

# In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin

DOUGLAS A. BERMAN\*  
JEFFREY O. COOPER\*\*

*Many commentators, including Chief Judge Boyce F. Martin, Jr., argue that unpublished opinions serve as a necessary tool for federal appellate courts to manage their caseload and to avoid confusion in the creation of legal doctrine. Moreover, Chief Judge Martin and others assert that, for this tool to operate effectively, citations to unpublished opinions must be strictly prohibited.*

*The authors agree that unpublished opinions can play a vital role in the operations of the federal courts of appeals. The authors urge, however, that this role should be reconceived in light of the unique institutional structure of the federal courts of appeals. The authors observe that the federal appeals courts must render a decision on every case brought before them, and that, because the Supreme Court rarely grants certiorari, the decisions of the federal court of appeals will usually be final. In addition, most cases are decided by a three-judge panel that is designated to speak for the entire court—the decision of this three-judge panel is considered binding upon all judges in the circuit for all future cases. The interaction of these unique institutional factors places the courts in a difficult position when new or unsettled legal issues are raised. The authors argue that, in these circumstances, unpublished opinions can play an important role in the development of legal doctrine, allowing appellate judges to engage in an intra-court dialogue before reaching a firm resolution of difficult legal issues. For unpublished opinions to play this role, however, practitioners must be allowed to cite to them.*

## I. INTRODUCTION

In his article, *In Defense of Unpublished Opinions*,<sup>1</sup> Chief Judge Boyce F. Martin, Jr., offers a thoughtful defense, informed by his two decades on the bench, of the use of unpublished opinions by the federal courts of appeals. Judge Martin posits that unpublished opinions are essential to allow the courts to manage their caseload and to avoid the muddying of legal doctrine that, he contends, would necessarily accompany the requirement of published opinions in unremarkable cases.<sup>2</sup> We agree with Chief Judge Martin that unpublished

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\* Assistant Professor, The Ohio State University College of Law.

\*\* Assistant Professor, Indiana University School of Law—Indianapolis. We extend thanks to James Brudney, Tom Gallanis, Arthur Greenbaum and Deborah Merritt for their thoughtful comments on previous drafts. We are also grateful to Karen Butler Reisinger of the Indiana University School of Law—Indianapolis and Brian Cunningham of the Ohio State University College of Law for their invaluable research assistance.

<sup>1</sup> Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999).

<sup>2</sup> See *id.* at 189–93.

opinions play an important, even a necessary role in the workings of the courts of appeals. We disagree, however, about precisely what that role should be. We believe that, used properly, unpublished opinions can facilitate not merely the resolution of individual cases but also the sound development of circuit law over time. But, for unpublished opinions to have this additional function, circuit judges must appreciate the special value of unpublished opinions within the unique institutional structure of the federal courts of appeals, and lawyers must be able to cite these opinions in subsequent cases. For this reason, we question Chief Judge Martin's ultimate conclusion that, for unpublished opinions to play their proper role, those opinions must lack any precedential value and must never be cited by litigants.<sup>3</sup>

From our perspective, the Sixth Circuit rule assailed by Chief Judge Martin, which permits, but discourages, the citation of unpublished opinions, comes closer to the desirable use of unpublished opinions than do the more restrictive no-citation rules in place in other circuits.<sup>4</sup> Such a rule, as we explain herein, best balances the competing pressures on the courts of appeals to resolve the cases that litigants place before them while simultaneously developing and maintaining a coherent body of law. In the end, we believe that unpublished opinions, if

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<sup>3</sup> *See id.* at 194–95.

<sup>4</sup> Compare 6TH CIR. R. 24(c) (disfavoring the citation of unpublished opinions unless to establish res judicata, estoppel, or the law of the case, or unless counsel believes that the unpublished opinion has precedential value and no other published opinion “would serve as well”), with 1ST CIR. R. 36.2(b)(6) (limiting citation of unpublished opinions to “related cases”), and 2D CIR. R. 0.23 (prohibiting citation of oral decisions rendered from the bench and summary orders in unrelated cases), and 7TH CIR. R. 53(b)(2)(iv) (prohibiting the citation of unpublished opinions as precedent except to establish res judicata, collateral estoppel or law of the case), and 9TH CIR. R. 36-3 (prohibiting the citation of any disposition that is not designated for publication under 9TH CIR. R. 36-5 as precedent except to establish res judicata, collateral estoppel or the law of the case), and D.C. CIR. R. 28(c) (prohibiting citation to unpublished opinions as precedent), and FED. CIR. R. 47.6 (prohibiting citation of unpublished opinion as precedent).

The Fourth, Fifth, Eighth, Tenth and Eleventh Circuits have local rules governing unpublished opinions that are similar to the Sixth Circuit's. *See* 4TH CIR. R. 36(c) (disfavoring citation to unpublished opinions except to establish res judicata, collateral estoppel or law of the case, but allowing citation if counsel believes that an unpublished opinion has precedential value and no other published opinion “would serve as well”); 5TH CIR. R. 47.5.4 (permitting limited citation to unpublished opinions while providing that they “are not precedent” but “may . . . be persuasive”); 8TH CIR. R. 28A(k) (indicating that unpublished opinions should not be cited as precedent except to establish res judicata, collateral estoppel or law of the case and allowing citation of an unpublished opinion for persuasive value only when no other published opinion “would serve as well”); 10TH CIR. R. 36.3 (asserting that unpublished opinions are not precedent except under the doctrines of res judicata, collateral estoppel or the law of the case, and disfavoring but allowing citation thereto if it has persuasive value and would assist the court in reaching its disposition); 11TH CIR. R. 36-2 (denying precedential value to unpublished opinions while allowing citation thereto as “persuasive authority”).

properly conceived and utilized, need not be merely tolerated as a necessary evil, but rather can and should be viewed as a key mechanism for effective and appropriate decisionmaking by the federal courts of appeals.

## II. THE UNIQUE FEATURES OF THE COURTS OF APPEALS

The federal courts of appeals occupy a unique place and exercise unique powers within the federal judiciary. Their decisions carry more authoritative weight than those of the district courts, which exercise broad discretion on a range of issues, but whose legal rulings lack binding precedential effect, and the Courts of Appeals carry a substantially greater caseload than the Supreme Court, which commands the observance of the district and circuit courts but which decides only a relative handful of cases per year. In this position, the courts of appeals face a variety of particular institutional challenges, all of which affect virtually every aspect of the courts' business, including their use of unpublished opinions. A full understanding and proper assessment of the role of unpublished opinions must take into consideration the interaction of the circuit courts' four defining characteristics.

### A. *The Federal Courts of Appeals Have Mandatory Jurisdiction*

By law, any and every litigant dissatisfied with a judgment at the district court level has an appeal as of right to the court of appeals in her circuit.<sup>5</sup> The federal courts of appeals thus have no effective means of controlling the number or types of cases that come before them. Though a court of appeals has some discretion when deciding how to resolve cases on its docket, it must render an on-the-record disposition in every case in which an appeal is sought.<sup>6</sup>

This characteristic sharply distinguishes the courts of appeals from the Supreme Court, which is able to structure its caseload and decisionmaking

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<sup>5</sup> See 28 U.S.C. § 1291 (1994 & Supp. III 1997).

<sup>6</sup> The methods of on-the-record dispositions vary from circuit to circuit. See 1ST CIR. R. 27.1 & 36.1 (allowing for summary disposition and permitting the court to choose the method of disposition: order, memorandum and order, or opinion); 2ND CIR. R. 0.23 (permitting disposition in open court or by summary order); 3RD CIR. INT. OP. PROC. 6.2 (permitting use of judgment order as a method of disposition); 4TH CIR. R. 36(b) (permitting the use of unpublished opinions); 5TH CIR. R. 47.6 (allowing affirmance without opinion); 6TH CIR. R. 19 (providing for disposition in open court after oral arguments); 7TH CIR. R. 53(c) (permitting the use of unpublished orders); 8TH CIR. R. 47A (allowing the use of summary disposition); 8TH CIR. R. 47B (permitting affirmance, and sanctioning enforcement, without opinion); 9TH CIR. R. 3-6 (providing for summary disposition); 10TH CIR. R. 27.2 (providing for summary disposition); 10TH CIR. R. 36.1 (allowing the court to dispose of certain appeals by unpublished order); 11TH CIR. R. 36-1 (providing for affirmance without opinion); D.C. CIR. R. 36(b) (permitting the court to use abbreviated disposition methods when deemed appropriate); FED. CIR. R. 36 (providing for affirmance without opinion).

through the exercise of its certiorari power.<sup>7</sup> By limiting and carefully selecting the petitions to be decided on the merits, the Supreme Court can determine the time, manner, and context in which it will resolve particular issues. If the legal issue in a petition for certiorari does not seem ripe for resolution, or if a particular case presents that issue in a peculiar manner, or even if the parties and their counsel simply appear unable to brief and argue the issue effectively, the Supreme Court can avoid consideration of the issue through denial of certiorari. Moreover, even on those occasions when the Court does exercise its discretion to hear a particular case, the Court may define and shape the issues to be decided through the wording of its grant of certiorari.

The courts of appeals have no such control over the content of their dockets.<sup>8</sup> They may not decline to hear an appeal that falls within their mandatory jurisdiction, and they have only a limited practical authority to defer resolution of such an appeal.<sup>9</sup> Moreover, unless the appeal raises multiple issues, resolution of any one of which would represent a full disposition of the appeal, the court is not at liberty to pick and choose among the issues presented. In this way, the courts of appeals resemble the federal district courts, which, with very narrow exceptions, must hear cases within their subject matter jurisdiction.<sup>10</sup> In both the courts of

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<sup>7</sup> See 28 U.S.C. § 1254 (1994 & Supp. III 1997).

<sup>8</sup> Interestingly, Professors Reynolds and Richman contend and complain that the use of unpublished opinions, when combined with other court practices, has now resulted in a form of de facto certiorari which denies, at least to some litigants, the full benefits of an appeal of right. See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275 (1996) [hereinafter Richman & Reynolds, *New Certiorari*]; see also 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, 598, 625–26 (1981) [hereinafter Reynolds & Richman, *Price of Reform*]; William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 821 [hereinafter Reynolds & Richman, *Limited Publication*]. Though the accuracy of this claim is certainly subject to dispute, see Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264 (1996), we suggest in Part III that some benefits may flow from the ability of unpublished opinions to give courts of appeals some certiorari-like control over the discharge of their lawmaking function. See *infra* text accompanying notes 38–45.

<sup>9</sup> This assertion applies only to appeals from final judgments pursuant to 28 U.S.C. § 1291 (1994 & Supp. III 1997). The courts of appeals do have discretionary authority to accept or reject interlocutory appeals pursuant to 28 U.S.C. § 1292(b) (1994 & Supp. III 1997). Interlocutory appeals, however, represent only a tiny fraction—typically less than 0.5%—of the courts of appeals' dockets. See Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1176, 1198–99 (1990) (documenting small number of appeals brought via § 1292(b) and urging greater use of interlocutory appeals).

<sup>10</sup> Indeed, the district courts might even be viewed as having more control over their docket than the circuit courts, since a trial judge typically has considerable means to cajole parties into settlements if she believes, for whatever reason, that formally adjudicating a particular dispute would be inappropriate.

appeals and the district courts, the litigants, rather than the courts, determine which, how, and when issues must be addressed.

### *B. The Federal Courts of Appeals Are, Effectively, Courts of Last Resort*

The combination of mandatory jurisdiction at the circuit court level and discretionary jurisdiction at the Supreme Court level means that, for nearly all appellate litigants, their cases will end with a disposition by the court of appeals. For the year ending in September 1998, the federal courts of appeals resolved nearly 25,000 cases on the merits, while the Supreme Court in its 1998–99 Term chose to give full review to fewer than 70 cases arising from the federal circuit courts.<sup>11</sup> In individual cases, the reality that the circuits are the de facto courts of last resort affects not only the litigants, who realize that they most likely have only one appellate forum in which to press their claims, but also the circuit court judges, who realize that they have a special obligation to try to achieve the best possible resolution of every dispute.

The significance of final review at the court of appeals level extends well beyond the parties and the individual judges in individual cases. Although the Supreme Court's decisions garner most of the attention from the media and the academy, most of the legal developments within the federal judiciary—the evolution of doctrines old and new through innovations and retrenchments in statutory interpretation and constitutional analysis—occur not at the Supreme Court but within the courts of appeals. The circuit courts are almost always the first appellate voice on the panoply of legal issues that occupy the federal courts,<sup>12</sup> and on many issues they remain—at least for a substantial period of time—the only appellate voice.

### *C. In the Federal Court of Appeals, Three-Judge Panels Speak for the Entire Court*

Though the Supreme Court frequently speaks with a fractured voice, almost all of its decisions are rendered by a full court of nine Justices.<sup>13</sup> That is, each Justice has an opportunity to contribute her or his vote and opinion in each and

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<sup>11</sup> See *The Supreme Court, 1998 Term*, 113 HARV. L. REV. 400, 408 tbl.II(E) (1999); see also G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 41 figs.2–3 (2d ed. 1998) (noting that the Supreme Court generally reviews considerably less than one percent of circuit court cases terminated on the merits).

<sup>12</sup> In a few settings with cases involving certain subject matters (e.g., bankruptcy proceedings, some administrative matters) the existence of specialized tribunals sometimes creates a layer of appellate review which precedes review in the federal courts of appeals.

<sup>13</sup> Examples of instances in which a Court of fewer than nine Justices may render a decision include: The existence of a vacancy on the bench, the illness of a Justice, and recusal of a Justice for a real or perceived conflict of interest.

every case. The courts of appeals, in contrast, do most of their work in panels of three judges.<sup>14</sup> Nearly all of the decisions rendered are the product not of the whole court, but of a randomly selected group of three judges who purport to speak for the entire court. Thus, except for those relatively rare instances when a case is considered en banc,<sup>15</sup> only a small minority of a circuit's active judges directly participate in the adjudication of each particular case.<sup>16</sup> Moreover, because panels will often include a senior judge, a judge from another circuit, or even a district court judge sitting by designation, it is not uncommon for only two or even just one active judge of the circuit to participate in the resolution of certain cases.<sup>17</sup>

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<sup>14</sup> See 28 U.S.C. § 46(b) (1994) (permitting the courts of appeals to hear and determine cases by separate panels consisting of three judges).

<sup>15</sup> Section 46 of the Judicial Code authorizes banc review. Although each Circuit has adopted its own particular procedural requirements for initiating en banc review or re-hearing, the subject of en banc review is dealt with generally by Federal Rule of Appellate Procedure 35. See 28 U.S.C. § 46(c) (1994 & Supp. III 1997). Rule 35(a) states: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. PROC. 35(a)(1999). Rule 35(a) provides that a majority of the judges in active service may order that an appeal or proceeding be heard en banc. Rule 35(b)(1) requires that a party seeking en banc review of a panel decision must state that the petition is necessary to address a conflict in the law between the circuit and the Supreme Court, or within the circuit itself, or that the appeal involves questions of "exceptional importance." *Id.* at 35(b)(1).

Ninth Circuit Rule 35-3 permits for a limited en banc court. The Rule states that the en banc court shall consist of the chief judge of the circuit and ten additional judges to be chosen by lot from the active judges of the court. See 9TH CIR. R. 35-3.

<sup>16</sup> The circuits range in size from six to twenty-eight judges:

1st: 6	6th: 16	11th: 12
2nd: 13	7th: 11	D.C.: 12
3rd: 14	8th: 11	Fed.: 12
4th: 15	9th: 28	
5th 17	10th: 12	

28 U.S.C. § 44 (1994). Thus, assuming all of the circuit's seats were filled, a panel of three judges would represent at most one-half and as little as eleven percent of the circuit's active judges. The existence of vacancies might improve these numbers somewhat. See *Vacancy List by Circuit and District Report* (last modified Feb. 1, 1999) <<http://uscourts.gov/vacancies/judgevacancy.htm>> (reporting 27 vacancies and 18 pending nominations for the federal courts of appeals as of February 1, 2000). Vacancies within a circuit, however, would also be likely to increase the number of panels that were not composed entirely of active circuit judges. See *infra* note 17.

<sup>17</sup> For the year ending in September 1998, nearly 25% of the judges participating in dispositions were either senior or visiting judges. In a number of circuits, this percentage exceeded 30%, and in the Second Circuit, it approached 50%. See ADMINISTRATIVE OFFICE OF

*D. The Federal Courts of Appeals Create Precedent That Is Binding on Themselves*

Though only a fraction of the active judges on the court are involved in most circuit court decisions, those decisions have, in a sense, more precedential weight than decisions rendered by other courts within the federal judiciary. When a federal district judge renders a decision, she speaks in the name of the district court, but the decision does not bind her fellow judges.<sup>18</sup> In practice, she speaks only for herself, and even then her decision does not formally bind her in future cases. For its part, the Supreme Court issues decisions that are binding on the courts of appeals and the district courts, but the Court itself remains free to change its course, bound only by the varying degree of respect it holds for the doctrine of *stare decisis*.<sup>19</sup>

At the court of appeals, in contrast, the entire court considers itself bound in all future cases by the decision of a prior panel. It is well-established precedent in every circuit that one panel's reported holding can only be overruled through procedures in which all of the active judges in the court participate.<sup>20</sup> The principal method for doing this is review by the entire court sitting *en banc*, a procedure that the courts of appeals collectively employ no more frequently than the Supreme Court accepts *certiorari*.<sup>21</sup> Given the rarity of *en banc* review, the

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THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1998 at 53 tbl.S-2 (1998) [hereinafter 1998 JUDICIAL BUSINESS].

<sup>18</sup> See, e.g., *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) ("A district court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not *stare decisis*) apply.").

<sup>19</sup> For a recent appraisal of the Court's observance of *stare decisis*, see generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

<sup>20</sup> Panels in each circuit have consistently stated that they lack the authority to overrule decisions by prior panels; thus, as a general matter, a panel's decision binds subsequent panels absent an intervening decision of the Supreme Court, act of Congress, or *en banc* decision by the court as a whole. See, e.g., *Dantzler v. United States Internal Revenue Serv.*, 183 F.3d 1247, 1250 (11th Cir. 1999); *Turner v. United States*, 183 F.3d 474, 476 (6th Cir. 1999); *United States v. Ortega*, 150 F.3d 937, 947 (8th Cir. 1998); *Barber v. Johnson*, 145 F.3d 234, 235 (5th Cir. 1998); *United States v. Nicholas*, 133 F.3d 133, 136 (1st Cir. 1998); *Ritz Carlton Hotel Co. v. NLRB*, 123 F.3d 760, 765 & n.4 (3d Cir. 1997); *Roundy v. Commissioner*, 122 F.3d 835, 837 (9th Cir. 1997); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 807 (D.C. Cir. 1997); *Moore v. Office of Personnel Mgmt.*, 113 F.3d 216, 218 (Fed. Cir. 1997); *United States v. Foster*, 104 F.3d 1228, 1229 (10th Cir. 1997); *In re Skupniewitz*, 73 F.3d 702, 705 (7th Cir. 1996); *Samuels v. Mann*, 13 F.3d 522, 525 (2d Cir. 1993); *Etheridge v. Norfolk & Western Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993); see also 3RD CIR. INT. OP. PROC. 9.1 ("It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court *en banc* consideration is required to do so.").

<sup>21</sup> For the year ending in September 1998, there were a total of only 65 *en banc*

effective result is that each three-judge panel's decision not only purports to represent the entire court in the case at hand, but it also commands the allegiance of all future panels in the consideration of subsequent cases.<sup>22</sup>

### III. RETHINKING THE ROLE AND VALUE OF UNPUBLISHED OPINIONS

#### A. *The Standard Arguments for and Against Unpublished Opinions*

Both supporters and critics of the use of unpublished opinions tend to focus on the first or second of the four distinguishing characteristics of the courts of appeals discussed above. That is, much of the scholarly commentary on unpublished opinions, both pro and con, has given primary attention to the need for circuit courts to resolve cases expeditiously and soundly: Support for unpublished opinions is typically based on a concern about the workload difficulties created by mandatory jurisdiction, while complaints about unpublished opinions center around the potential for diminished justice in the federal appeals courts that serve as de facto courts of last resort.<sup>23</sup> As a result, the

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dispositions out of nearly 25,000 appeals terminated on the merits. *See* 1998 JUDICIAL BUSINESS, *supra* note 17 at 52 tbl.S-1; *see also* CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 100-101 & tbl.5 (1999) (detailing that, over a recent twenty-five year period, circuit courts rendered en banc dispositions in only about 0.25% of all cases on their docket).

It must be noted that several circuits observe practices, established with varying degrees of formality, that permit one panel to overrule a decision of another (typically based on an intervening decision of the Supreme Court or act of Congress) through circulation of its opinion to the entire court. If a majority of the court does not vote to hear the issue en banc, the later panel's analysis is permitted to displace the former panel's approach. For example, Seventh Circuit Rule 40(e) provides:

A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.

7TH CIR. R. 40(e).

Other circuits have adopted a similar practice. *See, e.g.,* *United States v. Coffin*, 76 F.3d 494, 496 n.1 (2d Cir. 1998) (discussing practice in Second Circuit and others).

<sup>22</sup> *See* BANKS, *supra* note 21, at 90 (noting that "most times the panel outcome sets the legal principle and controls the ideological direction of policy for the indeterminate future").

<sup>23</sup> *See, e.g.,* Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 785-800 (1995); Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 173 (1998); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 128-46 (1995); Phillip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 914 (1986); Reynolds & Richman, *Price of Reform*,



scholarly literature typically is concerned only with whether unpublished opinions provide a sound or sensible means to deal with the practical pressures created by litigants in the courts of appeals.

Chief Judge Martin's defense of unpublished opinions reflects this, as he focuses upon the practical difficulties created by the circuit courts' mandatory jurisdiction and the consequent workload created by the many litigants eager to exercise their appeal rights.<sup>24</sup> As Chief Judge Martin puts it, the grant of appeals as of right leads to "a lot of dross" in the dockets of the courts of appeals.<sup>25</sup> He argues that requiring published opinions in all cases would cause judges already overburdened by swelling caseloads to spend too much of their limited time on cases with little merit.<sup>26</sup> In addition, argues Chief Judge Martin, requiring the publication of all dispositions would needlessly add to the bulk of the Federal Reporter, by their sheer volume diminishing the cohesiveness and coherence of the body of the law.<sup>27</sup> Unpublished opinions, in Chief Judge Martin's view, act as a safety valve to relieve the pressure on both the judges' workloads and library shelves groaning under the ever-increasing mass of published authority.

Where defenders of unpublished opinions tend to focus on the role of unpublished opinions in reducing the burdens of mandatory jurisdiction, opponents of unpublished opinions tend to focus on concerns related to the position of the courts of appeals as courts of last resort for litigating parties. Because the court of appeals will most likely be the final court to consider the merits of the litigants' positions, opponents of unpublished opinions are particularly concerned about the impact of unpublished opinions on the quality of justice that the circuit courts deliver.<sup>28</sup> These commentators frequently bemoan the alacrity with which many unpublished opinions are written, suggesting that the brief and unpolished summary memoranda issued by the court betray a lack of careful thought on the part of the deciding judges.<sup>29</sup> Worse, opponents note,

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*supra* note 8, at 275. See generally THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994).

<sup>24</sup> See Martin, *supra* note 1, at 181–83.

<sup>25</sup> *Id.* at 191.

<sup>26</sup> See *id.* at 182–83.

<sup>27</sup> See *id.* at 192.

<sup>28</sup> See Gulati & McCauliff, *supra* note 23, at 160–61, 189–90, 193–94 (stating that the use of judgment orders is not subject to external scrutiny, that the use of judgment orders will lead to "neglected" areas of law, and that published opinions serve to produce legitimacy, stability, and predictability); Reynolds & Richman, *Limited Publication*, *supra* note 8, at 820 (asserting that published opinions, through articulated reasoning, give assurance that the appeal has received the proper attention).

<sup>29</sup> See Reynolds & Richman, *Price of Reform*, *supra* note 8, at 606 (suggesting that unpublished opinions are of lower quality than published opinions); see also RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 165 (1996) (noting the criticism that unpublished opinions encourage sloppy judicial decisionmaking).

unpublished opinions frequently reflect significant contributions by law clerks and staff attorneys, individuals who lack the expertise and experience, let alone the constitutionally granted authority, of Article III judges.<sup>30</sup> The result is second-class justice, or at least the perception of lesser justice, since parties whose arguments are dismissed summarily in unpublished opinions may well feel that they have not been treated with sufficient respect and that their claims have not been given due consideration.<sup>31</sup>

Within the context of these arguments, both proponents and opponents of unpublished opinions do sometimes address broader concerns about the effect of unpublished opinions on the development of precedent and the evolution of the law.<sup>32</sup> Those who oppose unpublished opinions suggest that appellate jurisprudence tends to become stilted, or undeveloped, or lacking in uniformity or predictability when courts can produce opinions that lack precedential value and do not appear in the pages of the Federal Reporter.<sup>33</sup> Defenders of unpublished opinions, in contrast, argue that, because a large number of appeals turn on the application of well-settled points of law to familiar patterns of fact, the resolution of all cases through published opinions would add nothing of jurisprudential value.<sup>34</sup>

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<sup>30</sup> See, e.g., Reynolds & Richman, *Limited Publication*, *supra* note 8, at 837 (noting that increased staff involvement generally results in the judge being less likely to give the case “a fresh, inquiring look”); see also William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 4 (suggesting the need to maintain a line between judges performing their judicial work with the assistance of law clerks, which is appropriate, and judges merely supervising the work of law clerks, which is not).

<sup>31</sup> See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 52 (noting that, where a case is decided without either oral argument or published opinion, the “parties have little assurance that the judges have paid attention to their case”).

<sup>32</sup> See Gulati & McCauliff, *supra* note 23, at 189–92 (arguing that the use of judgment orders will allow certain judges to “capture” certain areas of the law, that judgment orders will lead to the development of neglected areas of the law, and that judgment orders allow judges to determine which cases are used to establish precedent); Martin, *supra* note 1, at 191 (noting that the use of unpublished opinions serves to increase the precedential value of those opinions that are published); Nichols, *supra* note 23, at 916 (noting that selectivity in the publication of opinions serves to confer greater precedential authority on those opinions which are published); Reynolds & Richman, *Price of Reform*, *supra* note 8, at 579–80 (contending that every case has some precedential value, and that “cumulative” opinions have a reinforcing effect).

<sup>33</sup> See Robel, *supra* note 31, at 52.

<sup>34</sup> See, e.g., Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1393 (1990) (asserting that “most unpublished opinions are so fact-specific and precedent-bound that their major use would be simply to clutter briefs with longer string citations”).

### B. *A More Complete Perspective on Unpublished Opinions*

While all of these arguments have merit and deserve consideration in any assessment of unpublished opinions, the scholarly commentary remains incomplete for failing to take full account of all the unique attributes of the courts of appeals. Neither supporters nor critics of unpublished opinions have fully integrated into their analysis the unique institutional pressures of the federal courts of appeals: the lack of control that the courts of appeals have over their dockets, the operation of the circuit courts through three-judge panels, and the firm precedential value of published appellate decisions. Each of these characteristics profoundly impacts the manner in which the courts of appeals develop an appellate jurisprudence, especially since, as Chief Judge Martin aptly observes, not all cases are equal.<sup>35</sup> Accordingly, only by considering these unique features of the courts of appeals can the role and value of unpublished opinions in the evolution of federal law be fully appreciated.

A court's ruling not only resolves the case at hand, but also sets a precedent that affects future cases. Thus, judges must strive to reach a just result in light of the facts and existing law in each individual case, while simultaneously being mindful of and attentive to the broad legal landscape and the direction of legal change. In the context of appellate decisionmaking, this means that judges must carefully review and correct any errors that may have impacted the determination below while at the same time articulating abstract legal concepts in a manner that will effectively guide the consideration of future cases. That is, appellate judges have the dual obligations of "error correction" and "lawmaking."<sup>36</sup> Moreover, for an appellate tribunal that serves as a *de facto* court of last resort, these dual obligations can be especially weighty. Such a court presents the final forum for errors to be corrected and for justice to be achieved in the case at hand, while the court's decisions, in the absence of action by a superior authority, shape the dynamics and direction of the legal landscape.<sup>37</sup>

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<sup>35</sup> See Martin, *supra* note 1, at 183, 191 (noting that "not all cases are of equal merit").

<sup>36</sup> See, e.g., ABA COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 5 (1994 ed.) [hereinafter ABA STANDARDS] ("The appellate courts have two functions: to review individual cases to assure that substantial justice has been rendered, and to formulate and develop the law for general application in the legal system."); BAKER, *supra* note 23, at 14–16; PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2–4 (1976); see also Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 868 (1984) (explaining that "the Supreme Court is generally thought to be in the business of law announcement rather than error correction. The intermediate appellate courts, in contrast, have both the 'institutional' function of rule development and the obligation to review for correctness and appropriateness.").

<sup>37</sup> See Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1635–36 (1998) (highlighting that, because of the very limited number of cases reviewed by the U.S. Supreme Court, "the circuit courts have become the courts of last resort for most litigants and the sources of doctrinal development for most

Judicial decisionmaking, especially at the appellate level, presents special challenges, because the dual obligations in each case to achieve a just result in the matter at hand and to further just law for future cases create differing demands and can often be in tension. Consider, for instance, a court's position when concluding on appeal that there was some procedural flaw in a lower-court proceeding, but that this flaw in the case at hand does not justify reversing the decision below. The appellate court's obligation to achieve a just result in this individual case (its error-correction function) could be discharged by a simple affirmance, but the court's obligation to further just law for future cases (its lawmaking function) would require a meaningful and instructive explanation of both the mistake that occurred below and the reasons why this mistake should not lead to a reversal.

Moreover, and of critical importance for a full appreciation of the appellate courts' work, though the dual obligations of error correction and lawmaking often create differing demands, they are always inextricably linked. Judges' perceptions of and contribution to the legal landscape and legal trends will always be impacted by the specific facts and procedural posture of the case before them, as well as by the specific arguments developed (and not developed) by the parties. Consequently, appellate courts' development of the law is inevitably affected by the order and the manner in which individual cases come before the court. Even though courts cannot possibly know or foresee all the contexts in which future cases will raise certain legal issues, their initial decisions on particular issues in the context of individual cases will shape, through the power of precedent, the framework within which future cases are decided.

These dynamics combine with the institutional structure of the federal courts of appeals to produce considerable difficulties for the sound and sensible development of the law. Because of the courts' mandatory jurisdiction, litigants ultimately determine both when and how cases are presented to the courts of appeals. In other words, the error-correction function of the federal circuits sets the agenda for and the parameters of their decisionmaking. As a result, circuit judges will sometimes first confront novel or important legal issues within cases that are factually or procedurally atypical, or which are poorly developed, briefed and argued by counsel. Accordingly, circuit courts must unavoidably consider some consequential legal questions in less-than-ideal contexts for the discharge of their lawmaking functions.<sup>38</sup> And yet, because of the binding force given to circuit court precedents, early decisions rendered in such imperfect settings may

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legal issues").

<sup>38</sup> Cf. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69–71 (1985) (suggesting that allowing appellate courts to select which cases to review might better serve their lawmaking function because an "appellate court arguably is in the best position to determine whether, where, when and how the law is in need of clarification or revision").

establish how all future cases raising the particular legal issue are litigated and decided.

For these reasons, judges may quite justifiably be reluctant in some cases to issue a firm and conclusive legal decision for fear that they might harmfully “petrify” the precedential framework for the consideration of future cases. A court may realize that the imperfect context or imperfect manner in which certain issues are raised in a particular case makes the case an especially poor vehicle for the creation and development of sound legal doctrine. An appellate court faced with such a case, though obliged to render a decision that discharges its error-correction function, may sensibly seek to avoid or limit the discharging of its lawmaking function.

Indeed, this reluctance to engage in lawmaking may be reinforced by the fact that the federal courts of appeals operate through three-judge panels, the decisions of which bind the entire court. A three-judge panel that confronts a novel or important legal issue might, even in the best of settings, be justifiably reticent about establishing a definitive precedent before other judges can have some input. Such reticence may stem from a circuit judge’s general disinclination to speak for and bind fellow judges before having some inkling of their views, or in some cases from a circuit judge’s candid appreciation that colleagues may be more knowledgeable or familiar with a particular area of law.<sup>39</sup> Accordingly, when a particular panel is forced to confront a consequential legal issue in a less-than-ideal context, the case for consciously avoiding the issuance of a firm and conclusive legal decision becomes especially compelling.

The idea that a court should exercise its lawmaking function prudently when novel issues arise in less-than-ideal circumstances is not new. In particular, the notion that the Supreme Court should at times purposely avoid premature definitive rulings has a long and distinguished history. Alexander Bickel sounded this theme nearly forty years ago when promoting “passive virtues”—the use of jurisdictional devices to avoid adjudication—as a means for the Supreme Court to

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<sup>39</sup> We recognize, of course, the contrary possibility of strategic behavior. Especially on ideologically-divided courts, members of a particular panel may view a case presenting novel issues as an opportunity to bind their differently minded colleagues, regardless of the peculiarities of the individual case. See Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 479 (1987) (discussing her belief that “some judges have definite ‘agendas’ for changing the law in certain areas, such as restricting access to the federal courts, and that they diligently pursue these agendas at every opportunity”); see also Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 823–27 (1993) (suggesting that a value of increased use of en banc procedures is to prevent possible “minority control of circuit law”); see generally BANKS, *supra* note 21 (reviewing the impact of ideological differences on the decisionmaking of the D.C. Court of Appeals). But the prospect of significant strategic behavior in circuit court decisionmaking, though perhaps altering the use and impact of unpublished decisions in particular courts, does not invalidate our analysis or significantly undermine our proposal.

ensure principled constitutional decisionmaking.<sup>40</sup> Writing in a similar vein, Cass Sunstein has recently touted “decisional minimalism”—judicial efforts to keep judgments “shallow and narrow”—as a means to fortify democratic processes.<sup>41</sup> Significantly, both of these commentators advocated means to avoid or limit Supreme Court adjudications in order to facilitate institutional dialogues: Bickel urged techniques for the Court to withhold constitutional judgment so as to enable the Court to engage “in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure . . . .”<sup>42</sup> Sunstein likewise asserts that minimalist adjudication by the Court is “democracy-forcing” and thus valuable as a means to “leave open the most fundamental and difficult constitutional questions [and] also . . . promote democratic accountability and democratic deliberation.”<sup>43</sup>

Reduced to their essence, the arguments of both Bickel and Sunstein suggest that it may at times be sensible, valuable, and appropriate for a court to avoid lawmaking.<sup>44</sup> Of course, Bickel and Sunstein write with the Supreme Court in mind, and they urge the avoidance of premature lawmaking by that body in order to ensure that other government institutions also have appropriate opportunities to make law. Nevertheless, their core insights about the value of judges seeking to avoid premature precedents merit particular attention within the context of federal circuit court decisionmaking. Because the unique institutional structure of the courts of appeals presents a particular and troublesome risk of a harmful “petrification” of precedent, it may be especially important and valuable for

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<sup>40</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). Bickel was greatly concerned by the fact that the High Court’s “function of declaring principled goals” was often forced to operate within the context of decisions by “political institutions do[ne] merely on grounds of expediency.” See Bickel, *supra*, at 50; see also BICKEL, *supra*, at 64, 68. Bickel thus identified and advocated various techniques or devices that allow the Supreme Court to withhold ultimate “constitutional adjudication” so as to best strike an “accommodation between principle and expediency.” Bickel, *supra*, at 50; see also BICKEL, *supra*, at 69–71. For a contemporaneous account and criticism of Bickel’s ideas, see generally Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (reviewing BICKEL, *supra*). For a modern account and defense of Bickel’s ideas, see generally Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

<sup>41</sup> See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3–4 (1999); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 3, 4 (1996).

<sup>42</sup> BICKEL, *supra* note 40, at 70–71.

<sup>43</sup> SUNSTEIN, *supra* note 41, at 6.

<sup>44</sup> For a critical review of Sunstein’s arguments which also suggests that Sunstein’s ideas are linked more closely to Bickel’s than Sunstein himself acknowledges, see Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971 (1999) (reviewing SUNSTEIN, *supra* note 41).

circuit judges to consciously avoid lawmaking in some instances.

Moreover, the interest of Bickel and Sunstein in promoting institutional dialogues also has special import within the context of federal circuit court decisionmaking. Though a three-judge panel confronted with a poorly presented legal issue may often sensibly seek to avoid handcuffing subsequent consideration of that issue, the circuit judges of the panel still can and should endeavor to render a decision with the potential to inform, and perhaps guide the efforts of future panels. That is, while properly seeking to avoid the premature creation of binding precedents when a novel or important issue arises in an imperfect setting, circuit judges should embrace and utilize these cases to begin a dialogue among the judges of the court by issuing opinions that will aid the future consideration of the legal issue in question. This dialogue may be intra-institutional, in contrast to the dialogue among government institutions and between those institutions and society envisioned by Bickel and Sunstein, but it nevertheless has the potential to advance and improve the functioning of the courts of appeals.

Unfortunately, at present, judges on the federal courts of appeals have few real options for effectively and appropriately avoiding definitive judgments while still facilitating a dialogue on a particular legal issue: Published opinions create binding precedent, while unpublished opinions may not be cited at all or only in limited circumstance in many circuits. Thus, in the context of having to render decisions as a reviewing court with mandatory jurisdiction, the circuit courts are often faced with a pair of decisionmaking options, neither of which can effectively further the sensible development of the law.<sup>45</sup> It is within this context that we urge a reconception of the unpublished opinion, which we believe may provide a way out of this dilemma.

To this point, unpublished opinions have been viewed and debated, attacked and defended almost exclusively as a tool for disposing of the routine case in which the law is well settled. But, in the end, for the truly routine cases, publication rules are largely inconsequential and noncitation rules are superfluous. If a case genuinely calls only for a straightforward application of well-settled law, then it is likely to receive summary treatment whether or not the opinion is subject

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<sup>45</sup> A third option, the crafting of a very narrow published opinion designed solely for the particular facts before the court, does not satisfactorily resolve the dilemma. Although such an opinion might properly resolve the individual case, thus fulfilling the court's error-correcting function, its limited focus would prevent it from contributing in a meaningful or effective way to the evolution of the law. From the lawmaking perspective, in other words, a truly narrow published opinion crafted only to resolve the case at hand is little different from an unpublished, uncitable opinion. Moreover, whenever an opinion is designed to be narrow but in fact says more than is absolutely necessary to resolve the case at hand, the decision's failure to provide a full statement of a clear legal rule will likely engender more problems than it will avoid. See generally Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 339-43 (1996) (discussing some of the disadvantages of narrow rulings).

to publication.<sup>46</sup> Moreover, since such an opinion by definition does not add or otherwise change the law, there is no real need or reason for either a litigant or a judge to cite to it.<sup>47</sup>

But the analysis developed above highlights the potential role and value of unpublished opinions in the consideration of those cases in which the law is novel or otherwise underdeveloped or in which the facts, procedural posture, or the litigants present the issue in a less-than-ideal way. An unpublished opinion, lacking full precedential weight, would permit an appellate panel to resolve the case before it, as it must, without tying the entire court into a particular mode of analysis that will govern future cases. It would also, however, have the potential to guide the court in future determinations, allowing the various members of the court to engage in a dialogue with each other across cases and across panels. Because such a dialogue would engage and draw upon a set of fact patterns and a collection of judges, it likely would facilitate the development of the law better than the present system, in which the first panel that, by happenstance, encounters an issue may set in stone the analysis that all subsequent panels must follow.

Of course, unpublished opinions of this type could only play the role suggested for them if they were both accessible to lawyers and judges and capable of being cited in briefs to the court (and, arguably, in subsequent published opinions). With the spread of the Internet and the availability of unpublished opinions on the commercial online research services, accessibility is an ever-diminishing problem.<sup>48</sup> The more serious issue is citability: At present, nearly half

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<sup>46</sup> See Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1494–95 (1995) (reviewing BAKER, *supra* note 23) (suggesting that the fleshing out of opinions that are currently unpublished for publication would not add to the legal analysis but simply engage courts in “time-consuming editorial tasks”); see also Martin, *supra* note 1, at 189–90 (suggesting that unpublished opinions are short not because they are unpublished, but because they “tend to involve settled law and variations on the facts”); cf. POSNER, *supra* note 29, at 272–74 (arguing that published per curiam opinions, disposing of appeals in summary fashion, became less common as unpublished opinions became more used).

<sup>47</sup> See ABA STANDARDS, *supra* note 36 § 3.37 commentary at 70 (noting that “many decisions [of appellate courts] are of little interest or use to anyone other than the immediate parties”). While some critics of unpublished opinions contend that every decision offers some insights into even well-settled law, see Reynolds & Richman, *Price of Reform*, *supra* note 8, at 579–80, 607 (arguing that all decisions make law in that they show how courts actually resolve disputes), it must be conceded that decisions which apply clearly established rules of law to familiar fact patterns are truly of almost no precedential value or impact.

<sup>48</sup> See Dragich, *supra* note 23, at 792 (noting that unpublished opinions “are now widely available, particularly through online legal research services” and researchers “can find unpublished opinions just as easily as published ones”); Martin, *supra* note 1, at 185–86 (noting that most unpublished opinions are in fact accessible online, rendering the differentiation between “published” and “unpublished” opinions “a fine, almost meaningless, . . . distinction”). The broad and still-increasing availability of unpublished opinions answers the critique made by Reynolds and Richman that the courts will use unpublished opinions to secretly resolve



the circuits do not permit citation of an unpublished opinion in a case other than the one in which the opinion was rendered.<sup>49</sup> In this regard, the Sixth Circuit's rule on citation of unpublished opinions comes closer to permitting the optimal use of unpublished opinions than do the rules of many other circuits. Sixth Circuit Rules 10(f) and 24(c) permit citation of unpublished opinions if those opinions relate to an issue in the case and are more directly on point than published opinions.<sup>50</sup> The Sixth Circuit's rule avoids the routine citation of unpublished opinions, while also providing a vehicle for communication among panels, and thus allows litigants to be the catalysts for such communication.

In sum, then, we believe that the strongest argument for unpublished opinions is not premised on the efficiency concerns that are at the center of Chief Judge Martin's defense. Rather, we believe unpublished opinions have their greatest value as a mechanism that can help the courts of appeals navigate their unique institutional challenges to develop legal doctrine in the soundest and most effective manner. Put another way, though unpublished opinions clearly have value and importance as time-savers, it is their ability to serve as "precedent-savers" that makes the case for them compelling.

The model of unpublished opinions that we propose here is neither formally or practically unfamiliar. As a formal matter, one must recognize and appreciate that district courts routinely issue unpublished opinions that may be cited in subsequent cases.<sup>51</sup> Indeed, because publication at the district court level depends

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cases contrary to established lines of precedent. *See Reynolds & Richman, Price of Reform*, *supra* note 8, at 581, 611.

<sup>49</sup> Compare 1ST CIR. R. 36.2(b)(6) (allowing citation of unpublished opinions only in related cases), and 2D CIR. R. 0.23 (same), and 7TH CIR. R. 53(b)(2)(iv) (prohibiting citation to unpublished orders except for purposes of claim preclusion, issue preclusion, or law of the case), and 9TH CIR. R. 36-3 (same) and D.C. CIR. R. 28(c) (prohibiting citation to unpublished opinions for purposes other than preclusion), and FED. CIR. R. 47.6(b) (prohibiting citation to opinions designated non-precedential except for purposes of claim preclusion, issue preclusion, judicial estoppel, or law of the case) with 4TH CIR. R. 36(c) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published opinion would serve as well), and 5TH CIR. R. 47.5.4 (stating that an unpublished opinion is not precedent but may be persuasive), and 6TH CIR. R. 24(c) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published opinion would serve as well), and 8TH CIR. R. 28A(k) (allowing citation where the unpublished opinion is persuasive and no other opinion would serve as well), and 10TH CIR. R. 36.3 (unpublished opinion may be cited if it is persuasive, no published opinion has addressed the issue, and citation would assist the court), and 11TH CIR. R. 36-2 (unpublished opinion is not binding precedent but may be persuasive). The Third Circuit's Internal Operating Procedures state that the court will not itself cite to unpublished opinions but do not mention whether such citations may be used in briefs submitted to the court. *See* 3RD CIR. INT. OP. PROC. 5.8. It appears that lawyers in the Third Circuit do in fact cite unpublished Third Circuit decisions in their briefs.

<sup>50</sup> *See supra* note 4.

<sup>51</sup> *But see* D.C. CIR. R. 28(c) (prohibiting citation to unpublished district court opinions as well as unpublished opinions of the D.C. Circuit and the other federal circuit courts of appeals).

almost entirely on the disposition of the individual district judge, a significant number of lengthy and carefully reasoned opinions do not find their way into the Federal Supplement. Although these opinions do not appear in the official reporters, they are easily accessible through the commercial online services; as well, many appear in unofficial specialized reporters and thus may be found in a well-stocked law library. Of course, these opinions lack any binding precedential value. Their weight depends, instead, on their persuasive power. So it would be with unpublished appellate opinions.

Moreover, as a practical matter, there is good reason to believe that unpublished appellate opinions are in some instances already playing the role in circuit court decisionmaking that we advocate.<sup>52</sup> A recent study of Judgment Orders in the Third Circuit has highlighted the internal judicial incentives to render decisions in certain hard cases without a published opinion,<sup>53</sup> and a number of commentators have noted that unpublished opinions are often used to dispose of difficult and complex cases as well as simple and routine ones.<sup>54</sup> Though these observations are typically couched in harsh criticisms of judges' failure to fulfill their judicial obligations to give complete and careful consideration to individual cases,<sup>55</sup> in at least some cases these dispositions might be viewed more properly as instances in which an appellate panel concluded—perhaps consciously, perhaps unconsciously—that the legal landscape would be better served by avoiding the possible petrification of precedent that could follow from a published opinion in these cases.<sup>56</sup> In the end, our proposed reconception

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<sup>52</sup> Cf. Martineau, *supra* note 23, at 145 (stating that “there is no question that some opinions that make law are still designated ‘not for publication’”).

<sup>53</sup> See generally Gulati & McCauliff, *supra* note 23.

<sup>54</sup> See, e.g., BAKER, *supra* note 23, at 125; Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 128–30 (1995); see also Richman & Reynolds, *New Certiorari*, *supra* note 8, at 286 n.64 (suggesting, without citation, that there is “widespread belief at the bar that judges sometimes use the non-publication route to reach decisions that cannot be squared with controlling authority”).

<sup>55</sup> See, e.g., sources cited *supra* note 29.

<sup>56</sup> Cf. Gulati & McCauliff, *supra* note 23, at 176 (suggesting that the “system of precedent . . . may be better served not by giving a published statement of published reasons in every hard case, but by avoiding some of these cases, focusing instead on the somewhat less difficult cases in which the appellate panel can contribute to the development of the law. . . .”); see also Jones, *supra* note 46, at 1495 (suggesting that “the law would develop more carefully” if judges decided more cases by unpublished decisions and could thereby devote more time to decisions that will be published); Diana Gribbon Motz, *A Federal Judge’s View of Richard A. Posner’s The Federal Courts: Challenge and Reform*, 73 NOTRE DAME L. REV. 1029, 1038 (1998) (book review) (suggesting that circuit judges’ production of even unpublished opinions is an “inefficient use of resources [because too much time is] spent ‘polishing’ aspects of unpublished opinions [that] could be better spent researching more complex points of law. . . . Disposing of at least some such cases by order would leave more time for both judges and their staffs to improve the quality of precedent-creating work.”). See generally Frederick Schauer,

of unpublished opinions may truly be no more than a suggestion that courts make overt—and expressly embrace—an important device that they are already utilizing, whether they realize it or not.

Last but not least, before we conclude our account of the potential doctrinal benefits of a reconception of unpublished opinions, we should address our proposal's impact on the traditional practical argument in favor of such dispositions. Specifically, we must concede that, under our conception and within the parameters described above, unpublished opinions may not significantly reduce the courts' workload. For unpublished opinions to serve the function of guiding future courts, they will likely require much of the thought, research, and care in drafting that is given to published opinions. Nevertheless, even within our model, unpublished opinions should still provide some relief relative to published opinions. Because courts will draft these opinions without the burden of having to create sound precedent for all future cases, they can and should be completed more expeditiously than published decisions.

Moreover, our proposal should not drastically undermine the efficiency value of unpublished opinions that Chief Judge Martin promotes. The truly routine cases that are presently decided by unpublished opinion can still be decided by unpublished opinion within our model, and because of the existence of superior published precedent, the opinions will tend to remain uncited. The additional role that we see for unpublished opinions would simply create a means by which the courts of appeals could continue to exercise the mandatory jurisdiction assigned to them while improving the procedures by which they fulfill their lawmaking functions.

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*Giving Reasons*, 47 STAN. L. REV. 633, 656–59 (1995) (highlighting that the commitments that stem from giving reasons for decisions do not come without a price in the consideration of future cases).

