, and hence are not precedential, because they are routine dispositions that do not "make" law.⁵³ So we begin with the strong

52. Our political science colleague, David Klein, points out in his contribution to the symposium that before we expend great energy arguing over whether judges are appropriately designating opinions as citable or not (roughly translating into precedential or not), it is important to determine whether judges are actually constrained by precedent. See David E. Klein, *Unspoken Questions in the Rule 32.1 Debate: Precedent and Psychology in Judging*, 62 WASH. & LEE L. REV. 1709, 1713–15 (2005) (discussing how much and why judges actually rely on nonbinding precedent).

53. This justification does not hold water for us, even though the lack of meaningful empirical testing of the matter has meant that the debate has been largely conducted with reference to anecdotal evidence. That said, even appellate judges have recognized that more than a few unpublished decisions address important questions of law. See, e.g., Arnold, *supra* note 10, at 224 (stating that "many cases with obvious legal importance are being decided by unpublished opinions"); Boggs & Brooks, *supra* note 10, at 18–22 (arguing that even cases that do not create new legal rules often involve important legal issues in the application of old rules). Moreover, as the FJC Preliminary Report confirms, judges feel unconstrained by noncitation rules they have imposed on counsel and routinely cite unpublished opinions in both published and nonpublished opinions. FJC PRELIMINARY REPORT, *supra* note 41, at 3–10 (surveying the opinion of judges concerning unpublished opinions). Finally, as we point out *infra*, although the Supreme Court rarely reviews unpublished rulings, a number of exceptionally important Supreme Court cases came from unpublished circuit court decisions. See Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 230–31 (2001) (discussing Supreme Court cases that arose out of unpublished opinions). These cases include an important decision on the scope of the Copyright Act, see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363–64 (1991) (holding that a telephone directory did not meet the constitutional or statutory requirements for copyright protection); a pivotal case examining the First Amendment rights of public employees, see *Connick v. Meyers*, 461 U.S. 138, 154 (1983) (holding that the discharge of a former district attorney did not violate the attorney's constitutionally protected right of free speech); a seminal case on the tax-exempt status of charitable organizations engaged in race discrimination, see *Bob Jones Univ. v. Simon*, 416 U.S. 725, 749 (1974) (holding that revocation of tax-exempt status did not necessarily infringe the constitutionally protected free exercise of religion by the institution); and a landmark Free Exercise Clause case, see *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 546–47 (1993) (holding that ordinance that prohibited ritual slaughter of animals did not serve a government interest that justified the targeting of religious activity). As Professor Hannon points out, it is hard to see how any of these cases could have been deemed "routine" or to involve the application of "settled law" to the particular

presumption that cases decided without a published opinion are far too unimportant to command the attention of a full en banc court, let alone the Supreme Court.

Possible en banc review is all but precluded by an array of circuit and appellate rules. First, as noted above, every circuit has enacted a local rule that explicitly states that unpublished opinions are not precedential.⁵⁴ Because unpublished decisions have no legal consequence (except their impact on the parties), it is hard to imagine a court of appeals expending the considerable resources required by en banc review to reconsider a legally inconsequential decision. Second, several circuits acknowledge what we suspect is a widespread practice: in contrast to published opinions, unpublished opinions are not circulated to all of the circuit's judges in advance of issuance to ensure consistency with circuit law.⁵⁵ As a result, the other circuit judges are not systematically made aware of unpublished decisions, and there is no formal mechanism by which the judges of a circuit provide a check on their colleagues. Third, the Federal Rules of Appellate Procedure, and local rules enacted by the circuits, make clear that en banc review is disfavored and available only when such consideration "is necessary to secure or maintain uniformity of the court's decisions," or "the proceeding involves a question of exceptional importance."⁵⁶

facts of the case. See Hannon, *supra*, at 225–26 (noting that nonpublication of opinions may hide important circuit splits on key legal issues).

For a treatment of the limited literature on court compliance with internal rules regarding the designation of opinions for publication, see David Law, *Strategic Judicial Lawmaking: An Empirical Investigation of Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 824–25 (2005) (noting that while some (but not all) of the early studies on publication practices in the 1970s concluded that courts were largely following their own publication rules, recent research points in the other direction). The classic empirical work in political science on publication practices and compliance with internal court rules was done by Professor Songer. See, e.g., Donald Songer, *Criteria for Publication in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 311 (1990) (finding significant variance between the formal rules and indications from actual practice).

54. *Supra* notes 22–34 and accompanying text.

55. See, e.g., 3D CIR. I.O.P. 5.5.4 (acknowledging that "[d]rafts of unanimous not precedential opinions do not circulate to non-panel judges"); 6TH CIR. I.O.P. 206 (stating that "all judges receive copies of any proposed *published* opinions") (emphasis added). *But see* D.C. CIR. R. 36(c)(1) ("An opinion . . . which does not satisfy any of the criteria for publication . . . will nonetheless be circulated to all judges on the court prior to issuance.").

56. FED. R. APP. P. 35(a); see also 1ST CIR. R. 35 ("Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service."); 3RD CIR. R. 3.4 ("Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigorous requirements of FRAP 35."); 4TH CIR. R. 36(a) ("A judge may file a published opinion without obtaining all acknowledgments [of all other members of the Court] only if the opinion has been in circulation for ten calendar days."); 5TH CIR. R. 35.1 ("Each request for en banc consideration

No case decided in an unpublished opinion can meet these criteria. Unpublished decisions are by definition nonprecedential, and thus they play no role in securing or maintaining the uniformity of the court's decisions (which, critics point out, is precisely the problem).⁵⁷ And because the designation "unpublished" signifies that the opinion addresses matters of unexceptional importance, that criterion too can rarely, if ever, be met. We are unaware of any study that systematically looks at the extent to which unpublished opinions have merited en banc review, but we suspect that such review is a rarity or, in some circuits, nonexistent.⁵⁸

must be studied by every active judge of the court and is a serious call on limited judicial resources."); 7TH CIR. R. 53(d)(2) ("Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish."); 8TH CIR. R. 35A ("The court may assess costs against counsel who files a frivolous petition for rehearing en banc deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously.").

57. See FJC PRELIMINARY REPORT, *supra* note 41, at 87 (presenting a Ninth Circuit judge's reasons for favoring the retention of the noncitation rule). The judge stated:

Often we do not call a case for a vote for a rehearing *en banc* because, although wrongly decided by the panel, it does not involve Rule 35 and Rule 40 issues [cases presenting unsettled questions of law]. And it will only affect the parties. If all memorandum dispositions are to be cited, the number of en banc calls will surely rise.

Id.

58. To test this theory, we examined the en banc rulings of the Third, Seventh, and D.C. Circuits from January 1, 1997, to June 1, 2005, and found no en banc ruling issued by either the Seventh or D.C. Circuit that reviewed an unpublished panel ruling. During the same time period, three Third Circuit en banc rulings overturned unpublished panel opinions. See *DeHart v. Horn*, 227 F.3d 47, 61 (3d Cir. 2000) (holding that an inmate's "sincerity and the religious nature of his dietary request establishes that he has a constitutionally protected interest"); *Coss v. Lackawanna County Dist. Attorney*, 204 F.3d 453, 467 (3d Cir. 2000) (finding "no parallel between the case at bar and those cases where courts have determined that states should be entitled to retry the petitioner"); *United States v. Askari*, 159 F.3d 774, 780 (3d Cir. 1997) (holding that the best course, "in light of the sharp disagreements . . . over the meaning of a number of still relevant terms, is to remand to the district court so that it can resentence in light of the Amended [Sentencing] Guideline"). In *Horn*, the en banc court vacated an unpublished panel decision, *DeHart v. Horn*, 2000 U.S. App. LEXIS 114 (3d Cir. Jan. 3, 2000), that upheld the dismissal of a prisoner's claim that prison officials had unconstitutionally interfered with his right to practice his religion. See *Horn*, 227 F.3d at 61 (reversing the district court). In *Coss*, the en banc court vacated an unpublished panel decision, *Coss v. Lackawanna County Dist. Attorney*, 1999 U.S. App. LEXIS 14209 (3d Cir. June 28, 1999), and upheld the district court's denial of habeas relief. See *Coss*, 204 F.3d at 467 (remanding to the district court with instructions to issue a writ of habeas corpus). The Supreme Court later reversed the Third Circuit. See *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 408 (2001) (reversing the lower court). And in *Askari*, the court reheard the case en banc because a member of the initial panel called for en banc rehearing, pointing out that Third Circuit law was in conflict with the law in other circuits. See *Askari*, 159 F.3d at 780 ("The district court deserves another

The possibility of Supreme Court review is also exceedingly remote—even more remote than usual. According to one study, the Supreme Court reviewed unpublished opinions only twelve times between 1974, when the practice of using unpublished opinions began in earnest,⁵⁹ and the end of the October Term of 2000—in other words, fewer than one case every other Term.⁶⁰ Though it appears that the Court may be starting to review unpublished decisions with somewhat greater frequency, it is still more likely that unpublished decisions will not be reviewed.⁶¹

We recognize that although unpublished opinions are, as a practical matter, insulated from further judicial review, this does not mean that courts use unpublished opinions for strategic or improper purposes. But there are ample grounds for concern. For one thing, a number of judges have suggested that unpublished opinions are breeding grounds for abuse. For example, former Chief Judge of the D.C. Circuit Judge Patricia Wald candidly observed that:

A double-track system allows for deviousness and abuse. I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug, though most will not stay put for long.⁶²

opportunity to make this determination.”)

59. See Reynolds & Richman, *Price of Reform*, *supra* note 7, at 574 (studying circuit publication practices).

60. See Hannon, *supra* note 53, at 230–31 (listing the twelve cases).

61. It appears that during the 2001–2004 Supreme Court Terms, the Court heard twelve cases that had been decided by federal courts of appeals in unpublished opinions. In the October Term of 2001, the Court heard *Holmes Group v. Vornado Air Circulation System, Inc.*, 535 U.S. 826 (2002), and *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). In the October Term of 2002, the Court heard *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Massaro v. United States*, 538 U.S. 500 (2003); *Clay v. United States*, 537 U.S. 522 (2003); and *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003). In the October Term of 2003, the Court heard *Holland v. Jackson*, 542 U.S. 649 (2004); *United States v. Flores-Montano*, 541 U.S. 149 (2004); *Muhammad v. Close*, 540 U.S. 749 (2004); and *Banks v. Dretke*, 540 U.S. 668 (2004). And in the October Term of 2004, the Court heard *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2004), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

62. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995). Judge Wald, however, saw no option but to continue the practice of issuing nonprecedential opinions. As she put it, “Time does not allow for the same careful, thoughtful analysis and writing to be poured into all cases.” *Id.* For further support for the proposition that the use of unpublished opinions leads to strategic behavior by judges, see Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 97–103 (2001) (discussing the “charge that unpublished opinions allow judges to engage in strategic behavior”

For another, there are a number of cases resolved by unpublished opinion that so clearly merit full treatment by a court that one must wonder whether, to borrow Judge Wald's phrase, the court swept "troublesome issues under the rug." Consider three examples.

First, the Supreme Court made precisely this observation in *United States v. Edge Broadcasting Company*,⁶³ one of the most important cases decided under the "commercial speech" doctrine. In *Edge Broadcasting*, the Court, in a highly fractured series of opinions, reversed a Fourth Circuit unpublished ruling affirming a district court decision striking down, on First Amendment grounds, a federal statute prohibiting the broadcast of lottery advertisements except by stations licensed to broadcast in states that conduct lotteries.⁶⁴ As the Court put it, "[w]e deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion."⁶⁵ The complexity of the issue in *Edge Broadcasting* is underscored by the fact that the Court has more recently addressed and upheld First Amendment challenges to a related statute that broadly prohibited the broadcast advertising of lotteries and casino gambling.⁶⁶

Consider next the Fifth Circuit's unpublished disposition in *Smith v. Crystian*,⁶⁷ a multimillion dollar class action settlement that resolved disputed equitable and damage claims based on allegations that the defendant had engaged in predatory lending practices.⁶⁸ Although the lawsuit sought both money damages and equitable relief, the district court certified the class under Rule 23(b)(1)(A), which provides for mandatory, non-opt-out class certification

and citing supporting and opposing authorities); Greenwald & Schwarz, *supra* note 7, at 1135 (noting that "practitioners harbor suspicions that noncitable opinions are used to paper over poorly reasoned, result-driven outcomes"). See generally Reynolds & Richman, *Studying Deck Chairs*, *supra* note 3, at 1291 (defining track-two justice as "decision without oral argument in a brief, unpublished opinion drafted by staff attorneys"); Richman & Reynolds, *New Certiorari*, *supra* note 4, at 278 (reviewing circuit court "shortcuts to decision making").

63. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993) (noting that the lower court applied questionable reasoning and expressing surprise that the court of appeals would affirm the unconstitutionality of a federal statute in an unpublished opinion).

64. See *id.* at 436 (reversing the judgment of the court of appeals because the challenged statute did "not violate the First Amendment").

65. *Id.* at 425 n.3.

66. See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195–96 (1999) (unanimously striking down federal law forbidding the broadcast advertising of lotteries and casino gambling where such gambling was legal).

67. *Smith v. Crystian*, 91 Fed. Appx. 952 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 972 (2005).

68. See *id.* at 956 (affirming the district court's approval of the settlement agreement).

when "inconsistent or varying adjudications . . . would establish incompatible standards of conduct for the party opposing the class."⁶⁹ Certification under this provision of Rule 23 is rare because the blanket denial of opt-out rights raises thorny due process questions, especially where the class is seeking money damages.⁷⁰ A closely related problem arises with some frequency in cases certified under Rule 23(b)(2), which permits certification in cases seeking class-wide injunctive relief. Classes certified under Rule 23(b)(2) often dispense with the actual notice and opt-out rights that are generally required when money damages are sought. Permitting non-opt-out class actions to be certified under Rule 23(b)(2) when the relief sought takes the form of both money damages and injunctive relief is controversial, raising due process questions.⁷¹ The Supreme Court has twice granted review in cases presenting those questions, but each time it dismissed the writ as improvidently granted.⁷² And the circuit courts have reached a variety of conflicting conclusions about the scope of a class member's due process right to opt out of classes when the remedies sought include both money damages and injunctive relief under Rule 23(b)(2).⁷³

69. Fed. R. Civ. P. 23(b)(1)(A).

70. See generally *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (stating that "the policy of avoiding serious constitutional issues" counsels against applying Rule 23(b)).

71. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (holding that absent class members seeking "wholly or predominantly" money judgments must be provided notice, adequate representation, and the opportunity to opt out of the class).

72. See *Adams v. Robertson*, 520 U.S. 83, 92 (1997) (citing an interest in comity and the value of a fully developed factual and legal record as justifications for dismissing the writ as improvidently granted); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121-22 (1994) (dismissing the writ as improvidently granted because it was not clear that resolving the constitutional question would "make any difference even to these litigants").

73. See Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 207 (stating that the courts of appeals are "all over the map concerning what due process requires for mandatory classes"). The Ninth Circuit requires that opt-out rights be provided to any class members seeking substantial damages even when the class also claims injunctive relief. See e.g., *Brown v. Ticor Title Ins. Co.*, 982 F.2d 392, 396 (9th Cir. 1992) (finding that due process requires the provision of opt-out rights to any class members seeking substantial damages when the class also claimed injunctive relief), *cert. dismissed*, 511 U.S. 117 (1994); *Molski v. Gleich*, 318 F.3d 937, 950-51 (9th Cir. 2003) ("In recent cases, we have indicated that certification of a mandatory class may be appropriate even when monetary damages are involved."). The Seventh Circuit has gone further than the Ninth, requiring opt-out rights "whenever possible." *Jefferson v. Ingersoll Int'l Corp.*, 195 F.3d 894, 899 (7th Cir. 1999). Other circuits permit splitting actions into separate mandatory and opt-out classes (so-called "hybrid" actions). See, e.g., *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 166-68 (2d Cir. 2001) ("The Class Plaintiffs argue that the district court erred in refusing to bifurcate the pattern-or-practice claim and certify the liability stage of the claim for (b)(2) class treatment. . . . We agree."), *cert. denied*, 535 U.S. 951 (2002); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("[W]e

Notwithstanding the disarray in this area of the law and the absence of any controlling Fifth Circuit authority,⁷⁴ in *Crystian*, the district court certified a mandatory, non-opt-out class under Rule 23(b)(1)(A) over the objection of over 1200 class members, many of whom had filed individual actions for money damages.⁷⁵ The Fifth Circuit affirmed the district court's certification order in a brief, unpublished, per curiam opinion that does not cite, let alone address, relevant authorities.⁷⁶ The upshot of the court's ruling is to strip objecting class members of any right to disassociate from the class and independently pursue their damages claims. And because the panel designated the opinion as unpublished, the petition for rehearing en banc filed by the objecting class members was all but doomed, as was their petition for a writ of certiorari to the Supreme Court.⁷⁷

conclude that the plaintiff class's damages claim predominates over its claim for equitable relief such that the district court abused its discretion by not exempting the damages claim from class treatment under Fed.R.Civ.P. 23(b)(2)."); *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997) ("[T]he court may adopt a 'hybrid' approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to claims for monetary relief . . ."). In marked contrast, several circuits encourage mandatory, non-opt-out class certification even when damages claims are present. *See, e.g., Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981) ("We therefore agree . . . that an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3) which serve no useful purpose under (b)(2)."); *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989) ("If an action can be maintained under (b)(1) and/or (b)(2), and also under (b)(3), the court should order that the suit be maintained . . . under (b)(1) and/or (b)(2) . . . so that the judgment will have *res judicata* effect as to all the class. . ."), *cert. denied*, 493 U.S. 959 (1989); *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989) ("[W]hen class certification would be appropriate under either §§ 23(b)(1) or (b)(3) of Fed.R.Civ.P. 23, the former section should control."); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) ("When either subsection (b)(1) or (b)(2) is applicable, however, (b)(3) should not be used, so as to avoid unnecessary inconsistencies and compromises in future litigation."), *cert. denied*, 517 U.S. 1156 (1996).

74. For the only even arguably relevant Fifth Circuit authority, see *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 425 (5th Cir. 1998) (holding that the "predominance" inquiry under Rule 23(b)(2) may be met only when the money damages sought "flow directly from liability to the class as a whole on claims forming the basis of the injunctive or declaratory relief"). Though the opinion in *Smith v. Crystian* cites *Allison* in passing, it did not apply that test in upholding the district court's certification of a Rule 23(b)(1)(A) class. *See Smith v. Crystian*, 91 Fed. Appx. 952, 954–55 (5th Cir. 2004) (citing *Allison* to establish the limited nature of review of a district court's certification of a class action suit), *cert. denied*, 125 S. Ct. 972 (2005).

75. *See Smith v. Crystian*, 91 Fed. Appx. at 954 (finding that the district court's certification of a mandatory class under Federal Rule of Civil Procedure 23 was proper).

76. *See id.* at 955 ("In the instant case, the district court applied the proper standard and found that the settlement was fair and reasonable.").

77. *See Crystian v. Tower Loan of Miss. Inc.*, 125 S. Ct. 972, 972 (2005) (denying certiorari). We do not mean to single out the Fifth Circuit for criticism. The Sixth Circuit also

We cite *Crystian* because it crystallizes our concerns about unpublished and uncitable opinions. Here, a panel of the Fifth Circuit was able effectively to insulate from any review a decision in a highly controversial and unsettled area of the law affecting the constitutional rights of over a thousand people.⁷⁸ There can be no plausible claim that *Crystian* was "routine" or met the criteria for cases suitable for disposition without a published opinion. Surely it did not involve the application of settled law to the unique facts of the case; there is no controlling precedent on the issue in the Fifth Circuit.⁷⁹ The absence of any legitimate reason for resolving the case in an unpublished opinion gives rise to speculation that the panel did so for strategic reasons—perhaps to give a green light to mandatory, non-opt-out classes, even where the class seeks money damages, and avoid subjecting that judgment to the probing eyes of their colleagues on the circuit or the Supreme Court.⁸⁰

As our final example, consider the Ninth Circuit's mea culpa in *United States v. Rivera-Sanchez*.⁸¹ Like other circuits that employ a high volume of unpublished opinions, the Ninth Circuit takes the view that unpublished opinions may not be considered precedential because they articulate no new

dodged a difficult class action question by using an unpublished decision to dispose of an appeal of a major nationwide class action settlement on the ground that the objectors had not intervened in the action below. See *Bowling v. Pfizer*, 995 F.2d 1066, 1066 (6th Cir. 1993) (dismissing the appeal). In its one-sentence order, the Sixth Circuit did not even cite then-controlling Sixth Circuit law holding that nonintervening objectors had a right to appeal a class settlement. See, e.g., *Sertic v. Cuyahoga, Lake, Geauga & Ashtabula Counties Carpenters Dist. Council*, 459 F.2d 579, 583 (6th Cir. 1972) (concluding that it was an abuse of discretion to deny an interested class member's intervention in an action concerning the class settlement). Since then, the Supreme Court has held that a member of a class who objects to a class action settlement may appeal the district court's approval of the settlement without having first intervened in the action. See *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002) (stating that a "District Court's approval of the settlement" is sufficient to establish a class member's right to an appeal).

78. See *Smith v. Crystian*, 91 Fed. Appx. at 956 (affirming all of the district court's rulings).

79. As noted, *supra* note 74, our independent research did not uncover any Fifth Circuit law on the question presented in *Smith v. Crystian*, let alone a controlling authority.

80. The FJC Preliminary Report confirms that even judges are concerned about the lack of consistency in circuit law that is the byproduct of unpublished opinions. Of 122 judges responding to a poll question that asked them to "best describe[] how often an attorney has cited an unpublished opinion of your court that is inconsistent or difficult to reconcile with a published opinion of your court," 27% of the responding judges said that cited unpublished opinions are "occasionally inconsistent," and 3% of the judges said that they were "often" or "very often" inconsistent. Virtually all judges said that such inconsistency did not occur "often." See FJC PRELIMINARY REPORT, *supra* note 41, at 11 (describing both appellate lawyers' and circuit judges' reactions to the proposed rule change concerning unpublished opinions).

81. See *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1065 (9th Cir. 2000) (affirming defendant's conviction for illegal entry into the United States).

legal standard.⁸² But during the argument in *Rivera-Sanchez*, it became apparent to the panel that the court had not developed a legal standard to answer a question left open by the Supreme Court in *Almendarez-Torres v. United States*.⁸³ Namely, when a district court is faced with a defendant convicted of illegal re-entry after deportation whose indictment refers to both 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2), must the district court re-sentence the defendant or merely correct the judgment of conviction?⁸⁴ Obviously, a defendant would prefer re-sentencing in the hope that his or her sentence would be reduced. Nonetheless, after directing the parties to file briefs addressing unpublished opinions on the point (something that is ordinarily forbidden under Ninth Circuit rules), it became apparent that the Ninth Circuit had issued no fewer than twenty "unpublished memorandum decisions taking different approaches to resolving" the question.⁸⁵ The court's resolution of that issue in *Rivera-Sanchez* is cold comfort to the criminal defendants whose sentences potentially hung in the balance.

The question that arises is whether there is any reason to think that we have done anything but identify a handful of aberrational cases or outliers. We do not think so for the following reason: The system is set up so that if a case gets past the staff attorney screening process and receives review by the full panel of three judges (and their law clerks), the level of scrutiny is so intense that there should be a zero probability that a case raising important unanswered questions of law would receive anything but full treatment in a published opinion. Cases at the margin, where it is unclear whether the issues are really important, may slide through. But no cases of the sort we identified in our examples should escape notice. And assuming that they did not escape notice leaves us with only one conclusion: The judges are intentionally choosing to duck some inconvenient issues.

Is this a completely implausible scenario? We do not think so. Judges are under workload pressures. They cannot devote full attention to all their cases. Inevitably, there are going to be some cases that they prefer to others. For judges who like leisure, there may be a preference for easier rather than harder

82. See *id.* at 1062 (noting that this decision meets the requirements for publication because it "establishes a rule of law that . . . [the Ninth Circuit] had not previously announced in a published decision").

83. *Almendarez-Torres v. United States*, 23 U.S. 224 (1998).

84. See *Rivera-Sanchez*, 222 F.3d at 1062 (noting that different panels of the Ninth Circuit have taken "different approaches to resolving" the question left open by the Supreme Court in *Almendarez-Torres*).

85. See *id.* (listing the unpublished opinions that address the issue left open by the Supreme Court in *Almendarez-Torres*).

cases. For judges who are seeking the attention of politicians making promotion decisions, the preference may be for cases that will provide appropriate signals. For still other judges who want to influence the academy, the preference may be for cases that will allow for innovative solutions to complex problems. The list of motivations that might drive judges to prefer some types of cases to others is nearly endless.⁸⁶ The point is that it is plausible that judges might seek to duck certain cases so as to give themselves more time for other cases or activities. To the extent circuits develop norms under which judges are willing to permit each other to avoid writing published opinions in distasteful cases, a pattern of systematic sweeping under the rug can arise.

The foregoing drives home our concerns about current restrictions on publication and citation practices. They stifle development of the law, they force courts to blind themselves to their own work product, they weaken public confidence in the fairness of courts, and perhaps most importantly, the no-citation rules erode the accountability of life-tenured Article III appellate judges who are subject to few checks on their power other than the watchful oversight of their colleagues.⁸⁷ These are all points that others at the symposium have made. We would like to suggest, however, that the analysis needs to take at least one additional step in terms of examining the potential impact of the above-identified practices on the incentives of appellate lawyers.

B. Lawyers and Incentives for Strategic Behavior

Sophisticated appellate lawyers have incentives to engage in strategic behavior—the two track system demands that they do so. For lawyers representing appellants (or petitioners), the pile on which your client's case is placed—the Track One argument pile, or the Track Two pile for cases disposed of summarily without argument—often determines the case's outcome. Experienced lawyers know the statistics: The chances of obtaining a reversal in a case selected for summary disposition is insignificant—at most a small fraction of the chance of obtaining reversal if the case is given plenary review.⁸⁸

86. For a discussion about how various judicial motives might affect federal district court opinions, see Andrew P. Moriss et al., *Signaling and Precedent in District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 74 (2005) (discussing the process by which a federal district court judge might craft opinions to signal that he or she is a candidate for promotion).

87. See Greenwald & Schwarz, *supra* note 7, at 1158 (noting the "few, if any, checks on life tenured judges").

88. According to statistics compiled by the Administrative Office of U.S. Courts, although the percentage varies considerably depending on the type of case, civil cases are reversed approximately 12% of the time and criminal cases are reversed about 5% of the time. ADMIN.

These lawyers also know that the courts grant oral argument more often in cases presenting novel and important questions of law rather than mundane questions of fact, and they have every incentive to shoehorn their appeals into that mold.

There is no mystery about the kinds of cases in which courts grant oral argument. Rule 34(a)(2) of the Federal Rules of Appellate Procedure permits a court to dispense with argument when "the appeal is frivolous," "the dispositive issue or issues have been authoritatively decided," or the "decisional process would not be significantly aided by oral argument."⁸⁹ Many circuits have promulgated local rules or established internal operating procedures that make clear that argument is generally not granted where "the issue is tightly constrained, not novel, and the briefs adequately cover the arguments," the "outcome . . . is clearly controlled by a decision of the Supreme Court or this Court," or the case will be determined by the "state of the record."⁹⁰ In contrast, argument is granted where "the appeal presents a substantial and novel legal question," when the appeal's resolution "will be of institutional or precedential value," when a "judge has questions to ask of counsel," or when an "important public interest will be affected."⁹¹

These clear-cut (and common-sense) directives on the criteria the courts use to grant argument—and rightly or wrongly, argument is perceived to be an essential step in the path to reversal—encourage experienced appellate lawyers to formulate their appeals in terms that maximize their chance for argument. As the lawyers see it, they face a Hobson's choice. Consider a case in which appellate counsel believes that the court below clearly erred in its fact-finding function and may well have also erred as a matter of law. On one hand, the lawyer can pursue a relatively weak claim based on alleged legal errors and, by so doing, increase the chance the case will be given oral argument, so long as the lawyer can plausibly claim that the legal issues presented are novel or unsettled in the circuit. On the other hand, the lawyer can pursue a stronger fact-based claim, but, in so doing, risk sacrificing the chance of having oral argument. Many appellate lawyers would opt to cast their appeals as presenting

OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.B-5 (2004), *available at* <http://www.uscourts.gov/caseload2004/contents.html>. Although the office does not report the affirmative rates of unpublished opinions as compared to published ones, it is conventional lore among experienced litigators that the chance of obtaining a reversal in cases disposed of without argument by unpublished opinion is slim.

89. See FED. R. APP. P. 34(a)(2) (describing the standards for oral arguments).

90. See, e.g., 3D CIR. I.O.P. § 2.4.1. (describing the criteria for oral arguments), *available at* <http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf>.

91. *Id.* at § 2.4.2.

chiefly legal issues because they take as an article of faith (and the statistics bear this out) that having oral argument is critical to success on appeal.⁹² Even if a lawyer decides to press both issues (and we assume that most would do so), the lawyer still must decide with which issue to lead, thereby giving that argument greater prominence.

The lawyer's strategic decision is further complicated by the argument practices that prevail in each circuit. For example, in some circuits, like the Second Circuit, oral argument for parties represented by counsel (and even some pro se litigants) is granted as a matter of routine.⁹³ In other circuits, like the Fifth and Eleventh, argument is a relative rarity, even for parties represented by counsel.⁹⁴ In those circuits, lawyers know that, in cases in which argument is granted, Article III judges will be actively involved in reviewing and deciding the case, even if the appeal is ultimately resolved in an unpublished opinion. The same is not necessarily true for cases decided without argument. In those cases, the lawyers and litigants have no idea whether the case will be handled by Article III judges or by staff counsel or law clerks in a "black box" process that is opaque to outsiders and may entail only minimal oversight by Article III judges. Most lawyers want to avoid the black box, Track Two process.

There are, in our view, rule of law consequences that flow from this process. Under the two-track system that is used in many circuits, appellate lawyers have incentives to frame their briefs (or at least the questions presented and the statements regarding the necessity for argument) to persuade staff counsel, law clerks, and judges that the case merits oral argument. This means that, if the appellate lawyers are able, they will mold their appeals in ways that present novel or unsettled questions of law, even if they have to reach to do so. That practice has at least two problematic consequences. First, courts are systematically asked to resolve questions of law that, under a different system, would not be presented. And they are often asked to do so in cases that do not present the legal question in the best light, thus distorting our system of precedent-development. Exactly what impact that has had on the development of the law is unknown and perhaps unknowable, but it is a question worth exploring. Second, and related, the foregoing game-playing opportunities

92. See *infra* note 133 (presenting statistical information concerning summarily dismissed cases in the Second, Seventh, and Tenth Circuit Courts of Appeals).

93. See Mitu Gulati & C.M.A McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 223 (1998) (reporting that, in 1998, 61.3% of the cases before the Second Circuit were granted oral argument).

94. See *id.* (reporting that, in 1998, the Fifth and Eleventh Circuit granted oral argument in 31.2% and 32.2% of cases respectively).

magnify the advantages that already accrue to parties represented by counsel, especially experienced appellate counsel. That too has rule of law implications that should be explored, especially since, as we discuss later, it appears that cases involving legal claims by people who cannot afford lawyers constitute a significant percentage of those cases resolved by unpublished opinion.⁹⁵

Is this strategic dilemma common? We believe it is but lack empirical evidence to support our intuition. Our prediction is that if judges favor certain types of cases more than others and are thereby more likely to look at them carefully, as opposed to delegating them to staff lawyers, lawyers will use this information to modify their litigation strategies to maximize their chances of winning their cases. Those modifications in litigation strategies, in turn, have an impact on how precedent develops and even on who wins.

The question then is how to test the strategic lawyer hypothesis. The fact that the circuits vary considerably in their treatment of cases, particularly the so-called less important cases, helps. The circuits have roughly similar internal rules that determine what types of opinions should be published—usually opinions in cases where new precedent will be created. But, as commentators have pointed out, those internal rules seem to translate into starkly different publication practices.⁹⁶ Consider two hypothetical situations. In the Seventh Circuit, hypothetically, the judges themselves may be dealing with the majority of unpublished dispositions.⁹⁷ In other words, Track One and Track Two may

95. See *infra* note 133 and accompanying text (claiming that unpublished opinions dispose disproportionately of cases brought by pro se litigants, prisoners, immigrants, social security recipients, and the disabled). Professor Pether, interpreting the findings of Professors Merritt and Brudney, suggests that forum shopping and manipulation of precedent by repeat-player litigants may result from the inconsistent way with which judges apply publication criteria. See Pether, *supra* note 7, at 1495 (citing Merritt & Brudney, *supra* note 62, at 112–13, 117) (claiming that inconsistent publication criteria encourage forum shopping).

96. See e.g., Merritt & Brudney, *supra* note 62, at 114 n.131 (discussing the predictors of publication for courts of appeals decisions); Robert A. Mead, *Unpublished Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeal*, 91 LAW LIBR. J. 589, 607 (2001) (describing the characteristics of cases resolved by unpublished opinions); Gulati & McCauliff, *supra* note 93, at 159–60 (describing the shortcomings of unsigned opinions and the judicial process that produces them). These differences in publication practices and informal norms seem also to filter down to the district court level. See Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 121–23 (2004) (discussing the latitude that district courts enjoy in publishing opinions).

97. While we are unaware of any study that has specifically examined judicial involvement across the circuits in the drafting of unpublished opinions, it should be possible to use computational linguistic techniques to do such an examination. See Stephen Choi & Mitu Gulati, *Which Judges Write Their Opinions (and Should We Care)?*, 32 FLA. ST. U. L. REV. 1077 *passim* (2005) (employing various tests to discover authorship of judicial opinions). In the course of writing this Article, we examined samples of unpublished dispositions from

essentially be the same in that both get the full attention of an Article III judge. By contrast, in the Eleventh Circuit, hypothetically, it may be that only the small subset of cases in which oral argument is granted receive meaningful attention from an Article III judge. Assuming that these types of stark circuit differences exist, we predict that different types of briefs will appear in different circuits.

In the hypothetical Eleventh Circuit scenario described above, the lawyer who won at the lower court will strive to portray the case as routine, largely involving factual issues, and unworthy of attention—the assumption being that unpublished dispositions that get shuttled to the staff lawyers will inevitably be affirmed. The lawyer on the other side will do the reverse and try to portray that case as involving complex and precedential issues—creating legal issues because there is a better chance of winning (that is, obtaining a reversal) if an Article III judge pays attention to his case. By contrast, in the hypothetical Seventh Circuit scenario, the judges themselves pay attention even if they are going to use an unpublished *per curiam* opinion to dispose of the case. Accordingly, incentives as to what arguments to make are not skewed by the need to first pass a screening mechanism that siphons off some large portion of cases to staff attorneys who almost invariably recommend affirmances and then have those recommendations rubber stamped. Assuming that these kinds of differences in publication norms exist across the circuits, we should see corresponding responses from the lawyers. Lawyers—seeking reversals for their clients in the Eleventh Circuit, knowing that the first hurdle that they need to cross is that of making sure that their case reaches a panel of Article III judges—will invest more effort in suggesting that the case involves important, precedent-creating legal issues than they would in the Seventh Circuit. Further, this differential focus should appear more clearly in areas where the subject matter is presumed, at the outset, to be routine (for example, in cases involving

several circuits. Even our cursory review disclosed signs of stark differences in judges' participation. Take for instance, the Seventh and Eleventh Circuits. In the set of Seventh Circuit dispositions, one sees a wide variation in writing and citation styles. Some opinions even seem to bear the mark of a particular judge such as Frank Easterbrook or Richard Posner, each of whom has a distinctive writing style. The Eleventh Circuit unpublished dispositions, by contrast, are generally brief, formulaic, and dominated by stock phrases explaining the court's decision to affirm such as: "because our independent review of the entire record reveals no arguable issues of merit," and "[w]e find no reversible error in the district court's determination." *See, e.g.*, *United States v. Perry*, No. 04-12065, 2005 U.S. App. LEXIS 15923, at *919 (11th Cir. Aug. 1, 2005) (disposing of case with brief and general language); *United States v. Crockett*, No. 04-15109, 2005 U.S. App. LEXIS 15668, at *915 (11th Cir. July 28, 2005) (same); *United States v. Garces*, No. 04-15112, 2005 U.S. App. LEXIS 15653, at *916 (11th Cir. July 28, 2005) (same); *Ophthalmic Mut. Ins. Co. v. Geller*, No. 05-11305, 2005 U.S. App. LEXIS 15377, at *910 (11th Cir. July 27, 2005) (same).

Social Security appeals as contrasted with cases involving First Amendment issues—with the latter set of cases presumed to involve important issues). Finally, we should also expect that these signs of strategic behavior will show up more in the briefs of the elite appellate lawyers—those used to gaming the system for even the smallest of advantages—than in the briefs of the more ordinary practitioners.⁹⁸

III. *The Perils of Judicial Triage*

The dispute over nonprecedential and noncitable opinions has proceeded as if it were hermetically sealed off from a larger and even more intractable problem—the rise of the caseload of our appellate courts without a commensurate increase in judicial resources.⁹⁹ As noted, judges are among the staunchest defenders of the restrictive publication rules they have developed and implemented.¹⁰⁰ As many judges see it, they have no choice, and people who do not share their views misconceive the gravity of the docket-management problems judges face.¹⁰¹ The judges have a point. The enormity of appellate caseloads precludes judges from giving each case the sort of individualized attention that we presume is the hallmark of appellate justice, let alone from issuing an opinion of publishable quality, written by an Article III judge, in every case.

98. There is the practical question of how to conduct a meaningful comparison of lawyer strategies in the different circuits. One method would be to evaluate the briefs themselves, perhaps starting with those in a few subject areas. A less painstaking and more direct method might be to interview the lawyers themselves. While we suspect that these appellate lawyers may not be willing to give meaningful answers on a survey, in-depth interviews might work. Ideally, of course, one would combine the quantitative and qualitative methods of inquiry, which is something that we are in the process of attempting.

99. Cases have risen over 300% in the last thirty years. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 9 tbl.1.1 (2005) [hereinafter JUDICIAL FACTS AND FIGURES] (setting forth the number of appeals filed from 1988 through 2004), available at <http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf>. The number of judges has increased marginally but not commensurately with the rise in the caseload. See *id.* at 13 tbl.1.3 (setting forth the number of authorized judgeships from 1960 through 2004).

100. See, e.g., Kozinski & Reinhardt, *supra* note 11, at 43–44 (defending the use of unpublished opinions); see also Schiltz Memorandum, *supra* note 35, at 17–19 (noting that the most ardent opposition to the proposed rule comes from court of appeals judges); Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553, 1592–93 (2005) (citing judicial support for unsigned opinions).

101. See Schiltz, *Explaining the Sturm Und Drang*, *supra* note 1, at 1475–80 (describing judicial objections to citation rules).

The numbers tell the story. At present, there are 167 authorized full-time circuit judges, excluding the twelve judges authorized for the Federal Circuit.¹⁰² That number has grown over the decades, from 97 in 1970, to 132 in 1980, to the current 167 in 1995.¹⁰³ For a variety of reasons, many judicial vacancies have gone unfilled for years, resulting in the number of sitting judges being generally fewer than the number of authorized judges. While the number of appellate judgeships has less than doubled over the past thirty years or so, the volume of appellate cases has risen far faster, moving from 11,662 in 1970 to 34,292 in 1986, to 48,322 in 1994, and to over 60,000 in 2002 (excluding the Federal Circuit).¹⁰⁴ To be sure, as a stop gap, circuits can draw on the services of senior judges and district court judges. But there is no dispute that the caseloads of the courts of appeals have grown to the point where notions of individualized judicial attention to each appeal are antiquated and unrealistic.

Perhaps the best way to understand the impact of the explosive caseload growth is to view it from the vantage point of a circuit judge. Take the Ninth Circuit. In 2002, that court disposed of 492 cases per active judge.¹⁰⁵ Assuming judges can reasonably devote 2000 hours a year to the task of judging (an assumption that puts to one side the myriad other responsibilities Article III appellate judges shoulder), a judge would have around four hours per case—four hours to read the briefs and record, to discuss the case with law clerks and colleagues, to hear oral argument, to decide in conference how to resolve the case, and to draft an opinion. That calculation does not include any time for the judge to participate in the consideration of the nearly 1000 other cases on which the judge would sit, where responsibility for drafting the opinion would be shouldered by a colleague. Nor does that calculation take into account the time spent drafting concurring or dissenting opinions. Given the complexity of the cases pending before our appellate courts, the idea that cases can reasonably be adjudicated in a few hours is a nonstarter.¹⁰⁶ And the

102. See 28 U.S.C. § 44 (2004) (setting forth the number of full-time circuit judges); see also RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 51 (5th ed. 2003) (setting forth the number of authorized judgeships).

103. LONG RANGE PLAN, *supra* note 2, at 76 tbl.6.

104. JUDICIAL FACTS AND FIGURES, *supra* note 17, at tbl.1.3.

105. Hon. Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFAIRS, Jan.-Feb. 2005, at 19. Judge Kozinski is referring to dispositions on the merits per active judge; he is not taking into account appeals dismissed for procedural reasons. See *id.* at 19 (referring to cases decided on the merits). In 1970, there were about 130 appeals per judgeship; by 1995 the number had grown to 297. LONG RANGE PLAN, *supra* note 2, at 157.

106. See Charles A. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 957 (1964) (arguing that no federal appeals court judge could handle more than eighty cases per year with reasonable efficiency).

Ninth Circuit was far from the busiest court of appeals; the Eleventh Circuit had that honor, with 843 cases per active judge.¹⁰⁷ That would translate into less than two and a half hours per case.

Judges cannot do the impossible. To address this crushing caseload, it is unsurprising that courts have developed tracking systems to differentiate among cases.¹⁰⁸ There are, of course, those who believe that more sweeping structural reforms are needed. And much thought has been given to find ways to permit appellate courts to better cope with their growing workloads. The Federal Courts Study Committee, appointed by the Chief Justice at the direction of Congress, issued a comprehensive set of recommendations in 1990.¹⁰⁹ These recommendations were, for the most part, embraced by the Committee on Long Range Planning of the Judicial Conference of the United States in 1995.¹¹⁰ The solutions advocated by these committees were far-reaching and involved highly political decisions that are the province of Congress, not the courts, to make. Among their proposals were ones to:

- ❖ Curtail diversity jurisdiction;¹¹¹
- ❖ Impose other restrictions on the subject-matter jurisdiction of federal courts;¹¹²
- ❖ Expand the size of the federal appellate judiciary to correspond to the increase in the appellate caseload;¹¹³

107. Kozinski, *supra* note 105, at 19.

108. Although Judge Kozinski defends the practice of devoting a disproportionate amount of judicial time to the big cases, even though it means "giv[ing] short shrift to small ones," he acknowledges the complexity of determining the category into which a case falls. *See* Kozinski, *supra* note 105, at 19 ("[H]ow close a look [to a case] any judges actually takes is strictly a matter of conscience."). As he put it, "I have found no way to separate the sheep from the goats, except by taking a close look at each case." *Id.*

109. *See generally* FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE [hereinafter STUDY COMMITTEE REPORT] (recommending solutions to the "mounting public and professional concern with federal courts' congestion, delay, expense, and expansion").

110. *See generally* COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (2d prtg. 1995) (presenting a plan that will allow courts to adapt to the "accelerating pace of social changes").

111. *Id.* at 27–32; LONG RANGE PLAN, *supra* note 2, at 89–93.

112. *See, e.g.*, Hon. Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 770–77 (1989) (arguing that cases "should not be assigned or barred from federal courts by entire categories," but judges should use discretion to determine whether cases "within designated categories may proceed to federal court"); *see generally* STUDY COMMITTEE REPORT, *supra* note 109.

113. On occasion, Congress has reviewed proposals to increase significantly the number of active appellate court judges. However, sitting Article III judges have staunchly opposed these proposals. *See* FALLON, *supra* note 102, at 49–50 (providing statistics for federal caseloads and discussing suggestions to fix the problem of an overextended judiciary); Hon. Jon O. Newman,

- ❖ Increase the use of alternative dispute resolution programs;¹¹⁴ and
- ❖ Create Article I courts to handle entire categories of cases, mostly involving fact-intensive disputes over individual rights (discrimination, immigration, and social security cases were commonly mentioned).¹¹⁵

What is significant here is that none of these proposals commanded a political consensus. All were controversial; all had their detractors; none bore fruit. Indeed, despite the efforts of these committees and others to curtail federal jurisdiction, Congress has headed in the opposite direction by adding to, not subtracting from, the workload of federal courts. And judges are not helping matters—many of them resist reform proposals such as those that would increase the number of judges.¹¹⁶ Over time, enthusiasm for sweeping, "cure all" approaches to reforming the federal courts appears to have died

1,000 Federal Judges—The Limit for an Effective Federal Judiciary, 76 JUDICATURE 187, 187–88 (1993) (arguing that 1000 judges at the federal level is the maximum number that will allow the federal judiciary to remain efficient and effective). *But see* Hon. Stephen Reinhardt, *Whose Federal Judiciary Is It Anyway?*, 27 LOY. L.A. L. REV. 1, 6 (1993) (suggesting that the number of federal judges should be increased in order to provide better access to the courts for all citizens). Those who support the broad expansion of the federal judiciary dismiss the judges' objections by arguing that they are "elitists" trying to preserve the exclusivity of their small club. *See* Richman & Reynolds, *New Certiorari*, *supra* note 4, at 339–40 (arguing that the restricted size of the federal judiciary impedes citizens' access to the courts); *see also* Michael Wells, *Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee*, 1991 BYU L. REV. 923, 933–46 (offering objections to the Federal Courts Study Committee report endorsing the maintenance of an elite federal judiciary). To be sure, Article III judges have long been the fiercest critics of proposals to expand dramatically their ranks. Nevertheless, sound reasons exist to keep the federal bench small, and Congress has shown no appetite to grapple with this question. For an insightful and comprehensive examination of the role the judiciary has played in helping determine the optimal number of judges, *see* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 983–95 (2000).

114. *See, e.g.*, Long Range Plan for the Federal Courts, 166 F.R.D. 49, 130 (1996).

115. *See* STUDY COMMITTEE REPORT, *supra* note 109, at 55–66, 74–81 (arguing that bankruptcy, parole hearings, and employment claims should be adjudicated in Article I courts, as should discrimination, immigration, and social security cases). One could argue that given the high percentage of these cases disposed of by unpublished, noncitable opinions drafted mainly by staff attorneys and not judges, the courts have already accomplished this end by judicial fiat. *See* Pether, *supra* note 7, at 1436 n.5, 1444 n.30 (noting that the real reason unpublished opinions have become so prevalent might be the increase in individual rights cases, and citing the remarks of Judge Margaret McKeown, United States Court of Appeals for the Ninth Circuit, at a January 2001 panel presentation held by the Association of American Law Schools) (on file with the Washington and Lee Law Review).

116. *See supra* note 113 (discussing Article III judges' opposition to increasing the number of judges); *see also* Paul D. Carrington, Checks and Balances: Congress and the Judiciary n.183 (unpublished draft, on file with the Washington and Lee Law Review); Resnik, *supra* note 18, at 602–05 (discussing the demand for additional judges).

down. Courts are conservative institutions and, if history is a guide, reform will come slowly and incrementally. Thus, we assume that the current system of resolving cases, for better or worse, will endure for the foreseeable future. We therefore turn briefly to our thoughts for examining and perhaps improving the two-track system that is in place today.

IV. Questions for the Courts

This paradigm shift in the way courts of appeals consider and decide cases raises questions for the judiciary—questions that have not received the attention they warrant. For one thing, embedded questions of procedure remain: Should courts openly acknowledge that we now have two distinct and very different tiers of appellate justice in the United States? Is it right that judges now rely heavily on staff counsel to do the heavy lifting in deciding significant numbers of cases? Should we move to a system that explicitly acknowledges the limited, supervisory role judges play in the disposition of these cases? Most critically, have the burdens on appellate courts reached the point where Congress should consider the creation of a permanent corps of professional assistants to Article III court of appeals judges? (Such assistants could fill a role modeled on that of the magistrate judge in district court litigation, with appointment for a term of years and formal, open participation in the disposition of routine appeals.)

Part of the concern over restrictive publication practices stems from the mystery that enshrouds the process of deciding Track Two cases. These case-resolving processes have evolved out of public sight. Apart from the antiseptic and cursory descriptions in the circuit handbooks and internal operating procedure guides, the courts have done little to explain to litigants and the bar what goes on behind the scenes. In most circuits, little is made public about how and when cases are culled from the pool and designated as cases to be decided without argument and without a published opinion, how unpublished opinions are produced, who writes them, and to what extent the process is overseen by judges. These are all fair inquiries. The authority of courts is not enhanced by cloaking this process in fog.

One insight into the workings of this process was provided by Judge Kozinski. Judge Kozinski has written that his court's practice of disposing of Track Two cases raises "one of the embedded ethical issues that no one ever talks about."¹¹⁷ He describes the process as follows:

117. Kozinski, *supra* note 105, at 19.

Ninth Circuit judges generally have four law clerks, and the circuit shares approximately 70 staff attorneys, who process roughly 40 percent of the cases in which we issue a merits ruling. When I say process, I mean that they read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges during a practice we call "oral screening"—oral, because the judges don't see the briefs in advance, and because they generally rely on the staff attorney's oral description of the case in deciding whether to sign on to the proposed disposition. After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible.¹¹⁸

Judge Edith Jones describes the Fifth Circuit's practice in similar, although less colorful, terms:

Case management has become integral to the operation of the appellate courts. Appeals are processed on different tracks, depending on such criteria as whether they were filed pro se or whether they present 'routine,' as opposed to novel, issues. Simply to keep up with the volume of appeals, growing components of which are cases filed by prisoners and direct criminal appeals, courts have had to employ staff attorneys rather than leaving initial review to individual judges. Staff attorneys often take primary responsibility for reviewing the trial court record, assessing the issues presented, and preparing memoranda that can readily be transformed into unpublished or published opinions.¹¹⁹

Apparently, most circuits now use staff attorneys or other judicial assistants to "process" nonargument cases by reviewing the briefs and records, analyzing the legal issues, and presenting the judges with memoranda setting forth their appraisals of the cases along with proposed dispositions.¹²⁰ It

118. *Id.* at 19–20; see also NINTH CIRCUIT COURT OF APPEALS, GENERAL ORDERS 6.5(b)(i) (2005) (defining case-screening procedure). The Ninth Circuit's formal procedure is as follows:

The staff attorneys shall orally present the proposed dispositions to the screening panels at periodically scheduled sessions. After the staff attorneys have presented each case, the panel members discuss the proposed disposition and make any necessary revisions. Disposition of cases presented at the oral screening and motions panel ordinarily will be by unpublished memorandum or order.

Id.

119. Hon. Edith Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1492 (1995) (reviewing THOMAS E. BAKER, *RATIONING JUSTICE: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994)).

120. See Merritt & Brudney, *supra* note 62, at 79 ("Many circuits use staff clerks to prepare memoranda disposing of certain cases; those memoranda are less likely to be published than opinions prepared in a judge's chambers. Staff in many circuits also screen cases for oral argument, exerting substantial influence over which cases ultimately generate published opinions."). See also Joe Cecil & Donna Stienstra, *Deciding Cases Without Argument: An*

appears that apart from the sort of "supervision" Judge Kozinski describes, in some circuits there is little participation by Article III judges in these dispositions, other than making sure that the dispositions are correct.¹²¹ Although few statistics are available, it appears that judges rarely disagree with proposed dispositions and that, as the number of unpublished decisions increases, the level of judicial involvement in them may be waning.¹²²

Consider the directly related question of "authorship."¹²³ Some circuits,

Examination of Four Courts of Appeal, FEDERAL JUDICIAL CENTER (1987), available at 1987 WL 123661 (noting that both the Fifth and Ninth Circuits rely heavily on staff attorneys in processing cases decided without a published opinion). The D.C. Circuit's Handbook of Practice and Internal Procedures also acknowledges that its staff attorneys screen cases and, at times, recommend cases for disposition without argument. In those cases, "the staff attorney also proposes a disposition, embodied in a draft judgment and, where appropriate, an accompanying memorandum." See U.S. COURT OF APPEALS FOR THE D.C. CIR., HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 31 (2005), available at <http://www.cadc.uscourts.gov/internet/internet.nsf/Content/Court+Rules>.

121. One scholar described another judge's view of the Ninth Circuit's practices of preparing unpublished opinions in these terms:

Most are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our [unpublished opinions] are in screening cases, which are prepared by our central staff. Every month, three judges meet with the staff attorneys who present us with the briefs, records, and proposed [dispositions] in 100 to 150 screening cases. If we unanimously agree that the case can be resolved without oral argument, we make sure the result is correct, but we seldom edit the [unpublished opinion], much less rewrite it from scratch.

William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report & Recommendations of the American College of Trial Lawyers on the Publication & Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 651 (2002).

122. Compare Cecil & Stienstra, *supra* note 120, at 84 (estimating in 1987 that in the Ninth Circuit, 10% to 20% of the cases selected by staff attorneys to be disposed of without argument were reclassified by the judges) with FEDERAL APPELLATE PRACTICE GUIDE: NINTH CIRCUIT 2D (2004) (estimating that, as of 2004, fewer than 5% of the dispositions selected by Ninth Circuit staff attorneys were reclassified by the judges).

123. That unpublished opinions are orphaned at birth is telling. The prevailing practice is for judges to sign not only the opinions they author but also to indicate the *portions* of opinions they author in complex cases where more than one judge participates in drafting the opinion. See, e.g., *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1277 n.1 (D.C. Cir. 1993) (per curiam) (identifying which judge drafted each section of the opinion). The fact that no one judge is willing to assume responsibility for these decisions suggests that no one judge played an integral role in their consideration and disposition. On the other hand, courts owe it to litigants, lawyers, and lower courts to provide *some* explanation for their rulings. Thus, courts have gravitated towards the brief, relatively formulaic, unpublished, nonprecedential, per curiam opinion that states the result and, on occasion, provides a brief explanation and little more.

like the Fifth,¹²⁴ Sixth,¹²⁵ Ninth,¹²⁶ and D.C.¹²⁷ Circuits, explicitly acknowledge the substantial role staff attorneys play in screening cases and in preparing proposed dispositions for the court. The other circuits, the First,¹²⁸ Second, Third, Fourth, Tenth, and Eleventh Circuits, are silent on what role, if any, staff attorneys play in the disposition of the court's cases. It may be that, in those circuits, staff counsel play no significant role in case disposition. But, given the high volume of unpublished decisions in every circuit and especially the Eleventh, that seems unlikely. That judicial assistants and not judges may be the principal authors of these opinions plainly has bearing on whether we ought to know more about these assistants than we currently know. Who are they? Who hires them? How long do they serve? What kinds of political biases do they tend to have? What career trajectories do they follow? Are these career positions for those jaded by the world of practice and client interaction, or are they two or three year stints that position the staff attorney to move to other endeavors? We consider all of these legitimate questions given the gravity of the work these public servants perform. Article III judges are vetted through an exhaustive process that examines every facet of their

124. See 5TH CIR. COURT OF APPEALS, RULES AND INTERNAL OPERATING PROCEDURES 24–25 (2004) (setting forth a section entitled "Screening," which acknowledges that staff attorneys screen cases to see whether they warrant oral argument and draft proposed opinions).

125. See 6TH CIR. R. 34(e) ("The staff attorney section reviews this Court's docket to identify cases which offer the possibility of decision without oral argument . . . [and] prepare brief legal research memoranda for any cases so identified and submit them, together with all briefs filed by the parties, to a hearing panel.").

126. See 9TH CIR. COURT OF APPEALS, GENERAL ORDERS 6.5(b)(i) (2005) (acknowledging that staff counsel assist in screening cases and draft proposed dispositions for the court).

127. See D.C. CIR. COURT OF APPEALS, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 49 (2002) (acknowledging that staff attorneys screen new appeals). The D.C. Circuit's handbook states:

When a staff attorney screens a new appeal and concludes that Rule 34(j) [disposition without argument] treatment may be appropriate, that screening recommendation goes to the Clerk's Office, and a briefing schedule (but no oral argument date) is set. The staff attorney then reviews the briefs, and if he or she concludes that the case should be disposed of without oral argument, the staff attorney recommends to the special panel that it decide the case on the merits, pursuant to the Rule. The staff attorney also proposes a disposition, embodied in a draft judgment and, where appropriate, an accompanying memorandum.

Id.

128. The First Circuit's rules say only that "initially, the staff attorney reviews the briefs in the cases the Clerk has assigned for a particular session. If a panel of 3 judges, in accordance with Fed. R. App. P. 34 and after consultation with the staff attorney, is of the opinion that a case does not warrant oral argument, the Clerk so advises Counsel." 1ST CIR. COURT OF APPEALS, INTERNAL OPERATING PROCEDURES 4 (2005), available at <http://www.ca1.uscourts.gov/files/rules/iop.pdf>.

professional lives.¹²⁹ Should the public know more about the backgrounds of the staff attorneys who now play a pivotal role in the administration of appellate justice in the United States?¹³⁰

Consider as well the question of what types of cases fall into Track Two. What criteria, if any, are used to make that determination? As noted above, most circuits explain what criteria are used to decide whether to grant oral argument and what cases warrant disposition by published decisions. These criteria all go to whether the case presents a novel or unsettled question of law. Nothing in the materials published by the circuits answers basic questions about the makeup of these cases. Are Track Two cases a fair cross-section of the court's docket? Or are cases brought by pro se litigants, prisoners, immigrants, social security recipients, and the disabled disproportionately represented?¹³¹ From all available evidence, it appears that cases of this sort make up the lion's

129. See generally Stephanie K. Seymour, *Remarks: The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691 (2004); David C. Vladeck, *Keeping Score: The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U. L. REV. 1415 (2005).

130. The recent FJC Preliminary Report sheds no light on the authorship question. There are a number of statements from unidentified judges in the Seventh and Ninth Circuits that support the idea that many unpublished opinions are written by staff counsel with little judicial supervision. FJC PRELIMINARY REPORT, *supra* note 41, at 84–90. For instance, one Seventh Circuit judge commented that if "attorneys were allowed to cite unpublished orders . . . it would immeasurably increase the amount of time spent by judges in reviewing the draft orders of staff law clerks, who do not usually operate under the direct supervision of a judge." *Id.* at 84. A Seventh Circuit judge also noted that "[i]n our circuit, staff attorneys prepare routine drafts that judges approve but do not research or write. These definitely should not be available for citation." *Id.* at 86. A Ninth Circuit judge acknowledged that "[a]bout one-half of our unpublished dispositions are written by central staff attorneys (not elbow clerks). Judges review them minimally, mostly for result. That practice could not be maintained [if the noncitation rule were jettisoned]." *Id.* at 88. A Ninth Circuit judge also suggested that "dispositions that come out of our screening panels in large volume are essentially right as to result, but somewhat short on reasoning." *Id.* at 89. The judge added that "I have much less confidence in whatever reasoning does appear" in those opinions than in opinions drafted by judges. *Id.*

131. This is not an idle concern. Another distinguished Ninth Circuit Judge, Margaret McKeown, has suggested that the practice of issuing unpublished opinions was in part a response to the flood of pro se prisoners' rights cases brought in the 1960s. Judge McKeown says there was concern that "the Federal Courts were going to drown under this increasing volume and that was the real reason that some of these were going to be shunted aside to unpublished opinions." Pether, *supra* note 7, at 1444 n.30 (citing the remarks of Judge Margaret McKeown, United States Court of Appeals for the Ninth Circuit, at a January 2001 panel presentation held by the Association of American Law Schools) (on file with the Washington and Lee Law Review). Excluding the Federal Circuit, for the twelve month period ending on September 30, 2004, there were 62,762 appeals, of which 26,800 (about 40%) were pro se. ADMIN. OFFICE OF THE U.S. COURTS, 2004 JUDICIAL BUSINESS tbl.5-4 [hereinafter 2004 JUD. BUS.], available at <http://www.uscourts.gov/judbus2004/tables/s4.pdf>. Of those, more than half (14,530) were brought by prisoners. *Id.*

share of the unpublished opinion docket.¹³² In one unscientific survey, we looked at the dispositions for one month by the Second, Seventh, and Tenth Circuits to see the kinds of cases those circuits were resolving in unpublished opinions. Our findings show that the overwhelming majority of the cases involved immigration matters, criminal appeals, prisoners' rights (including habeas), and civil rights cases; few of the cases involved commercial disputes or corporate parties.¹³³ What are the implications of a system that appears to

132. See Pether, *supra* note 7, at 1444 n.30 (finding an increase in the number of pro se litigants since the 1960s); 2004 JUD. BUS., *supra* note 131 (providing statistics on the types of pro se appeals brought to the courts of appeals); Reynolds & Richman, *Studying Deck Chairs*, *supra* note 3, at 1299 n.46 (noting that district court judges devote most of their attention to these types of cases).

133. Consider first the summary dispositions entered by the Second Circuit during May 2005. During May, the Second Circuit issued unpublished opinions in seventy-four cases: twenty-seven immigration cases; fifteen criminal cases, including eleven which were remanded with the government's consent for re-sentencing in light of *United States v. Booker*, 125 S.Ct. 738 (2005); thirteen prisoners' rights cases (including habeas cases); nine civil rights cases; six commercial or securities cases; two pension fund cases; and two miscellaneous cases. See U.S. COURT OF APPEALS FOR THE 2D CIR., DECISIONS, <http://www.ca2.uscourts.gov/> (last visited Jan. 18, 2006) (providing database of Second Circuit dispositions, searchable by date). Of these seventy-four cases, and apart from those involving uncontested remands under *Booker*, only six cases were not affirmed in their entirety. *Id.* In two immigration cases, the court vacated in part decisions by the Board of Immigration Appeals, permitting the immigrants to renew claims on remand. See *Markus v. BIA*, 131 Fed. Appx. 754, 756 (2d Cir. 2005) (holding that applicant's reasonable opportunity to present evidence was violated when the judge did not allow asylum applicant's witness to testify); *Singh v. Gonzales*, 129 Fed. Appx. 663, 666 (2d Cir. 2005) (finding that the immigration judge erred by relying solely on adverse credibility findings in denying petitioner's claims without weighing documentary evidence). In two prisoners' rights cases, the court vacated part of a lower court decision and remanded to permit the prisoner to attempt to pursue one or more claims. See *John v. N.Y. Dep't of Corr.*, 130 Fed. Appx. 506, 508 (2d Cir. 2005) (finding an abuse of discretion where inmate was not allowed leave to amend his complaint); *Boddie v. Bradley*, 129 Fed. Appx. 658, 661 (2d Cir. 2005) (holding that the lower court had failed to determine whether petitioner qualified for exceptions to the exhaustion doctrine and whether petitioner had exhausted his administrative remedies). In one habeas case, the court reversed a grant of habeas relief and directed the district court to deny relief. See *Crump v. Reno*, 130 Fed. Appx. 500, 501 (2d Cir. 2005) (holding that the Antiterrorism and Effective Death Penalty Act's limitation on eligibility for waiver of deportation applies retroactively). And in one commercial case, the court vacated and remanded one aspect of the plaintiff's claim. See *4 Third Ave. Leasehold, LLC v. Permanent Mission of the U.A.E. to the U.N.*, 133 Fed. Appx. 768, 770 (2d Cir. 2005) (remanding to the lower court for calculation of attorney's fees).

Consider next the Seventh Circuit. In a one month period, running from May 25, 2005 through June 21, 2005, the court resolved forty-one cases in unpublished opinions: seven immigration cases; fourteen criminal cases (including four remanded for re-sentencing under *Booker*); ten prisoners' rights cases (including habeas and civil rights cases); seven civil rights cases; two product liability cases; and one Social Security case. Of these, only two (apart from the *Booker* remands) were not affirmed in their entirety. In one immigration case, the court vacated a decision of the Bureau of Immigration Appeals and remanded the case for further

give certain categories of cases closer attention than others? Are these findings consistent across the circuits, or are there considerable variations in the kind of cases circuits select for Track Two treatment? The answers to these questions would tell us a good deal about the process, yet insofar as we can tell, no circuit makes this information public.¹³⁴

There is also a puzzling dissonance between the way caseload burdens have been addressed in district and appellate courts. The district courts have also confronted a sharp increase in their caseload. To relieve pressure on overworked district court judges, Congress expanded both the number of and the authority conferred on magistrate judges, who now play an integral role in the disposition of substantial numbers of district court cases, albeit in a formal, transparent, and highly regimented fashion.¹³⁵ Magistrate judges relieve

proceedings. *See* *Tesfahun v. Gonzales*, 133 Fed. Appx. 332, 336 (7th Cir. 2005) (holding that the Board lacked substantial evidence to deny application for asylum). In the second case, the court vacated a district court ruling that a prisoner had failed to exhaust certain civil rights claims and remanded the action for consideration of those claims. *See* *Turner v. Huston*, 137 Fed. Appx. 880, 883 (vacating petitioner's first four claims and remanding to the lower court).

Finally consider the Tenth Circuit. In May 2005, that court disposed of eighty-five cases in unpublished opinions. In contrast to both the Second and Seventh Circuits, the Tenth Circuit disposed of only one immigration case in an unpublished opinion. Sixty criminal and prisoner cases made up the overwhelming majority of the court's unpublished docket, with twenty-five criminal cases, four cases involving remands for re-sentencing under *Booker*, and thirty-one prisoners' rights cases (including habeas and civil rights). The remaining cases include fourteen civil rights cases, three commercial cases, and seven miscellaneous cases, including two involving the Employment Retirement Income Security Act (ERISA), and one each raising trademark, defamation, bankruptcy, qui tam, and tax claims. Apart from the *Booker* remands, only three cases were not affirmed in their entirety. In one case, a conviction was vacated with the government's consent. *See* *United States v. Isham*, 131 Fed. Appx. 641, 641 (10th Cir. 2005) (noting that government conceded that the evidence was insufficient to support the conviction). In another case, the court overturned a district court ruling granting a criminal defendant's motion to exclude evidence as a sanction for a discovery violation, directing the district court to find a lesser sanction. *See* *United States v. Ivory*, 131 Fed. Appx. 628, 632–33 (10th Cir. 2005) (holding that the lower court abused its discretion in finding a discovery violation). In another case, the court granted relief in a prisoner civil rights action that had been dismissed. *See* *Trapp v. U.S. Marshals Serv.*, 139 Fed. Appx. 12, 15 (10th Cir. 2005) (finding that the lower court erred in dismissing the entire complaint for lack of jurisdiction).

134. Others have made the same point. Judge Wald urged ten years ago that there should be:

periodic overviews of which kinds of cases get sent down one track rather than another. Danger signals include the presence of obviously difficult issues or the predominance of certain kinds of cases (for example § 1983 prisoner cases) on one track, inconsistencies between published and unpublished results and rationales, and widely differing rates of published and unpublished opinions among different judges.

Wald, *supra* note 62, at 1376.

135. Congress first authorized the use of magistrate judges in 1968 and, in a series of

significant pressure on the district courts, but there is no pretense about their role; no questions about accountability; and no confusion as to whether it is the magistrate judge, district judge, or someone else who is the responsible decision-maker. To be sure, as non-Article III judges, there are strict limits on what tasks magistrate judges may perform. But even recognizing that their powers are circumscribed, the substantial increase in the number of magistrate judges has permitted overburdened district courts to cope tolerably well with a caseload burden that would otherwise be intolerable.

There needs to be more creative thinking on how to provide assistance to overburdened courts. Should thought be given to formalizing and expanding the role of judicial assistants? Should Congress look to the magistrate judge model for courts of appeals and use "appellate" magistrate judges to participate—formally and openly—in the initial disposition of routine appeals (putting aside the vexing question of what appeals, if any, are routine) or to provide other assistance to Article III appellate judges?

One question is why there has been no consideration to giving appellate courts similar support. One can easily imagine a system of magistrate appellate judges appointed to assist court of appeals judges. Just as in the district court, litigants could opt to have their cases heard in the first instance by a panel of magistrate judges, with some form of limited review available to the court. In our view, one real test of whether a case is sensibly relegated to Track Two would be whether the parties would agree to having their appeal heard by a panel of magistrate judges rather than Article III circuit judges. As in the district court, there would be incentives to encourage parties to make that choice. Foremost among the incentives would be the promise that the cases would be heard by far-less burdened judges who could give each case individual attention, perhaps hear argument, decide each case more quickly, and possibly do so in a less formal and expensive procedure (perhaps the parties would dispense with the production of a joint appendix and instead rely on the record below). In cases in which the principal question presented is not a novel question of law, but is instead whether the lower court properly applied

enactments, expanded their authority to hear, determine, and enter final judgment in both jury and nonjury civil cases with all parties' consent. See FED. R. CIV. P. 73 (2000) (delineating a magistrate judge's powers in civil cases); 28 U.S.C. § 636 (2000) (setting forth magistrate judges' jurisdiction and powers). Magistrate judges also have the power to conduct pretrial criminal proceedings and to try criminal misdemeanor cases with the defendant's consent. See FALLON, *supra* note 102, at 48 (discussing the expanding role of magistrate judges). In 2001, there were 471 full-time and 59 part-time magistrate judges, who disposed of more than 850,000 judicial matters. *Id.*; see also ADMIN. OFFICE OF THE U.S. COURTS, 2001 JUDICIAL BUSINESS 36 tbl.14 (providing statistics related to the federal courts of appeals in 2001), available at <http://www.uscourts.gov/judbus2001/front/2001artext.pdf>.

settled law to the facts of the case, it may not matter to the parties whether review is afforded by magistrate judges or Article III judges.¹³⁶

Our purpose here is not to suggest that a magistrate-like system should be engrafted into our appellate system. The point is more modest—namely, that if the resource problems that are dogging our appellate courts are so intense that they have prompted the development of these black box systems to resolve large numbers of cases, perhaps the time has come to adopt more formal and more transparent mechanisms to relieve courts of some of their burden.

Finally, there is question about outcomes that should be explored as well. Most cases decided without argument in unpublished opinions affirm lower court or agency rulings.¹³⁷ There are of course a number of plausible explanations for this high affirmance rate. One explanation could be that high affirmance rates demonstrate that the tracking system works as intended—it effectively screens out those cases that do not require intensive judicial attention because the disposition below is clearly correct. On the other hand, there may be two less benign explanations. First, affirmance rates are high because staff attorneys have overwhelming caseloads and may not see an error in the disposition below unless the error is glaring. Second, affirmance rates are high as a matter of default because to do anything else would require more work and the commitment of scarce judicial resources that are better spent elsewhere. Even though this concern has been raised routinely,¹³⁸ there are no data that provide any answers.

136. Those who are skeptical that litigants might rationally make such a choice should examine the district court referral procedures which permit parties to opt to have their case proceed before a magistrate judge in lieu of a district court judge. See FED. R. CIV. P. 73 (2000) (setting forth a magistrate judge's powers in civil cases); 28 U.S.C. §§ 631–639 (2000) (setting forth a magistrate judge's term of appointment, duties, and powers). As the statistics cited above make clear, parties often choose to have their case heard by a magistrate judge, especially in backlogged district courts where it might be a year or more before a case could otherwise come to trial. See FALLON, *supra* note 102, at 48 (setting forth statistics that show that a substantial number of cases are handled by magistrate judges).

137. See *United States v. Maynard*, 97 Fed. Appx. 439, 440–41 (4th Cir. 2004) (affirming the lower court's upward departure from guidelines); *Redd v. Sailor*, 37 Fed. Appx. 76, 76 (4th Cir. 2002) (dispensing with argument and affirming the lower court); *Ortiz v. INS*, 230 F.3d 1363, 1363 (8th Cir. 2000) (affirming lower court's finding that it lacked jurisdiction).

138. See, e.g., Peter Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 985–86 (1990) (raising the issue over fifteen years ago). Professors Schuck and Elliott were attempting to analyze the impact of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on agency review cases, but were struck by the fact that at that time, 60% of agency review cases were resolved by unpublished opinions that were reported in a table in *Federal Reporter Second*. See *id.* at 1055 (discussing the effects of the increase in unpublished decisions). As they pointed out:

The dramatically increased use of table [unpublished] dispositions may reflect an

V. Conclusion

Embedded in the controversy over publication practices is a problem of far greater dimension: the workload burdens on our federal appellate courts have grown to the point where something must be done or else the published opinion will become a statistical anomaly. That result would serve no one. Nonetheless, the legal establishment focuses on the publication question and leaves unattended the more threatening problem of caseload overload. Federal courts and civil procedure courses seldom make mention of the two track system of appellate justice in our federal courts, and most academics are barely aware (if that) that this problem exists. And Congress, almost predictably, has responded by failing to provide additional resources to the judiciary, notwithstanding the clear resource deficit facing the courts. Instead, Congress continues blindly to place new burdens on the courts.¹³⁹

Perhaps it is the duty of all symposia participants to plant the seeds of a return invitation. But we believe that until solutions are found for the resource burdens plaguing our appellate courts, debates over publication practices will persist and become even more intense. It is time to address the root cause of the problem and not just one symptom.

increase in affirmances caused by other factors; in this view, table decisions are simply a less time-consuming way to clear judicial dockets than writing full published opinions. On the other hand, the increased use of table decisions may be a *cause* of a higher affirmance rate, rather than (or as well as) an effect. In this view, docket considerations motivate reviewing courts to dispose of cases summarily, and summary dispositions can be accomplished most readily through affirmance by table decision rather than reversal, remand, or affirmance by written opinion.

Id. at 1055.

139. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (amending class action procedures to permit class actions brought in state court and not otherwise removable to be removed to federal court where amount in controversy exceeds five million dollars).