

2015

The Bottom of the Iceberg: Unpublished Opinions

Donna S. Stroud

Follow this and additional works at: <http://scholarship.law.campbell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Donna S. Stroud, *The Bottom of the Iceberg: Unpublished Opinions*, 37 CAMPBELL L. REV. 333 (2015).

This Article is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

The Bottom of the Iceberg: Unpublished Opinions

HON. DONNA S. STROUD*

ABSTRACT

Most federal intermediate appellate court opinions are “unpublished”—they have no precedential value, even though they are readily available in online databases. Most research on judicial behavior is based on analyses of published opinions. If a court’s decisions not to publish are based on factors relevant to behavioral research, exclusion of unpublished opinions may skew the results. Currently, the United States Court of Appeals for the Seventh Circuit has the lowest percentage of unpublished opinions, while the United States Court of Appeals for the Fourth Circuit has one of the highest rates of unpublished opinions. Do the differences in publication rates demonstrate anything about the reasons that judges decide not to publish cases, and how do these reasons inform selection of cases for research on the courts? This Article concludes that the publication decision itself is a form of judicial behavior that is worthy of study, and that unpublished opinions should be considered in most research on the federal appellate courts.

INTRODUCTION	334
I. THE DEBATE REGARDING UNPUBLISHED OPINIONS	336
II. STUDY PROCEDURE	345
A. <i>Methods</i>	346
B. <i>Publication Decision Factors</i>	352
1. <i>Identification of Factors</i>	352
a. <i>Jurisprudential Factors</i>	356

* Judge, North Carolina Court of Appeals. I would like to thank the Duke University School of Law Master of Judicial Studies Program for giving me the honor and opportunity of being a member of its charter class of 2014. This Article began as my thesis in the Duke LL.M. Program, and I could not have completed it without the encouragement, advice, and criticism of the thesis from my classmates, and particularly from my advisors, Professor Mitu Gulati and Professor Jack Knight. I also want to thank Dayna Principe, Adam Berkland, Scottie Beth Forbes, Amanda Bryan, Rob Smith, and the *Campbell Law Review* staff for their invaluable assistance in research and preparation for publication.

334	CAMPBELL LAW REVIEW	[Vol. 37:333]
	<i>b. Case-Quality Factors</i>	360
	<i>c. Collegiality Factors</i>	361
III.	DIFFERENCES BETWEEN THE FOURTH AND SEVENTH CIRCUIT COURTS OF APPEALS	366
IV.	CIRCUIT CHARACTERISTICS	371
	<i>A. The United States Court of Appeals for the Fourth Circuit</i>	371
	<i>B. The Seventh Circuit Court of Appeals</i>	376
	<i>C. Caseload Comparisons of the Fourth and Seventh Circuits</i> ...	381
V.	ANALYSIS OF DIFFERENCES IN RESPONSES OF THE FOURTH CIRCUIT AND SEVENTH CIRCUIT JUDGES	382
	CONCLUSION	385

INTRODUCTION

*“Compromise is not a bad word for every institution, whether in Congress
or corporate governance or a court.”*
Judge J. Harvie Wilkinson III¹

It is a Thursday afternoon, near the end of a busy week. Judge Smith is in his chambers, looking through the stack of draft opinions on his desk. Filing day is Monday, and he has several difficult cases that he is preparing to file. One of these is a draft opinion from Judge Jones for the *ABC Inc. v. First Bank* case.² Judge Smith has seriously considered writing a dissenting opinion in the case; he believes that Judge Jones’s draft opinion relies on several cases that it should not have relied on, and unless it is substantially revised, the opinion may cause additional confusion in the case law interpreting the statute that is the subject of the draft. Judge Smith has already discussed his concerns with Judge Jones, and she disagrees with his analysis of the cases. Judge Vinson, the third judge on the panel, has already concurred with Judge Jones’s draft and is not inclined to reconsider his concurrence. Judge Smith had been hopeful that this case would assist the trial courts and attorneys in dealing with cases that arise under this statute, since it has been an area of some dispute. This draft, however, might simply make matters worse.

But writing a full opinion concurring in part and dissenting in part would take far more time, and this case is already past the court’s usual

1. Telephone Interview with Judge J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit (Oct. 2, 2013).

2. This is a fictional case, made up for purposes of this illustration, considered by fictional judges.

filing deadline. Judge Smith gets some coffee and walks down to Judge Jones's chambers. "Look, Mary, I have been thinking about our discussion the other day regarding the *ABC Inc. v. First Bank* case. I just can't concur with the rationale, but I can't get a dissent done right now. I'm OK with the result in this case, though—would you consider just filing it unpublished? If you will, I'll concur in result only and we'll be done." "Sure, Tom. I know you've been swamped with those tax cases. I'll designate it unpublished and we can get it filed on Monday," Judge Jones replies. Judge Smith goes back to his chambers, relieved to have one more case out of the way. Perhaps he can get his own cases finished now.

What just happened here? All courts that allow judges to issue unpublished opinions have rules that provide guidance or direction on when cases should be designated as "unpublished."³ None of the rules include as a reason for issuing unpublished opinions that the judge does not have time to write a dissent before the filing deadline. The issue presented by the *ABC Inc.* case is not one that is clearly controlled by existing law, or Judge Smith would not have needed to dissent at all. Actually, if he had written it, his dissent might have made an important contribution to the law.

The *ABC Inc.* case and the judges in this scenario are all fictional. But similar scenarios do happen in our appellate courts. There is truly no way to know precisely how often it happens, and there is no way to determine that it happens in any particular case. Under local rules of court and the Code of Judicial Conduct, judges may not discuss their panel deliberations and decision-making processes in a particular case with those outside the court.⁴ No records of such things are made or kept, but all appellate judges have the experience of working with other judges to reach resolutions of

3. "Published" cases are those designated by the issuing court to be physically published in official reporter books and, more importantly, to have precedential value. With the advent of electronic databases and the Internet, the practical physical or financial constraints on publication of opinions are gone, and electronic research enables attorneys to research all cases instantaneously, but the old terminology remains. Thus, the term "unpublished" is a bit misleading, since cases designated as "unpublished" are actually published electronically, even though they are not physically published in the official *Federal Reporter* books. See Adam Liptak, *Courts Write Decisions That Elude Long View*, N.Y. TIMES, Feb. 3, 2015, at A10 (noting that "technology has turned the term 'unpublished' into a misnomer"). Ironically, in 2001, Thomson West began publishing the "unpublished" federal opinions in books in the *Federal Appendix*.

4. See MODEL CODE OF JUDICIAL CONDUCT r. 2.10 (AM. BAR ASS'N 2011); see also Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1903 (2009) ("[J]udicial decisionmaking takes place in a closed environment and deliberating judges are bound by propriety and ethics to maintain confidentiality.").

cases. Statistics clearly demonstrate that the vast majority of those deliberations now result in the issuance of an unpublished opinion.⁵ Some judges have written about and discussed their own experiences and beliefs on how judges make decisions about publication and the advantages or disadvantages of unpublished opinions.⁶ Other researchers have sought to identify factors that determine publication decisions based on statistical analysis of the cases themselves and the characteristics of the court and judges.⁷

This Article examines the reasons that judges report for designating cases as “unpublished,” using interviews and surveys of judges on the United States Courts of Appeals for the Fourth and Seventh Circuits, along with examination of their rules and customary practices. It also notes similar practices in the North Carolina Court of Appeals, based on my own observations as a judge on the court.

I. THE DEBATE REGARDING UNPUBLISHED OPINIONS

There has been much debate about whether courts should designate cases as “unpublished,” and whether these unpublished cases should be citable.⁸ This debate extends to the potential jurisprudential and practical ramifications of excluding unpublished opinions from the development of the common law.⁹ For many judges, lawyers, law professors, and others in

5. From September 30, 2012, to September 30, 2013, the federal courts of appeals, excluding the United States Court of Appeals for the Federal Circuit, issued 88.2% of their opinions as unpublished opinions. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2013 ANNUAL REPORT OF THE DIRECTOR *supp. tbl.S-3* (2013), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S03Sep13.pdf>. This number decreased slightly during the twelve-month period ending on September 30, 2014. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2014 ANNUAL REPORT OF THE DIRECTOR *tbl.B-12* (2014), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2014/appendices/B12Sep14.pdf>.

6. In *Unpublished Opinions: A Comment*, Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit discusses his thoughts on unpublished opinions as a judge “who has produced probably hundreds of unpublished opinions, but has always felt uneasy about it.” Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 219 (1999).

7. *See generally* Edwards & Livermore, *supra* note 4; Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001).

8. *See generally* David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667 (2005).

9. *See id.* at 1668–69 (discussing the debate on unpublished opinions and the questions raised by the development of a “two-track” system for cases in the federal courts). Vladeck

the legal profession, this debate has been quite intense and has persisted for many years.¹⁰

While this Article acknowledges that debate, the Article's purpose is not to examine the wisdom of the federal courts' practices of issuing unpublished opinions.¹¹ Instead, the purpose is to examine how judges

and Gulati describe the "Track One" and "Track Two" models of opinions in the federal courts:

[In] "Track One" cases . . . [e]ach 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.

Id. at 1668. On the other hand, unpublished opinions travel the "Track Two" or "black box" track, where they

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.

Id. at 1669. The debate regarding how unpublished opinions should be used has even divided the judiciary. See Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 2 (2007) ("The period since 2002 has seen a bitter dispute over the apparently trivial issue of a proposed and eventually enacted uniform citation rule splitting the ranks of the federal judiciary" (citation omitted)).

10. See generally Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005) (describing the intense debate on the treatment of unpublished opinions from the author's perspective as reporter to the Advisory Committee on the Federal Rules of Appellate Procedure). Schiltz says:

On the day that I became Reporter, the issue of unpublished opinions was the most controversial issue on the Advisory Committee's agenda. Eight years later, the issue of unpublished opinions continues to be the most controversial issue on the Advisory Committee's agenda. I have devoted more attention to the unpublished-opinions issue than to all of the other issues the Advisory Committee has faced—combined. At times, I have devoted more attention to the unpublished-opinions issue than to all of my children—combined. An Advisory Committee member once joked that my obituary would be unpublished.

Id. at 1429–30 (footnote omitted).

11. Further, my purpose is not to examine the wisdom of any intermediate appellate court in the United States in issuing unpublished opinions. The intermediate appellate courts of the states issue "unpublished" or nonprecedential opinions as well, but this Article focuses on the federal courts, with a particular focus on the Fourth and Seventh Circuit Courts of Appeals. Donald R. Songer noted in 1990:

themselves understand and practice the decision to designate a case as published or unpublished. The federal circuits each have formal rules that address the publication of opinions, but these rules vary, and the publication rates also vary, although the variance in publication rates does not seem to be directly related to the plain text of the rules.¹² The real reasons for designating cases as unpublished may also reveal just as much useful information for analysis of the courts as the statistical analysis of the published cases.

Although the reasons that judges decide to publish cases may be important for many reasons, this Article focuses on how these publication decisions may affect statistical research on the courts. We must rely on the work product of the courts—the opinions—to examine or analyze the work of the courts or of a particular judge, and that is exactly what many researchers do.¹³ If judicial-behavior researchers ignore unpublished cases,

[T]here is no consensus on the wisdom of the practice of nonpublication. Behind the normative debate over nonpublication are conflicting views as to whether or not the formal criteria governing publication provide an accurate description in fact of which cases are selected to be unpublished. There is little controversy over the abstract notion that cases with no precedential value, no significance for public policy, and in which the existence of clear precedents give judges no discretion in decisionmaking should not be published. The important controversy rages over whether the cases currently designated for nonpublication status are in fact such cases.

Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 309 (1990).

12. See *id.* at 313. Even in 1990, Songer, who compiled one of the most frequently used case databases, concluded that the official rules regarding unpublished opinions did not seem to explain the courts' publication practices. See *id.* After examining the published and unpublished cases from the United States Courts of Appeals for the Fourth and Eleventh Circuits in 1986, he noted that "[t]he data presented . . . clearly demonstrate that the official criteria for publication do not provide an adequate description of the differences in practice between decisions which are published and those which are not." *Id.* He further explained:

A significant number of the unpublished decisions of the courts of appeals appear to involve cases which are non-routine, sometimes politically significant, and which are nonconsensual appeals which present the judges on the panel hearing the appeal with an opportunity to exercise substantial discretion in their decisionmaking. The data suggest that for a number of the unpublished decisions the outcome of the case might have been different if heard by a different panel of judges. For other cases the data suggest that while the outcome might have been the same, a different panel would have been likely to issue a published opinion.

Id.; see also Merritt & Brudney, *supra* note 7, at 72 ("Each court has formal rules governing the publication of opinions, but those standards fail to account for variations in publication. Despite substantial overlap among circuit rules, publication rates differ widely among courts and even among individual judges.").

13. See Edwards & Livermore, *supra* note 4, at 1906–07 (describing the difficulties of empirical analysis of the opinions of the federal courts, including the inability of this

they may be omitting relevant information on the behavior of courts. The assumption that every unpublished case is so designated because it is entirely uncontroversial or has nothing to add to the development of the law is simply incorrect.¹⁴ Even the process of determining whether a particular case should be published is a type of judicial decision making, independent of the substantive issues raised by a case, which could be relevant to research on courts' behavior and work.

The decision on publication is not the only decision process by courts that is hidden from public view. The Supreme Court and highest state appellate courts do not provide explanations for denying petitions for

analysis to take many aspects of the decision-making process into account, and the methodological and conceptual challenges presented by these studies).

14. Judges themselves are well aware of this fact. See Arnold, *supra* note 6, at 224 (noting that “many cases with obvious legal importance are being decided by unpublished opinions”).

On rare occasions, the United States Supreme Court has commented on the obvious importance of an unpublished opinion. In *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Court noted, “[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.” *Id.* at 425 n.3; see also *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (describing the Ninth Circuit’s opinion in *Jackson v. Felkner*, 389 F. App’x 640 (9th Cir. 2010) as “inexplicable as it is unexplained”).

Another recent example is Justice Thomas’s dissent, joined by Justice Scalia, from the denial of certiorari in a case from the Fourth Circuit, *Plumley v. Austin*, 135 S. Ct. 828 (2015) (mem.). In *Plumley*, Justice Thomas noted:

True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. But that in itself is yet another disturbing aspect of the Fourth Circuit’s decision, and yet another reason to grant review. The Court of Appeals had full briefing and argument on Austin’s claim of judicial vindictiveness. It analyzed the claim in a 39-page opinion written over a dissent. By any standard—and certainly by the Fourth Circuit’s own—this decision should have been published. The Fourth Circuit’s Local Rule 36(a) provides that opinions will be published only if they satisfy one or more of five standards of publication. The opinion in this case met at least three of them: it “establishe[d] . . . a rule of law within th[at] Circuit,” “involve[d] a legal issue of continuing public interest,” and “create[d] a conflict with a decision in another circuit.” It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit.

Id. at 831 (Thomas, J., dissenting) (quoting 4TH CIR. R. 36(a)(i), (ii), (v)).

For an excellent description of the increased number of unpublished cases since 1970 and a statistical analysis of publication practices in multiple federal circuits, including statistics that illustrate the importance of many unpublished opinions from other courts’ citation to those opinions and from the Supreme Court’s review of unpublished opinions, see Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001).

certiorari, even though the vast majority of these petitions are denied review.¹⁵ Some courts issue brief memorandum opinions, summary affirmances, or brief per curiam opinions that do not contain any legal analysis.¹⁶ In those cases, the court's decision-making process is totally hidden. But although unpublished opinions are "unpublished" in that they have no precedential value, they are readily available to read. They are not hidden, and although some things cannot be seen, such as Judge Smith's reasons for concurring in result only, there is some information that we can see in the unpublished opinion. Many unpublished opinions also include a

15. In the October Term 2012, 7509 cases were filed in the Supreme Court, but the Court granted review by certiorari in only 92 of those cases. See U.S. SUPREME COURT, JOURNAL OF THE SUPREME COURT OF THE UNITED STATES: OCTOBER TERM 2012 II (2013), <http://www.supremecourt.gov/orders/journal/jnl12.pdf>. In recent years, petitions have been granted at rates ranging from about 1% to 5%. See *History of the Federal Judiciary*, FED. JUD. CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_petitions_for_certiorari_2 (last visited May 11, 2015). The votes of at least four of the nine justices are required for the Court to grant certiorari. See PUB. INFO. OFFICE OF THE SUPREME COURT OF THE U.S., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 3 (Nov. 2014), <http://www.supremecourt.gov/publicinfo/reportersguide.pdf>. The United States Supreme Court has explained:

[A] denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.

Brown v. Allen, 344 U.S. 443, 492 (1953) (opinion of Frankfurter, J.).

A Supreme Court Justice may dissent from the denial of certiorari, so while the reasons that a dissenting Justice would have granted certiorari are known, the reasons that the other Justices did not grant certiorari normally remain a mystery. For example, in *Smith v. United States*, 502 U.S. 1017 (1991), Justice Blackmun, joined by Justices O'Connor and Souter, dissented from the Court's denial of certiorari, noting that in an unpublished opinion, the Fourth Circuit had "reviewed [Smith's] conviction in a manner inconsistent with this Court's precedents on the application of harmless-error analysis." *Id.* at 1017 (Blackmun, J., dissenting). Further, Justice Blackmun commented in a footnote that "[t]he fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion." *Id.* at 1020 n.*. Does this footnote hint at one of the unstated reasons that the majority of the Court voted to deny certiorari? There is no way to know, but sometimes dissenters tend to address the positions of the majority via an oblique comment. See *id.* Yet the Supreme Court has granted review of a number of unpublished opinions, so the unpublished status of a case certainly does not always protect an opinion from review. See Hannon, *supra* note 14, app. A at 241–50 (listing a sample of eighty-three unpublished opinions reviewed by the Supreme Court from 1974 to 2000).

16. See Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691, 1693–94 (1995).

full legal analysis and differ from published opinions only in the designation as nonprecedential.¹⁷ Much of the information in an unpublished opinion is hidden only to the extent that researchers studying judicial behavior ignore it.

The most frequently stated practical reason for high nonpublication rates is that it is necessary to deal with the courts' increasing workloads.¹⁸ The federal courts simply cannot issue a fully researched, well-written, precedential opinion in every single case; instead, they must allocate their time and effort to those cases that most need and deserve it.¹⁹ At least one federal court explicitly recognizes this workload concern in its Internal Operating Procedures (IOP): IOP 10 of the United States Court of Appeals for the Federal Circuit begins with the recognition that "[t]he workload of the appellate courts precludes preparation of precedential opinions in all cases," and notes that "[u]nnecessary precedential dispositions, with

17. Although they are officially nonprecedential, unpublished opinions are sometimes cited by later published opinions. In addition, some argue that unpublished opinions may actually "make[] law the wrong way" when they "guide the opinions that follow, but troublingly, not as deliberately, and not nearly as openly, as precedential opinions do." Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 154 (2012). Soucek describes how portions of text from unpublished opinions regarding different interpretations of "social visibility" in asylum cases in the Second Circuit have been copied and pasted without acknowledgement in later published opinions, leading to error in the court's analysis of this issue. *Id.* at 158–61, 171 (discussing *Romero v. Mukasey*, 262 F. App'x 328, 330, 333 (2d Cir. 2008) and noting subsequent decisions that cited *Romero*).

18. See Arnold, *supra* note 6, at 221 ("Why would the federal courts take such a step, seemingly so much at odds with traditional ways of adjudication? The answer lies in one word, the same word that describes the most serious problem facing all our courts today: volume.").

19. See *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 33 (2002) (statement of Hon. Alex Kozinski, U.S. Court of Appeals for the Third Circuit), <http://commdocs.house.gov/committees/judiciary/hju80454.000/hju804540.HTM>. Kozinski states:

Writing twenty opinions a year is like writing a law review article every two and a half weeks; joining forty opinions is like commenting on an article written by someone else nearly once every week. It's obvious just from the numbers that unpublished dispositions get written a lot faster—about one every other day. It's also obvious that explaining to the parties who wins, who loses and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. We seldom review unpublished dispositions of other panels or take them en banc. Not worrying about making law in 3800 unpublished dispositions frees us to concentrate on those decisions that will affect others besides the parties to the appeal.

Id.

concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort.”²⁰

The process of selecting only the most meritorious cases for publication has been compared to emergency-room triage; patients with life-threatening conditions need to receive immediate treatment, while those who are not in danger will have to wait until medical personnel are available to assist them.²¹ But although case triage may be necessary, what standards do judges actually use to decide which cases need full treatment? In the emergency room, the medical standards for patient assessment are reasonably clear and uniformly applied: nurses gather personal information about the patient’s complaints and status and check temperatures, heart and respiratory rates, and blood pressures, and follow standards set by the hospital as to which patients need treatment first. In the courtroom, however, no clear or uniform triage standards exist. For many cases, most lawyers and judges would agree that publication is not needed, simply because the issues presented do not merit publication. But in other cases, such as the fictional *ABC Inc. v. First Bank* case, the legal issue is actually a disputed one that needs to be addressed, but was not, due to workload considerations.²² Or, were there other hidden reasons as well?

What about Judge Vinson in the *ABC Inc.* case? Why will he not reconsider his position? Perhaps he has strong ideological opposition to the approach that Judge Smith would like to take in the case. Judge Vinson would prefer to let the law stand as it is, or even with a bit more confusion added by *ABC Inc.*, because he does not want this case to establish a definitive interpretation of the statute at issue in the case. Perhaps Judge Vinson believes that the law does need to be clarified, but thinks that the briefs in this case were poorly written and the court should wait for another opportunity to address the issue. Maybe Judge Vinson is very busy and does not have time to reconsider. In reality, each of the three judges on this panel may have an entirely different reason for not wanting this case to have precedential status. Many different factors may be hidden in this one publication decision.²³

Lawyers, the media, the general public, law professors, law students, political scientists, psychologists, and other judges all examine, parse, criticize, praise, and analyze the details of cases issued by appellate courts at every level for many reasons. The Supreme Court of the United States is naturally subjected to the most intense examination, given its position and

20. FED. CIR. I.O.P. 10(1).

21. See Vladeck & Gulati, *supra* note 8, at 1673.

22. See *supra* notes 2–3 and accompanying text.

23. See discussion *infra* Part II.B.

power. Yet, the federal intermediate appellate courts are also closely examined, not just to learn the formal content of the law, but also to analyze judicial performance and to determine if judges are ruling in certain ways based on ideologies or other biases. With life tenure, federal appellate judges tend to serve in their positions for a long time, and attorneys who practice before them are quite interested in predicting their predilections.²⁴ Historically, nominees to the Supreme Court often come from the federal intermediate appellate bench, so their ideological orientations that are demonstrated at the intermediate appellate level will be microscopically examined if the judges are nominated to the Supreme Court.²⁵ Because of their obligations under the Code of Judicial Conduct,²⁶ judges do not simply announce how they might rule on particular issues, but many people have reasons to try to predict how they might rule, using the judge's prior opinions to make these predictions. However, because of the tremendous number of opinions issued by the federal courts, it is physically impossible for one person to read and thoughtfully analyze

24. See Ahmed E. Taha, *Judge Shopping: Testing Whether Judges' Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007, 1035 (2010). Some research indicates that litigants' decisions to file cases in a particular court are driven by beliefs about the court's ideology:

[T]he political orientations of U.S. district court judges are also important; the political orientation of federal district judges affects which cases are filed in federal courts. Plaintiffs file more of certain types of lawsuits—such as product liability and motor vehicle personal injury suits—when the judges on a court are politically liberal rather than politically conservative. This demonstrates that many litigants believe the political orientation of the trial judge can affect who wins. Fewer plaintiffs seek relief in a court if they believe the judge is less likely to be sympathetic to their cases.

Id.

25. See Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 33 (2004) [hereinafter Choi & Gulati, *Choosing the Next Supreme Court Justice*]. Choi and Gulati describe the usual "tournament" of Supreme Court confirmation:

In step two of the current process, the president seems to narrow the candidate pool on the basis of likely votes on a key subset of political issues such as abortion, gay rights, affirmative action, sexual harassment, the death penalty, gun control, and federalism. The candidate's likely votes on this subset of key issues become a proxy for the nominee's fuller range of future voting behavior. And, as we know from newspaper reports of the recent fights over judicial nominations, the candidate's judging record and personal life are magnified and scrutinized to discern all possible signals of future voting patterns.

Id. (first citing Helen Dewar, *GOP Presses for Votes on Judges*, WASH. POST, July 30, 2003, at A4; then citing James Wensits, *Chocola Supports Bush Court Nominee*, S. BEND TRIB., Feb. 14, 2003, at D3).

26. See MODEL CODE OF JUDICIAL CONDUCT r. 2.10 (AM. BAR ASS'N 2011).

every single case.²⁷ Researchers must use statistical analysis to find the answers to their questions, but to get a valid answer, the researchers must ask the right questions and use the right data.

No matter how elegant a statistical analysis may be, it is only as good as its underlying data. Therein lies the problem: even the simplest case produces very complex data. First, the researcher must select the set of cases to study, and then, the cases must be read, classified, and coded, or reduced to a set of numbers that can be plugged into statistical formulas.²⁸ The researcher must determine whether the result in each case is considered ideologically “liberal” or “conservative” in a study of political orientation, or favorable or unfavorable to a particular interest or group, or whatever the relevant feature sought may be. Studies of how frequently a judge’s opinions are cited and whether those citations are favorable or unfavorable must also characterize each citation.²⁹ People may disagree on whether a particular result indicates a certain ideological position—the results of cases may depend upon procedural or jurisdictional rationales that actually have no relation to substantive issues or ideology.³⁰ But beyond these

27. See *supra* notes 18–20 and accompanying text.

28. See Edwards & Livermore, *supra* note 4, at 1922–23 (describing the problems with selecting and coding cases for the U.S. Courts of Appeals Database, also known as the Songer Database, which has been used by many empiricists).

29. See Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Courts of Appeals*, 76 MO. L. REV. 315, 316–17 (2011) (discussing empirical research based on citation counts). Anderson determines that the omission of unpublished opinions in some studies should have no effect on the accuracy of the research if the researcher is “not . . . attempting to draw inferences about the *precedents* created in those dispositions.” *Id.* at 372. Anderson notes:

[T]he very idea of a study of citations to unpublished opinions is, in a sense, a contradiction in terms, because unpublished decisions are generally not citable as precedent. Thus, to the extent one wishes to study the quality of the legal reasoning that forms part of the body of precedent for later cases, the unpublished decisions are not relevant.

Id. (citing FED. R. APP. P. 32.1). Yet Anderson recognizes that if “one wishes to draw inferences about the dispositions of individual cases by the federal courts, citation analysis may prove less useful than other techniques.” *Id.* In addition, the legal analysis in an unpublished case may end up being used by another court without formal citation. See Soucek, *supra* note 17, at 170–71. Soucek examines the creation of a line of cases perpetuating a legal error in the Second Circuit, where copy/paste quotations of language from unpublished cases led to published cases, which “suggest[s] that to qualify as a social group, asylees must share a trait that is visible to society at large.” *Id.* at 171. Soucek concludes: “This is wrong. But the deeper wrong is that the Second Circuit’s case law on this subject is guided by a system of ‘precedent’ that is itself not visible Before now, it has not been recognized or understood, and even now, it operates in ways almost entirely unseen.” *Id.*

30. See Edwards & Livermore, *supra* note 4, at 1925.

difficulties that arise even in the most meticulous research, the first inquiry looks at which cases will be included in the dataset. If some are excluded, what is the reason for their exclusion?³¹ Will the exclusion of these cases leave out meaningful data and result in the wrong conclusions? To answer this question, we must first consider the actual reasons that the vast majority of federal appellate opinions are unpublished. In addition, it may be necessary for the treatment of unpublished opinions to differ based on the court, since the published cases of a court that publishes a large percentage of its cases will more likely result in a representative sample of its work than those of a court that publishes a very small percentage.

To answer these questions, I asked the judges who actually make these publication decisions every day to describe their experiences. Part II of this Article describes the study procedure, which included surveys and interviews with Fourth and Seventh Circuit judges. Part III describes some of the objective characteristics of the Fourth and Seventh Circuits, including their caseloads, publication percentages, and official procedures and rules for making decisions regarding oral argument and publication. Part IV analyzes the factors that judges consider in making publication decisions. Part V compares the judges' responses at each court and describes how the culture of each court creates and affects the court's publication practices. The final Part presents my conclusions regarding the potential importance and use of unpublished opinions in research on judicial behavior based on the way that judges make decisions regarding publication.

II. STUDY PROCEDURE

Although each court has its own official rules and procedures that address the publication of opinions, these rules do not assist in understanding how judges actually make the publication decision. While many have speculated about the various reasons that certain opinions are unpublished, the literature has not addressed in detail how individual judges make the publication decision.

As a practical matter, the publication decision is made almost entirely by the authoring judge, and only nominally by the panel. As one judge put

31. As Edwards and Livermore note, “[p]ublished decisions as a sample of total decisions are far from random . . . and these cases typically involve more straightforward applications of law. However, they still dispose of appeals on the merits and offer information on “a court’s adherence to precedent.” *Id.* at 1923. Edwards and Livermore conclude that “any assessment of the work of the courts of appeals that does not include unpublished decisions cannot be seen as complete.” *Id.*

it, “publication is a very individual decision.”³² Although the deliberative processes are hidden from the public, we know that in recent years, the rate of published opinions from the Fourth Circuit has been the lowest among the federal courts of appeals, while the Seventh Circuit’s rate of published opinions has been the highest.³³ Because of this difference in publication rates, I believed that a comparison of the decision processes regarding publication at these two courts could shed light on how judges make their publication decisions.

Each court has essentially three levels of rules that may influence publication decisions.³⁴ First, the Federal Rules of Appellate Procedure apply to all federal courts.³⁵ The next level of rules is the internal procedures of each court, which includes written rules adopted by each court. The last level is the unwritten culture—the customs and traditions that each court uses in making these decisions. At the most basic and more inscrutable level, these decisions are made by each individual judge based on many factors. This Article examines the unwritten rules and the ways in which judges actually make their publication decisions.

A. *Methods*

Research on people always has its difficulties, but research on the personal thoughts and motivations of federal judges presents far more than the usual challenges. The first challenge is access: federal judges are not readily accessible.³⁶ Federal judges are scattered all over the country, and

32. Interview with Judge, U.S. Court of Appeals for the Seventh Circuit, in Chicago, Ill. (Nov. 3, 2013).

I promised all of my interview or survey subjects that I would not identify them, either directly or indirectly, without specific permission provided after review of any quote or comment used in this Article. Any information about the subject that I was able to furnish consistent with my promise of anonymity can be found in the text surrounding the various quotes or comments.

33. See Orin Kerr, *Rates of Unpublished Opinions in the Different Circuits—And Especially the Fourth Circuit*, VOLOKH CONSPIRACY (Sept. 8, 2011, 12:53 PM), <http://volokh.com/2011/09/08/rates-of-unpublished-opinions-in-the-different-circuits-and-especially-the-fourth-circuit/>.

34. I will refer to this process as the publication decision, not the nonpublication decision, although they are both the same. Since the vast majority of cases are now unpublished, I believe that judges tend to view the decision as an affirmative decision to publish, almost acknowledging a default of nonpublication.

35. FED. R. APP. P. 32.1(a)(i) (providing that “[a] court may not prohibit or restrict the citation of federal judicial opinions . . . that have been . . . designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like”).

36. I was fortunate to have access to the judges as a fellow appellate judge and based on my association with the Duke Law School Judicial Studies Program.

they are very busy. I asked the current active or senior-status judges on the Fourth and Seventh Circuits to participate in either a written survey, a telephone interview, or a personal interview, as their schedules permitted. I also interviewed the general counsel to the circuit executives and clerks of the Fourth and Seventh Circuits. I conducted the interviews in person either at each circuit's main courthouse—in Chicago for the Seventh Circuit, and in Richmond for the Fourth Circuit—or at the judges' home-state offices. Interviews were not recorded, because I believed that fewer judges would be willing to participate in recorded interviews. I took notes during each interview and did my best to record any direct quotes that I have used in this Article. Any direct quotes of this type that are attributed to a particular person were also reviewed by the particular judge or interview subject prior to publication of this Article to ensure accuracy.³⁷ I was not able to interview or obtain information from all of the judges on these courts, but I was able to talk to nearly half of the judges on the Fourth Circuit, and about a third of the active judges on the Seventh Circuit. I developed questions based on my experience as a judge and based on the existing literature relating to nonpublication, and I asked the judges if there were additional factors that influence their publication decisions that I had not mentioned. In addition to conducting interviews, I observed sessions of oral argument at both courts.³⁸

Based on the current literature and on the surveys and conversations with the judges that I interviewed, I have attempted to identify the factors that judges actually consider in deciding whether to publish and how these judges vary in their decision processes. Thus, my conclusions are based primarily on self-reporting by the judges—something that would no doubt be frowned upon by many empirical researchers.³⁹

But what aspect of human behavior can be studied without asking the people being studied for their own thoughts on the question? Certainly, research should go far beyond just asking a question and taking their word

37. However, in the event that any quotes used in this Article are inaccurate in any way, the responsibility is entirely mine.

38. On a personal note, I would like to express my gratitude to all of the judges and personnel at each court, all of whom were so gracious in spending their valuable time on this study and so welcoming to my visits. Judges normally do not have the time or opportunity to visit courts outside of their own jurisdictions in this way, and having the chance to examine in some detail how these other courts work was simply a wonderful educational experience for me as a judge.

39. See LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 57–58 (2013) (“The premise is sound only if judges are introspective, only if introspection enables a judge to dredge up from the depths of his unconscious the full array of influences on his exercise of discretion, and only if judges are candid in their self-reporting. None of these assumptions is plausible.”).

for it, but asking these questions is a necessary part of research and may assist future research. The judges that I interviewed appeared to consider and answer the questions in a genuinely introspective and candid manner, although I have no way of knowing if they truly dredged up all of the influences in the depths of their unconscious minds.⁴⁰

The motivations and experiences reported by federal judges cannot be entirely irrelevant or unworthy of study. Judges have a long tradition of introspection as to how they make decisions,⁴¹ and this sort of introspection has contributed to most of our literature on theories of judicial behavior, including the nine theories of judicial behavior examined in Judge Posner's book, *How Judges Think*,⁴² as well as Judge Posner's own theory of pragmatic judging. Judicial decision-making is simply too complex to be fully explained by either purely statistical empirical analysis or by purely subjective self-reporting,⁴³ but taken together, I believe that each type of research may inform the other and contribute to the accuracy and completeness of the end results of each form of study. Given the lack of research that asks the judges themselves to explain their actions, I have attempted to give judges this opportunity.

In the same vein, I would be remiss in this study not to reveal my own background as a judge and the frame of reference I have from my

40. *See id.*

41. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921). This work is perhaps the classic text of judicial introspection. Justice Cardozo ponders these questions:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

Id.

42. *See* RICHARD A. POSNER, *HOW JUDGES THINK* 19 (2008) (noting possible internal reasons that judges act and rule as they do). These theories are "the attitudinal, the strategic, the sociological, the psychological, the economic, the organizational, the pragmatic, the phenomenological, and, of course, what I am calling the legalist theory." *Id.*

43. *See* EPSTEIN ET AL., *supra* note 39, at 57–58. Justice Cardozo also acknowledged:

A richer scholarship than mine is requisite to do the work aright. But until that scholarship is found and enlists itself in the task, there may be a passing interest in an attempt to uncover the nature of the process by one who is himself an active agent, day by day, in keeping the process alive. That must be my apology for these introspective searchings of the spirit.

CARDOZO, *supra* note 41, at 13.

experience as an appellate judge. Since 2007, I have served as a judge on the North Carolina Court of Appeals, which is the sole intermediate appellate court in North Carolina.⁴⁴ The court has fifteen judges⁴⁵—the same number of active judges on the Fourth Circuit Court of Appeals.⁴⁶

Rule 30(e) of the North Carolina Rules of Appellate Procedure is the court’s rule governing unpublished opinions.⁴⁷ The rule was originally adopted in 1975 before the advent of electronic databases, when all cases had to be published in physical books. It provides that the purpose of the rule is to “minimize the cost of publication and of providing storage space for the published reports” and that “[i]f the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.”⁴⁸

44. See *Court of Appeals of North Carolina*, N.C. CT. SYS., <http://www.nccourts.org/courts/appellate/appeal/> (last visited Apr. 29, 2015).

45. See *NC Court of Appeals Judges*, N.C. CT. SYS., <http://appellate.nccourts.org/Bios/?c=2> (last visited Apr. 29, 2015).

46. See *List of Judges of the Court*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/docs/pdfs/list-of-judges-of-the-court.pdf?sfvrsn=0> (last visited Apr. 29, 2015).

To provide a sense of the workload of the North Carolina Court of Appeals, in 2013, 1474 appeals were filed with our court, and we issued 1346 opinions. Data Compilation by Marcos DeSouza, Director of Information Systems for the North Carolina Supreme Court and the North Carolina Court of Appeals (on file with author). The North Carolina Court of Appeals issues full opinions in all cases and does not use brief memorandum opinions that simply state a result. The court also issues unpublished opinions. In 2013, 63% of the court’s opinions were unpublished. *Id.* Of my own opinions issued in 2013, 37% were unpublished. *Id.*

47. See N.C. R. APP. P. 30(e). Lawyers today who have never had to use actual books for legal research may fail to appreciate the historical development of the nonpublication rules. For a fascinating perspective, see the views of Judge Philip Nichols, Jr. in his article, published by the *American University Law Review*. See Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909 (1986). Judge Nichols graduated from law school in 1932 and began his judicial career in 1964 on the United States Customs Court. See *History of the Federal Judiciary*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1759> (last visited May 2, 2015). He then served from 1966 to 1982 on the United States Court of Claims, and then on the United States Court of Appeals for the Federal Circuit in 1982, when that court was created. *Id.*

48. N.C. R. APP. P. 30(e)(1). Appellate Rule 30(e) provides in pertinent part as follows:

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

....

Each associate judge on the North Carolina Court of Appeals has an executive assistant and two law clerks, and the chief judge has an executive assistant and three law clerks.⁴⁹ The court also has an Office of Staff Counsel, which has ten attorneys. In addition to assisting the court with petitions and motions, the court's staff attorneys prepare drafts of opinions in some cases that are designated as "fast track" cases by the panel to which they are assigned.⁵⁰ Most of these "fast track" cases are single-issue criminal appeals that are clearly controlled by existing law or consist of "Anders brief" cases⁵¹ and are not orally argued, but are issued as unpublished opinions. If any judge on the panel believes that a case designated as "fast track" needs additional consideration or oral argument, that judge can move the case from the fast-track panel to a regular panel for full consideration. Staff counsel also assist in preparing drafts of opinions in certain "qualifying juvenile cases,"⁵² mostly involving terminations of parental rights, which are heard on an expedited schedule. Although staff

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. . . . When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

Id. R. 30(e)(1), (3).

49. See N.C. GEN. STAT. § 7A-7 (2013) (providing that "each justice and judge of the appellate division is entitled to the services of not more than two research assistants, who must be graduates of an accredited law school"); see also Brenda D. Gibson, Staff Attorney, N.C. Court of Appeals, *The Appellate Process and Jurisdiction* (Sept. 9, 2004), <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/200411GibsonAppellateProcess.pdf> (noting that the chief judge of the court of appeals has three law clerks).

50. N.C. R. APP. P. 30(f)(2). Appellate Rule 30(f)(2) provides in part:

The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on the record and briefs.

Id.

51. "Anders brief" cases, named after *Anders v. California*, 386 U.S. 738 (1967), are cases where appointed counsel believes, after a conscientious review of the record, that there is no merit to the appeal. See *id.* at 744. In these cases, counsel must provide the court with a brief that notes anything in the record that might reasonably support an appeal. See *id.* The court will then make a determination as to whether the appeal is frivolous. See *id.*

52. See N.C. R. APP. P. 3.1.

counsel does prepare draft opinions for the Rule 3.1 cases,⁵³ and although these cases are normally not argued, the panels meet and deliberate on these cases in the same manner as the cases that are on the regular calendar, and judges often end up writing these opinions in their own chambers.

The North Carolina Court of Appeals does not hear oral argument on all cases; each panel designates which cases will be argued. In 2013, 7.9% of the cases decided were orally argued.⁵⁴ There is no official link between oral argument and publication on the North Carolina Court of Appeals like there is on the Fourth Circuit Court of Appeals.⁵⁵ Although orally argued cases are more likely to be published, some are not published, and some cases that were not orally argued are published. Whether published or not, the author of each opinion is identified (except in the case of per curiam opinions, which are relatively rare⁵⁶). The decision to publish a case is almost always made by the authoring judge, although authoring judges often request that the other judges on the panel weigh in on whether the case should be published. From my experience, there is rarely any disagreement about publication decisions. The final decision to publish a case is made after the case has been considered by the entire panel after an opinion has been drafted.⁵⁷

Another unique feature of North Carolina law may also influence a judge's decision to write a dissenting opinion, and perhaps might influence publication decisions on the North Carolina Court of Appeals: section 7A-30 of the North Carolina General Statutes provides for an appeal of right to the Supreme Court of North Carolina from any court of appeals decision "[i]n which there is a dissent."⁵⁸ If there is a dissent, the losing party has a right of appeal to the state supreme court.⁵⁹ If an opinion of the

53. These drafts come to the panel with a default "unpublished" designation, but the panel can, and sometimes does, change this to a "published" designation.

54. Data Compilation by Marcos DeSouza, *supra* note 46.

55. See *infra* notes 170–78 and accompanying text.

56. See Michael C. Gizzi & Stephen L. Wasby, *Per Curiam Revisited: Addressing the Unsigned Opinion*, 96 JUDICATURE 110, 115 (2012) (explaining that "the range of published dispositions issued per curiam extends from the very rare use in the D.C. Circuit (only 0.3%) to as many as one-fourth (11th Cir.)," and that the average use in most federal courts of appeals is between 3% and 7%).

57. Although individual judges may differ in their approaches to publication decisions, I have sought to present a general description of this court's procedures based on the rules and practices that are almost always followed by all of our judges. I thank former Chief Judge John Martin and Judge Robert N. Hunter, Jr. of the North Carolina Court of Appeals for their input and review of my description of the court's procedures to ensure that I have presented this accurately. To the extent that I have not, the fault is entirely my own.

58. N.C. GEN. STAT. § 7A-30(2) (2013).

59. *Id.*

court of appeals is unanimous, review by the supreme court is discretionary.⁶⁰ In recent years, only a small percentage of petitions for discretionary review have been granted by the supreme court. In fiscal year 2013, the supreme court granted only 12.5% of petitions for discretionary review that were docketed in the court.⁶¹ Judge James A. Wynn, Jr., who served on the North Carolina Court of Appeals and the Supreme Court of North Carolina prior to his appointment to the United States Court of Appeals for the Fourth Circuit, notes that section 7A-30⁶² gives a dissenting judge on the North Carolina Court of Appeals the power to grant a right of appeal to the state supreme court: “Because the North Carolina Supreme Court does not accept certified questions, N.C. Gen. Stat. § 7A-30 in effect empowers a single dissenting judge to do something that the panel of judges cannot do—grant a right of appeal.”⁶³ This statute may create a greater incentive for judges on the North Carolina Court of Appeals to exert the additional time and effort to write a dissenting opinion.

B. *Publication Decision Factors*

1. *Identification of Factors*

The literature arising from the debates on the federal courts’ adoption of Appellate Rule 32.1,⁶⁴ which requires all federal circuits to allow citation of unpublished opinions, addresses many of the reasons that courts should or should not issue nonprecedential opinions. It was also apparent to me from my experience as an appellate judge that judges often consider these same factors in making publication decisions, regardless of the specific language of the court’s rule on unpublished opinions. Thus, I asked judges on the Fourth and Seventh Circuit Courts of Appeals whether and to what extent the following factors are relevant to their publication decision:

60. *Id.* § 7A-31.

61. From July 1, 2013, to June 30, 2014, the court considered 657 petitions for discretionary review. See N.C. ADMIN. OFFICE OF THE COURTS, STATISTICAL AND OPERATIONAL REPORT: APPELLATE COURTS 5 (2014), http://www.nccourts.org/Citizens/SR_Planning/Documents/2013-14_appellate_courts_statistical_and_operational_report.pdf. Of those petitions, 82 were granted, 465 were denied, 80 were dismissed or withdrawn, and 30 were disposed for reasons labeled “other.” *Id.*

62. See N.C. GEN. STAT. § 7A-30(2).

63. Interview with Judge James A. Wynn, Jr., U.S. Court of Appeals for the Fourth Circuit, in Raleigh, N.C. (Nov. 26, 2013).

64. FED. R. APP. P. 32.1.

1. The case lacks value as a legal precedent, since many prior cases have addressed the same issue;
2. No new or novel legal issue is raised by the case;
3. Efficiency (the need to get cases completed promptly);
4. Heavy and repetitive caseload in a particular type of case;
5. Pro se case with poor briefs on both sides, or only one brief was filed;
6. Pro se cases with good briefs on each side;
7. Poorly developed record on appeal;
8. Great disparity in quality of legal representation between the parties;
9. Lack of review (even by internal informal means) by entire court; a concern that the opinion may not represent the views of the entire court;
10. Agreement as to outcome but some disagreement among panel judges as to the rationale of opinion; the use of unpublished opinion avoids the need for dissenting or concurring opinion;
11. Authoring judge's lack of experience or expertise in the legal subject matter of the case;
12. Avoidance of a bad precedent based on the particular facts of a case;
13. The case involves a controversial or politically charged issue.

Table 1 lists my findings relating to these factors from interviews with judges on the Fourth and Seventh Circuits.

Table 1: Summary of Responses Regarding Publication Decision Factors

Factor Number	Factor Description	Fourth Circuit (7 judges)		Seventh Circuit (5 judges)	
		Yes	No	Yes	No
	Jurisprudential Factors				
1	Lack of value as precedent	7	0	5	0
2	No new or novel legal issue is raised by the case	7	0	7	0
3	Efficiency	2	5	0	7
4	Repetitive/heavy caseload	6	1	5	0
13	Controversial	3	4	2	3

	Case-Quality Factors	Yes	No	Yes	No
5	Pro se case, bad briefs, or just one brief	7	0	5	0
12	Bad facts, hard case	5	2	3	2
6	Pro se case, good briefs	4	3	7	0
7	Poor record	5	2	4	1
8	Legal-representation disparity	2	5	1	4
	Collegiality Factors				
9	No review by entire court	N/A		0	7
10	Agreement as to outcome but not analysis	3	4	0	5
11	Lack of expertise	4	3	0	5

Because some of these factors are very similar, I have grouped them, for purposes of analysis, into three overall categories: (1) jurisprudential factors (factors 1, 2, 3, 4, and 13), (2) case-quality factors (factors 5, 6, 7, 8, and 12), and (3) collegiality factors (factors 9, 10, and 11).

The reason behind the grouping of some factors may be more obvious than others. For example, the thirteenth factor, “the case involves a controversial or politically charged issue,” may not necessarily seem to fit under jurisprudential factors, but it fit best in this category based on my surveys and interviews of the judges. Judges do not avoid publication of a case solely because of a potentially controversial issue, such as abortion; in a case that presents a novel issue, the controversial subject matter would not influence a judge to avoid publication.⁶⁵ In fact, some judges are more inclined to publish a case that involves a controversial issue to avoid being perceived as sidestepping the issue.⁶⁶ But many of these cases also present well-settled questions of law, and the mere fact that a case raises a controversial issue does not determine whether the case should be published. After all, most federal judges have lifetime appointments and normally need not fear political repercussions from an opinion, even one that addresses a controversial issue.⁶⁷

65. See *infra* Part II.B.1.a.

66. See *infra* Part II.B.1.a.

67. See *How the Federal Courts Are Organized: Federal Judges and How They Get Appointed*, FED. JUD. CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/183> (last visited May 11, 2015); see also EPSTEIN ET AL., *supra* note 39, at 353. Although life tenure means that they need not fear for loss of their judgeship, some judges may hope for promotion to the United States Supreme Court. See *How the Federal Courts Are Organized, supra*. Currently, eight of the nine justices on

Another caveat is that in most cases, several of these factors are at play, but no single factor may be controlling. In addition, the views of the judges on a panel may differ as to the importance of each factor in a particular case. Some judges have never devoted much thought to the reasons on which they base publication decisions; rather, they have simply adopted the practices that are normally followed by their particular court.⁶⁸ As noted above, the authoring judge almost always has the final say, so the surveys and interviews primarily focused on how judges personally view these factors for opinions that they have authored.

While the authoring judge almost always makes the final decision as to publication on both the Seventh and Fourth Circuit Court of Appeals, I asked what other individuals, if any, may influence the publication decision. In particular, I asked about the contributions of other judges on the court, including judges on and off the panel, law clerks, staff counsel, and circuit executives. Another influence to consider is the ability of the parties to request publication of an unpublished opinion.⁶⁹

As noted above, judges describe the publication decision as an individual decision in most cases, and the publication numbers tend to support this observation.⁷⁰ Judges on the same court may publish at very different rates, even though they are all operating under the same written rules, with the same resources, and in the same court culture. Because the publication decision is almost entirely discretionary for the author, there is no right or wrong publication percentage and no objective basis for claiming that any judge or court should publish more or less. In addition, some judges change their views on publication over the course of their tenures on the court.⁷¹ Some new judges come to the appellate court with a preference to publish, only moving to a default position of unpublished over the years, while others come to the bench with a preference for nonpublication and begin to publish more frequently with more years of

the Supreme Court previously served as judges on the federal courts of appeals. See EPSTEIN ET AL., *supra* note 39, at 350–53 (describing the “auditioners,” judges whose characteristics of age, legal education, and other qualifications place them into a “promotion pool” from which appointment to the Supreme Court is more likely than it would be for the group of federal appellate judges as a whole). Epstein writes that there are some indications that “auditioners” may have a tendency to “alter their judicial behavior in order to increase their chances.” *Id.* at 363.

68. See *infra* Part II.B.1.c.

69. 4TH CIR. R. 36(b).

70. See *supra* Table 1.

71. See *supra* Table 1.

experience.⁷² Some judges claim that they stay about the same for their entire career.⁷³

a. Jurisprudential Factors

The five jurisprudential factors were identified as follows: the case lacks value as a legal precedent, since many prior cases have addressed the same issue (factor number one); no new or novel legal issue is raised by the case (factor number two); efficiency (the need to get cases completed promptly) (factor number three); heavy and repetitive caseload in a particular type of case (factor number four); and the case involves a controversial or politically charged issue (factor number thirteen). The jurisprudential factors could also be characterized as workload factors, as a practical matter, but instead, judges tend to view these factors based mostly on their understanding of the need—or lack of a need—for more law on a particular issue. These are the factors that are most commonly stated in the official written rules and are normally identified by researchers as the reasons that unpublished opinions need not be considered.⁷⁴ All of the judges that I interviewed or surveyed agreed that these factors are the most important in making decisions on publication.⁷⁵

The first factor—that the case lacks precedential value because many prior cases have addressed the issue—was cited as of the highest importance by all of the judges.⁷⁶ Of course, the devil is in the details of how each judge decides what may have precedential value and why it has value as a precedent. A judge's ability to predict precedential value has been questioned by many, including by judges themselves.⁷⁷ Some judges,

72. *See supra* Table 1.

73. *See supra* Table 1. Because of the use of opinions or orders without an identified author, the changes in an individual judge's publication percentages over time would likely be impossible to confirm based solely on publicly available information; only actual numbers of published authored cases can be determined. I have not sought to do comparisons of actual numbers of published opinions over an extended time period, as this would also require consideration of changes in caseloads, periods when a judge may have a lessened caseload due to illness, or other circumstances which could affect the judge's work output. However, an empirical comparison of changes in publication practices based on a judge's experience would be a good area for additional research.

74. *See supra* Table 1.

75. *See supra* Table 1.

76. *See supra* Table 1.

77. Most judges seem to accept the factor of precedent potential as entirely proper, and it is included in the official rules of many courts (including my own, the North Carolina Court of Appeals, under N.C. R. APP. P. 30(e)(1)). Not all judges agree. *See, e.g.*, Arnold, *supra* note 6, at 222 (“This practice disturbs me so much that it is hard to know where to begin in discussing it.”). Arnold explains:

and certainly some practicing lawyers, believe that even though a legal rule may be well established, it is useful to have cases addressing the application of that rule to a variety of fact patterns. Having a published case addressing a particular fact pattern may provide more guidance to lower courts and to litigants, thus leading to more cases settling before trial and fewer appeals. Other judges believe that once the rule is well established, additional fact patterns alone are not a good reason to publish.⁷⁸ Judges also note that it is not uncommon to find unpublished cases that address issues of first impression.⁷⁹ One Fourth Circuit judge noted that “hardly a week goes by without finding an unpublished opinion that decides a matter of first impression.”⁸⁰

A few of the judges in the study identified a slightly different view for determining precedential value. Some favor nonpublication of diversity cases because such cases would not have precedential value on issues of state law.⁸¹ Even if the federal court addresses state law, the opinion would not have precedential value in that state, even if the opinion were published.⁸² Others believe that although the opinion is not binding on the state courts, the federal court’s analysis of the issue might be persuasive

I question the proposition that any opinion lacks precedential value. . . . To be sure, there are many cases that look like previous cases, and that are almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished; and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law.

Id. Songer agrees that determination of precedential value is a subjective decision:

The rules governing publication in the circuits are stated in very broad general language. No precise, objective guidelines are included. Judges are admonished to avoid publishing decisions if their opinion would have no precedential value; but interpretation of such rules is inevitably quite subjective. As a result, it should not be too surprising that we found that the rules were not applied in a consistent manner by different judges. In effect, this means that there are potentially a different set of implicit rules for publication in each circuit and perhaps even for each combination of judges that sit together in the same circuit. Determination of what those implicit criteria are is beyond the scope of the present study. It may be that they are largely unarticulated assumptions that shape the perceptions of judges about the importance of various cases which are derived from the socialization, values and experiences of the various judges.

Songer, *supra* note 11, at 313.

78. *See supra* Table 1.

79. Anonymous Survey Response (Dec. 8, 2013) (on file with author).

80. *Id.*

81. *See supra* Table 1.

82. *See Sanders v. Mueller*, 133 F. App’x 37, 41 (4th Cir. 2010) (“In a diversity action, state law of the forum court governs substantive issues” (citing *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002))).

and helpful to trial judges, and thus, they do not consider diversity jurisdiction to be a factor in the publication decision.⁸³ A judge who had many years of experience as a federal district court judge noted that when he was serving as a district court judge, he hesitated to publish a case that addressed a novel issue of state law in a diversity case because he did not want lawyers to attempt to use his opinion as binding precedent.⁸⁴ But since cases in federal court have the benefit of consideration by a panel of three judges, and more thorough research than may be available to a single judge at the trial level, the diversity issue no longer influenced his consideration of precedential value.⁸⁵ Although the case would have only persuasive value in the state whose law was addressed, it may nonetheless be useful to the bench and the bar.

Jurisprudential factors logically lead to nonpublication of the majority of cases in areas of law with heavy caseloads, such as immigration and employment cases, as these cases are so common, and because they often present similar factual situations with legal issues that have been addressed in prior cases. Yet the influence of unpublished cases may be significant in these heavily litigated areas as well, perhaps because there are so many unpublished cases in these areas of law that are still readily searchable and may be used to guide the drafting of other opinions.⁸⁶ Judges also acknowledge that even cases of a type that frequently appear before the court may present important and novel issues, or that the lower courts may be even more acutely in need of appellate guidance because of the frequency of these types of cases, making them more inclined to publish.⁸⁷

The next factor, “efficiency; the need to get cases completed promptly,” was not endorsed by judges at all. This is interesting, since it was originally one of the main reasons for nonpublication of cases and, as noted above, is implicitly recognized by Federal Circuit IOP 10.⁸⁸ In any individual case, judges claim that they do not consciously consider the “efficiency” factor, but the “efficiency” systemic factor is always present, because judges have the option to issue unpublished opinions—an option that has not always existed.⁸⁹ Certainly, it would be impossible for the

83. *See supra* Table 1.

84. Interview with Judge, U.S. Court of Appeals for the Seventh Circuit, in Chicago, Ill. (Nov. 3, 2013).

85. *Id.*

86. *See Soucek, supra* note 17, at 160–64.

87. Interview with Judge, U.S. Court of Appeals for the Fourth Circuit, in Raleigh, N.C. (Nov. 26, 2013).

88. FED. CIR. I.O.P. 10(1); *see* text accompanying *supra* note 20.

89. *See Arnold, supra* note 6, at 219 (noting that the practice of issuing unpublished opinions appears to have started in 1964 when the Judicial Conference of the United States

federal courts to issue a publication-quality opinion in every case, given the caseloads and court resources at this time. Thus, the efficiency factor is built into the court's processes, and it manifests normally as factor 1 or 2, as the judge believes that the question is well settled by existing law and there is no need to devote additional time and resources to yet another published opinion.

Another reason that judges may not endorse an unpublished opinion as a way to save time and effort is that many judges do not believe that unpublished opinions are that much easier or quicker to prepare than a published opinion.⁹⁰ One judge noted, "I try to write them all the same, whether published or unpublished."⁹¹ Since all opinions are now available and searchable in electronic databases, judges do not want to issue clearly inferior work, even if an opinion is "unpublished." Even if an unpublished opinion or order does not identify an author, judges still take great pride in their work, and each judge who is on the panel can be identified, so they must devote a certain amount of time and effort to each opinion to make sure that it is of sufficient quality.⁹²

"issued a general recommendation that judges publish only those opinions 'which are of general precedential value'" (quoting ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964)).

90. W. Warren H. Binford et al., *Seeking Best Practices Among Intermediate Courts of Appeal: A Nascent Journey*, 9 J. APP. PRAC. & PROCESS 37, 84–85 (2007). Research of the state appellate courts has also found that judges "have not seen an appreciable decrease in the amount of preparation time as a result" of issuing unpublished opinions. *Id.* (quoting the Minnesota Court of Appeals' response to Binford's survey).

91. Telephone Interview with Judge, U.S. Court of Appeals for the Fourth Circuit (Oct. 7, 2013).

92. See Schiltz, *supra* note 10, at 1486 (citations omitted). Schiltz writes:

Judges are also proud people. They care about their reputations, and they care about their legacies. Those reputations—and those legacies—are almost entirely a function of judges' opinions. Justice Louis Brandeis, when asked whether he was writing his memoirs, reportedly said: "I think you will find that my memoirs have already been written." He was referring, of course, to his opinions. The giants of the federal appellate bench in the twentieth century—Learned Hand, Henry Friendly, Richard Posner—owe their reputations in no small part to the fact that they wrote their own opinions. After Judge Friendly died, the *Harvard Law Review* published a series of tributes in his honor. The very first sentence of the very first tribute was: "Henry Friendly did his own work." Few judges can write all of their own opinions today, but they still aspire to leave a respected and influential body of work. Judges have a strong sense of ownership in their opinions—which itself explains much of the strong feeling about Rule 32.1.

Id. (footnotes omitted) (quoting Bruce A. Ackerman, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1709 (1986)).

b. Case-Quality Factors

Case-quality factors are particularly difficult for researchers to discern or quantify in a statistical analysis, but they are quite important to judges in the publication decision-making process. The ways to deal with case-quality issues may also vary by circuit. The ideal is that a published case that addresses an important legal issue should be based upon a full, well-developed record and all of the angles of the case should have been examined and presented to the court by brief and argument. In a perfect world, important legal issues would all be presented in this manner, but our world is not perfect. Records may lack crucial information, and as a general rule, there is no way to change the record once the case is on appeal.⁹³ The litigants may have failed to preserve issues for appellate review, or they may have violated rules of the court in presenting issues.

In criminal cases, defendants will almost always have court-appointed counsel, so both sides will be presented to the court by attorneys. Unfortunately, even if all parties are represented by counsel, not all attorneys have equal ability, and many have little appellate experience. The overall rate of pro se appeals is quite high, and appointment of counsel to pro se litigants in civil cases happens rarely.⁹⁴ In civil cases, litigants have no right to court-appointed counsel. In both the Fourth and Seventh Circuits, the courts may occasionally appoint counsel to represent parties in civil pro se cases presenting important issues. Representation is provided pro bono by law firms that have volunteered to perform this service and through law-school legal clinics. But the vast majority of pro se appeals remain just that, and almost all judges agree that they are much less likely to publish a case that was presented pro se, mainly because of the poor presentation of the case or the absence of a valid legal issue.⁹⁵

Most judges agree that the quality of the representation by counsel is reflected in the quality of the opinion, or as one judge put it, “almost all bad judgments are from bad lawyering,” and judges try to avoid publishing bad judgments.⁹⁶ However, most judges also agree that poor briefs are not typically a reason to avoid publication; poor briefs just create more work for the court, since the judges must make sure that the issues are fully

93. See FED. R. APP. P. 10(c)–(e).

94. LAURAL HOOPER ET AL., FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 38–39 (2d ed. 2011), [http://www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/\\$file/caseman2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/caseman2.pdf/$file/caseman2.pdf).

95. See *supra* Table 1.

96. Interview with Judge, U.S. Court of Appeals for the Seventh Circuit, in Chicago, Ill. (Nov. 3, 2013).

researched.⁹⁷ Because these case-quality factors create more work for the judge who must write an opinion in a poorly presented case, the “effort averse” judge may decide that it is not worth the effort.

According to the famously prolific Seventh Circuit Judge Richard A. Posner,⁹⁸ effort aversion, which “includes both reluctance to work ‘too’ hard . . . and reluctance to quarrel with colleagues,” is an integral part of judicial decision-making.⁹⁹ Unsurprisingly, Judge Posner believes that the option to issue opinions as unpublished tends to be overused by federal judges, but he acknowledges that case-quality factors properly lead to nonpublication of many cases.¹⁰⁰

c. Collegiality Factors

It is paradoxical that the judges seem to disagree on the importance of the collegiality factors more than the other factors. Former Chief Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit has described a collegial court as a court where “judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result, [they] are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.”¹⁰¹ A court’s

97. *See, e.g., id.*

98. In addition to publishing more cases than other judges on the court, Judge Posner has authored more than forty books and more articles than I could count. In fact, he has written so much that there is a book devoted to quotes from his court opinions. *See THE QUOTABLE JUDGE POSNER: SELECTIONS FROM TWENTY-FIVE YEARS OF JUDICIAL OPINIONS* (Robert F. Blomquist ed., 2010).

99. EPSTEIN ET AL., *supra* note 39, at 7 (“Both [effort aversion and conflict aversion] are aspects of the ‘quiet life’ that is especially valued by persons in jobs that offer little upward mobility—and in the case of a federal judgeship involve virtually no downward mobility—and few opportunities for increasing their pecuniary income other than by quitting and, in the case of judges, having quit, going into the private practice of law.”).

100. *See id.* at 55. Judge Posner explains:

The vast majority of unpublished decisions are affirmances, and . . . this is a reflection of the signal lack of merit of most cases filed in the federal district courts. It doesn’t cost much to file a case; the filing fee is low and the plaintiff is not required to be represented by a lawyer. There are also many incompetent lawyers, many potential plaintiffs who have very low opportunity costs of suing (prison inmates, for example), and many emotional plaintiffs with a deep sense of having been wronged who will sue even if there is no substantial legal ground for suing. These cases are losers and the unpublished decisions affirming their dismissal have little impact on the law, especially since most such decisions cannot be cited as precedents.

Id.

101. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003) (citing Lewis A. Kornhauser, *Adjudication by a Resource-*

collegiality and its productivity are closely related. Judge Edwards notes that work on “the appellate bench is a *group* process.”¹⁰² Court collegiality is a part of each courts’ culture, which some researchers have described as including “sociability” and “solidarity.”¹⁰³ “Sociability” is “the degree to which judges and administrators get along and emphasize the importance of social relations,” and “solidarity” is “the degree to which a court has clearly stated and shared goals, mutual interests, and common tasks.”¹⁰⁴ The Judicial Conference of the United States has recognized that collegiality is part of the very definition of a “court”:

An appellate “court,” in this special sense, is not merely an administrative entity. Nor should it consist of a large group of strangers—like a jury venire—who are essentially unknown to one another. Rather, a “court” is a cohesive group of individuals who are familiar with one another’s ways of thinking, reacting, persuading, and being persuaded. The court becomes an institution—an incorporeal body of precedent and tradition, of shared experiences and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency (thus assuring its predictability), and adjudicating cases in like manner.¹⁰⁵

I have identified the factors that I call “collegiality factors” as lack of review (even by internal informal means) by entire court so that the opinion may not represent the views of the entire court (factor number nine); agreement as to outcome but some disagreement among panel judges as to rationale of opinion so the use of unpublished opinion avoids the need for dissenting or concurring opinions (factor number ten); and the authoring judge’s lack of experience or expertise in the legal subject matter (factor number eleven).

These factors are grouped under “collegiality” because they are ways in which the judges work together and strive to make a clear and consistent presentation of the law from the court. Since published opinions carry

Constrained Team: Hierarchy and Precedent in a Judicial System, 68 S. CAL. L. REV. 1605, 1612–13 (1995)). Further, Judge Edwards describes collegiality as “a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.” *Id.* (emphasis omitted).

102. *Id.* at 1656.

103. Brian J. Ostrom et al., *Examining Court Culture*, in CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF STATE COURTS, at 1, 2 (Court Statistics Project, Nat’l Ctr. for State Courts, Caseload Highlights Vol. 11, No. 2, May 2005), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/664>.

104. *Id.*

105. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 44 (1995), <http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf>.

precedential value, these opinions are binding on the court in the future, and judges believe it is important both to get the law right and to ensure that no other members of the court have serious objections or reservations to a particular opinion.¹⁰⁶ For both the Fourth and Seventh Circuit courts, the final publication decision is almost always made by the authoring judge.¹⁰⁷ The author has essentially unlimited discretion in this decision.¹⁰⁸ Other judges on the panel or on the court may recommend publication, but typically, the other judges defer to the author, and recommendations to publish an opinion that was written as an unpublished opinion are uncommon.¹⁰⁹ Authoring judges consider a recommendation to publish very seriously, and often will convert the opinion to a published opinion, although it may require more work to perform additional research and add more analysis to the draft.¹¹⁰ Law clerks may also recommend for or against publication, and judges tend to take these recommendations seriously.¹¹¹ Very seldom, staff counsel, the circuit executive, or a clerk may recommend publication, particularly in a case that raises an issue that comes up frequently in a certain type of case, and where they believe that more guidance to the trial courts would be helpful.¹¹² But ultimately, the authoring judge has the final say in the publication decision.¹¹³ For this reason, looking at the written rules of the court for guidance on the publication of judicial decisions tells us very little. Each judge makes her own decisions independently, weighing all of the factors discussed independently, and judges tend to view the rules and the reasons for publication a bit differently.¹¹⁴

The tenth factor, the agreement not to publish to avoid dissent, is the scenario that attorneys fear the most. The judges disagree only on the analysis or legal reasoning for this outcome, and the compromise will allow

106. See Interview with Judge, U.S. Court of Appeals for the Fourth Circuit, in Raleigh, N.C. (Nov. 26, 2013); Interviews with Judges, U.S. Court of Appeals for the Seventh Circuit, in Chicago, Ill. (Nov. 3, 2013); Telephone Interview with Judge, U.S. Court of Appeals for the Fourth Circuit (Oct. 7, 2013); Telephone Interview with Judge, U.S. Court of Appeals for the Fourth Circuit (Oct. 2, 2013); Interviews with Judges, U.S. Court of Appeals for the Fourth Circuit, in Richmond, Va. (Sept. 17–19, 2013).

107. See 4TH CIR. R. 36(a); see also Interviews with Judges, U.S. Courts of Appeals for the Fourth and Seventh Circuits, *supra* note 106.

108. Interviews with Judges, U.S. Courts of Appeals for the Fourth and Seventh Circuits, *supra* note 106.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

the court to get the opinion completed more quickly. But are the judges really just seeking a certain result at the expense of the law? Are they engaging in “effort aversion” by avoiding the work of writing a dissent?¹¹⁵ Nearly all judges agree that they have seen this happen, but this is not a “deal” to get a benefit in the future or to get a particular result.¹¹⁶ All of the judges in my study who acknowledged that this type of compromise does occur also agree that this is done only in cases where the judges agree on the result of the case—meaning the outcome for the parties will be the same either way.¹¹⁷

Some empirical research based on published cases has indicated that judges do “bargain” to reach compromises in the rationale of published opinions.¹¹⁸ It is perhaps no coincidence that the idea of bargaining or compromise among panel judges tends to inspire intense disagreement, as this sort of behavior strikes at the heart of the divide between philosophical theories of adjudication. The importance of deliberations and collegiality

115. See EPSTEIN ET AL., *supra* note 39, at 7, 385–86. The authors write:

We have found that like other workers judges exhibit in their judicial behavior leisure preference and, something that includes but goes beyond leisure preference, effort aversion—as when appellate judges yield to the views of colleagues rather than insisting on dissenting every time they hold contrary views, or dissent less frequently the heavier their caseload grows.

Id. at 385–86. For a detailed analysis of the use of dissents in the federal courts of appeals and the United States Supreme Court, see *id.* at 255–304. Yet, dissent aversion cannot be fully explained by “leisure preference.” See Renée Cohn Jubelirer, *The Behavior of Federal Judges: The “Careerist” in Robes*, 97 JUDICATURE 98, 100 (2013) (“The authors [of *The Behavior of Federal Judges*] do not explain why [leisure preference is] more important than other non-monetized factors, such as the intrinsic interest of the work, prestige or pride, a sense of accomplishment or value in the work, or the social dimension of the work.”).

116. See Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 742 (2008) [hereinafter Choi & Gulati, *Trading Votes for Reasoning*] (“We are suggesting a form of logrolling—behavior considered common in legislatures. But the view with respect to courts appears to be that judges would not engage in such unseemly behavior.” (citing FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 156–57 (2007))).

117. See Interviews with Judges, U.S. Courts of Appeals for the Fourth and Seventh Circuits, *supra* note 106.

118. Choi & Gulati, *Trading Votes for Reasoning*, *supra* note 116, at 739. “The multimember panel studies indicate that the votes of judges are influenced by the ideologies of other judges on the same panel. Either to maintain collegiality, to avoid a judge’s breaking away to author a dissenting opinion, or simply because of group dynamics, judges appear to moderate their voting in settings where there is potential diversity in political views.” *Id.*

in judicial decision-making has been debated by the legal realists¹¹⁹ and legalists¹²⁰ for many years.

Research indicates that these differences between judges are not the traditional ideological differences, but they may have significant influence on how the judge works with other judges to decide a case.¹²¹ For example, some judges may be characterized as “outcome judges” who care more about the vote in a particular case, while others are “precedent judges” who care more about the “legal precedent established through the reasoning” of the majority opinion.¹²² In recent years, some researchers have proposed expanding the traditional classifications of judges beyond ideology to include many factors, including the interactions of judges on the panel or court.¹²³

119. Richard A. Posner, *Realism About Judges*, 105 NW. U. L. REV. 577, 578 (2011). The traditional conception of legal realism views the judge as merely a discoverer and transmitter of the law:

The modern idea of the judge as analyst shares with the idea of the judge as oracle the assumption that legal questions always have right answers: answers that can be produced by transmission from an authoritative source, though in the modern view the transmission is not direct but is mediated by analysis.

Id.

120. *Id.* at 580. Judge Richard Posner, likely one of the most prolific and pertinacious current proponents of legal realism, claims that Judge Harry Edwards “is the most pertinacious current critic of legal realism as a positive theory of judicial behavior Judge Edwards contends that the realist scholars exaggerate the degree to which judges are unable to achieve agreement through deliberations that, overriding ideological and other differences, generate an objectively correct decision.” *Id.* (first citing Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); then citing Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985); and then citing Edwards & Livermore, *supra* note 4, at 1908–10).

121. See Choi & Gulati, *Trading Votes for Reasoning*, *supra* note 116, at 746 (citations omitted).

122. See *id.* at 742, 746; see also Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1415–16 (2009) (citing DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 22 & tbl.2.1, 26 (2002)).

123. See Corey Rayburn Yung, *A Typology of Judging Styles*, 107 NW. U. L. REV. 1757, 1757 (2013) [hereinafter Yung, *Typology*].

For example, Professor Yung proposes nine different “distinctive judicial decision-making styles” for federal appellate judges: Trailblazing, Consensus Building, Stalwart, Regulating, Steadfast, Collegial, Incrementalist, Minimalistic, and Error Correcting. See *id.* at 1761–62. An exposition of these types is beyond the scope of this Article, but Yung found that these nine decision-making styles did a better job of predicting future votes than the traditional ideological model. See *id.* at 1803. Of particular relevance to the consideration of collegiality was the finding that

the two most basic dispositional choices an appellate judge could make, to dissent or reverse, were both better explained using the judge style categories. In the case

III. DIFFERENCES BETWEEN THE FOURTH AND SEVENTH CIRCUIT COURTS OF APPEALS

One of the notable differences between the Fourth and Seventh Circuit Courts of Appeals is the difference in the judges' views as to the most controversial factor—the compromise to issue an unpublished opinion when the panel agrees on the outcome but not the analysis. On the Seventh Circuit, no judge endorsed this factor as having an influence on the publication decision.¹²⁴ On the Fourth Circuit, several judges endorsed compromise and gave well-considered reasons for this approach.¹²⁵ For example, Judge J. Harvie Wilkinson III cited authority for his position, noting that the United States Supreme Court has endorsed “flexibility in the processes of the Courts of Appeals” in *Pearson v. Callahan*,¹²⁶ which he identified as “one of the most important cases of the last decade,” and a case that is “very insightful about how courts operate.”¹²⁷ He noted that compromise on a narrow or broad ground for a decision is “a mechanism to reach consensus. Compromise is not a bad word for every institution,

of predicting the dissenting judge, the classic ideology-based model showed just modest improvements over predictions based upon a random guess with model consistency levels of approximately 40 to 46%. The judicial typology model, in contrast, was accurate in approximately 72 to 90% of cases tested (depending upon a variation in the model). The decision to reverse by a panel, and not just an individual judge, was also better explained by the judicial typology model.

Corey Rayburn Yung, *How Judges Decide: A Multidimensional Empirical Typology of Judicial Styles in the Federal Courts* 4 (Feb. 2011) (unpublished manuscript) (Northwestern University School of Law & University of Chicago Law School Workshop on Judicial Behavior) [hereinafter Yung, *How Judges Decide*].

124. Interviews with Judges, U.S. Court of Appeals for the Seventh Circuit, in Chicago, Ill. (Nov. 3, 2013).

125. Interview with Judge, U.S. Court of Appeals for the Fourth Circuit, in Raleigh, N.C. (Nov. 26, 2013); Telephone Interview with Judge, U.S. Court of Appeals for the Fourth Circuit (Oct. 7, 2013); Telephone Interview with Judge, U.S. Court of Appeals for the Fourth Circuit (Oct. 2, 2013); Interviews with Judges, U.S. Court of Appeals for the Fourth Circuit, in Richmond, Va. (Sept. 17–19, 2013).

126. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009). Justice Samuel Alito, himself a former judge on the Third Circuit Court of Appeals, wrote this unanimous opinion, which eliminated the two-step analysis that had previously been required by *Saucier v. Katz*, 533 U.S. 194, 199–200 (2001). Part of the rationale for this change was that the *Saucier* rule “create[d] a risk of bad decisionmaking” when the “briefing of constitutional questions is woefully inadequate” in the lower court, and that, in some cases, “a court will rather quickly and easily decide that there was no violation of clearly established law [the second prong] before turning to the more difficult question whether the relevant facts make out a constitutional question at all [first prong].” *Pearson*, 555 U.S. at 239. These cases tend to be very fact-specific and contribute little to the law, although the two-step analysis created more work for the trial court. *See id.*

127. Telephone Interview with Judge J. Harvie Wilkinson III, *supra* note 1.

whether in Congress or corporate governance or a court.”¹²⁸ His comments are consistent with his reputation as a collegial judge.¹²⁹

Other judges view this sort of compromise with suspicion. Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit presented a hypothetical example of “some of the effects” that the use of unpublished opinions can have “on the psychology of judging”:

[I]f, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug. Again, I’m not saying that this has ever occurred in any particular case, but a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings.¹³⁰

Former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit Patricia Wald also disapproves of this type of compromise:

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.¹³¹

Why is there a difference in the view of the compromise on analysis and issuance of an unpublished opinion between these two circuits? At this point, I can say only that it seems to exist and speculate as to why. The Fourth Circuit does have a larger caseload, and due to the court’s policy of circulating all published opinions to the entire court, the court has even more work to do on the published cases than the Seventh Circuit, which does not circulate all published cases to the entire court prior to issuance.¹³²

128. *Id.*

129. See Yung, *How Judges Decide*, *supra* note 123, at 51 (“[T]here are a lot of good fits in terms of similarities between impressionistic and quantitative categorization. Judge Wilkinson, a judge who has long championed collegiality among judges is designated as a Collegial Moderate Republican.” (citing J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1170 (1994))).

130. Arnold, *supra* note 6, at 223.

131. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

132. See 4TH CIR. R. 36(a); 4TH CIR. I.O.P.-36.2; see also U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, PRACTITIONER’S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 155 (2014), <http://www.ca7.uscourts.gov/>

The Fourth Circuit's workload may lead to more of a need for compromise to get the work done in a timely manner and more of a need to focus work on the very small percentage of published cases so that they will be of sufficient quality to be issued as precedential opinions. Yet none of the Fourth Circuit judges specifically endorse efficiency, or the need to get cases done, as a reason for nonpublication; as noted above, this factor is built into the court's rules and operating procedures at two levels—the selection of cases for oral argument, and the decision whether to publish following oral arguments.¹³³

The difference in views on the compromise to issue an unpublished opinion is not explained by ideology, since this is not a traditional liberal-conservative ideological issue.¹³⁴ Given the individual and entirely discretionary nature of the publication decision, the decision-making styles of the individual judges may be the crucial distinction. Yung's classifications of the decision-making styles on these two circuits seem to fit with the results of my interviews. Although his data is based only on cases from 2008, and not all the same judges are on the two courts now, many are the same. Although he did not consider the judges' views on unpublished opinions specifically, he did consider collegiality, and the publication decision is an element of collegiality, although it has been expressed in the literature normally as "dissent avoidance" while the decision not to publish might be called "precedential opinion avoidance." Yung's distribution of judges on the Fourth and Seventh Circuits by decision-making style is shown in Table 2 below:¹³⁵

Table 2: Decision-Making Styles on the Fourth and Seventh Circuits

Decision-making style	Fourth Circuit	Seventh Circuit
Error-correcting	25%	21%
Regulating	17%	14%
Collegial	41%	22%

rules/handbook.pdf [hereinafter SEVENTH CIRCUIT HANDBOOK] ("Copies of a proposed opinion or order are circulated to members of the panel . . .").

133. See *infra* notes 166–76 and accompanying text.

134. In any event, neither circuit seems to have extreme ideological variance among the judges, as some other circuits do. See Yung, *Typology*, *supra* note 123, at 43 fig.20. Yung's analysis of data from 2008, which included unpublished opinions, of the average ideological variance on all of the federal courts of appeal determined that variance on the Fourth Circuit was 10.5, while the Seventh Circuit was 10.3. The highest average ideological variance was on the Sixth Circuit, at 36.1. See *id.* at 12, 43 fig.20.

135. See Yung, *How Judges Decide*, *supra* note 123, app. D at 77, 79.

Pragmatic	17%	29%
Minimalistic	--	14%

The main differences between the two courts fall under collegiality and pragmatism. Again, this is not surprising, with Judge Wilkinson being well known for his promotion of collegiality,¹³⁶ and Judge Posner likely the most famous pragmatist among the federal judges.¹³⁷ In addition, collegiality appears to lead to a willingness of panel members to compromise, which may lead to issuance of an unpublished opinion with what all agree to be the correct result, although all do not agree on the legal rationale. The idea of an agreement to compromise by issuing an unpublished opinion reaching the result that the entire panel agrees on, even if lacking complete agreement on rationale, is thus acceptable to some judges and not acceptable to others. Most judges acknowledge that this happens, although most seem to disavow any personal participation in such an agreement.

Judges on the Fourth Circuit Court of Appeals were also more likely to cite a lack of experience or expertise in an area of law as a potential reason not to publish an opinion.¹³⁸ As one judge noted, a lack of expertise in a subject area “could be a factor, in immigration, ERISA, specialized areas—it depends on time you have to study the area of law. If you are advancing something neither side advocated, it is probably tricky. You may not know why they did not bring it up.”¹³⁹ Judges on the Seventh Circuit Court of Appeals were less likely to endorse this factor.¹⁴⁰ One judge jokingly responded, “We’re all experts in everything.”¹⁴¹ He also did not endorse lack of expertise as influencing the publication decision.¹⁴² Yet, the expertise factor is likely tempered by the fact that on both courts, the chief judge on a panel assigns the cases to members of the panel and may consider the interest or expertise of each judge in making these assignments. The fact that the chief judges consider expertise in making case assignments indicates that the factor is of some concern to the court.

136. *See supra* note 129 and accompanying text.

137. *See* Gavin Broady, *The Prolific Pragmatist: Judge Richard Posner*, LAW360 (Mar. 25, 2014, 3:02 PM), <http://www.law360.com/articles/520805/the-prolific-pragmatist-judge-richard-posner> (discussing Judge Posner’s reputation for pragmatism on the bench).

138. *See supra* Table 1.

139. Interview with Judge, U.S. Court of Appeals for the Fourth Circuit, in Raleigh, N.C. (Nov. 26, 2013).

140. *See supra* Table 1.

141. Interview with Judge, U.S. Court of Appeals for the Seventh Circuit, in Chicago, Ill. (Nov. 3, 2013).

142. *Id.*

But the cases are still assigned to panels at random on both courts, so even if the court has a judge with great expertise in a particular area, that judge may not end up on the panel that considers the case.¹⁴³ And on both courts, judges may sometimes consult other judges who are not on the panel.¹⁴⁴ In any event, the judges tend to draw on the experience and expertise of the other members of the court, which is part of the collegiality of the court.¹⁴⁵

The last collegiality factor, lack of review by the entire court, is also important to both courts, even if the judges do not specifically endorse it, as it is addressed by the rules and procedures of each court.¹⁴⁶ In the Fourth Circuit Court of Appeals, all published opinions are circulated to the entire court before opinions are issued.¹⁴⁷ This circulation process means that each judge must read and consider not only the cases that she has been assigned but also cases that other panels have considered if the panel wants to publish the opinion. This circulation procedure increases the judges' workload even more in a court that already has a heavy caseload. Additionally, a judge may feel hesitant to publish an opinion, knowing that publication will require circulation, adding to the workload of all of the judges. If any judge has serious questions about an opinion, the authoring judge will normally address these questions.¹⁴⁸ If an opinion is published, this usually means that none of the judges have any serious objections to the opinion.¹⁴⁹ Judges who are not on the panel hearing the case tend to defer to the panel, but their views are still considered.¹⁵⁰ In addition, if a judge has serious questions about a case that has been circulated for publication, the judge may call for en banc review of the case, which allows all members of the court to participate in the decision.¹⁵¹

At the Seventh Circuit Court of Appeals, opinions are not routinely circulated to the entire court prior to publication, but all published opinions

143. See SEVENTH CIRCUIT HANDBOOK, *supra* note 132, at 10; see also 4TH CIR. I.O.P.-34.1.

144. See Interviews with Judges, U.S. Courts of Appeals for the Fourth and Seventh Circuits, *supra* note 106.

145. See *id.*

146. See SEVENTH CIRCUIT HANDBOOK, *supra* note 132, at 160; see also FED. R. APP. P. 35; *supra* Table 1.

147. See 4TH CIR. R. 36(a); see also 4TH CIR. I.O.P.-36.2.

148. See Interviews with Judges, U.S. Courts of Appeals for the Fourth and Seventh Circuits, *supra* note 106.

149. See *id.*

150. See *id.*

151. See *id.* But see FED. R. APP. P. 35(a) (providing that “[a]n 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”).

are circulated to all judges when they are issued.¹⁵² The Seventh Circuit judges note that a motion for rehearing may be filed and a case may be reconsidered.¹⁵³ In addition, under the Seventh Circuit's Rule 40(e), a case that overrules a prior precedent or conflicts with another circuit is circulated prior to issuance and the court may decide to hear the case en banc.¹⁵⁴ Thus, although the Seventh Circuit judges do not explicitly consider whether the entire court would agree with a particular opinion, the court does have procedures in place to avoid major disagreements among the panels.

IV. CIRCUIT CHARACTERISTICS

A. *The United States Court of Appeals for the Fourth Circuit*

The Fourth Circuit Court of Appeals, which sits in Richmond, Virginia, hears appeals from the nine federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina, as well as from federal administrative agencies.¹⁵⁵ Fifteen judges currently serve on the Fourth Circuit,¹⁵⁶ with one judge who assumed senior status in 1999,¹⁵⁷ and another judge who received senior status in 2014.¹⁵⁸

Although the court has had its full complement of authorized judges since December 2010, there were several vacant seats for many years.¹⁵⁹ North Carolina suffered from years of senatorial stalemates in the confirmation process, leaving several seats on the Fourth Circuit open for

152. See SEVENTH CIRCUIT HANDBOOK, *supra* note 132, at 155, 160 (citing 7TH CIR. R. 40(e) (providing for sua sponte rehearing before decision)).

153. Interview with Judges, U.S. Court of Appeals for the Seventh Circuit, *supra* note 124.

154. See SEVENTH CIRCUIT HANDBOOK, *supra* note 132, at 160.

155. See *About the Court*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/about-the-court/> (last visited Apr. 18, 2015). For a summary of the procedures and statistics for all federal courts of appeals as of 2010, see HOOPER ET AL., *supra* note 94, at 30–32.

156. See *Judges of the Court*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court> (last visited Apr. 18, 2015).

157. See *Senior Judge Clyde H. Hamilton*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court/senior-judge-clyde-h-hamilton> (last visited Apr. 18, 2015).

158. See *Senior Judge Andre M. Davis*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court/senior-judge-andre-m-davis> (last visited Apr. 18, 2015).

159. See Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2163 (2011) (noting that “[f]or over thirty months, the [Fourth Circuit] functioned without a quarter of its judicial complement, and for more than a year absent one-third”).

years.¹⁶⁰ In fact, the seat vacated by Judge James Dickson Phillips, Jr., who assumed senior status on July 31, 1994, languished for sixteen years, until Judge James Wynn was commissioned on August 10, 2010, to fill the vacant seat.¹⁶¹ Judge Albert Diaz was commissioned on December 22, 2010, to fill the seat vacated by Judge William Walter Wilkins, who assumed senior status on July 1, 2007.¹⁶² Judge Allyson Duncan, commissioned on August 15, 2003, filled the seat previously held by Judge Samuel James Ervin, III, who died in 1999.¹⁶³ Although the court used senior judges and district court judges sitting by designation to attempt to fill the void, some observers believe that the protracted vacancies may have contributed to the Fourth Circuit's low publication rate.¹⁶⁴ Recent court

160. *See id.* Tobias writes:

The appointment of federal judges has grown extremely controversial. Allegations and countercharges, interparty squabbling and unceasing retribution have punctuated the appeals court selection process for the last quarter century. These phenomena were ubiquitous during the administration of President George W. Bush as well as in nominations and appointments to the United States Court of Appeals for the Fourth Circuit, especially regarding judgeships assigned to North Carolina. Over the Bush Administration's concluding half term, the White House proffered six nominees for the appellate court's five vacant positions; the 110th Senate promptly confirmed a single prospect and did not even grant votes to the remainder.

Id.

161. *See Phillips, James Dickson Jr.*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1879&cid=999&ctype=na&instate=na> (last visited Apr. 18, 2015); *Judge James A. Wynn, Jr.*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-james-a-wynn-jr-> (last visited Apr. 18, 2015).

162. *See Judge Albert Diaz*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-albert-diaz> (last visited Apr. 18, 2015); *Wilkins, William Walter*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2586&cid=999&ctype=na&instate=na> (last visited Apr. 18, 2015).

163. *See Judge Allyson K. Duncan*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-allyson-k-duncan> (last visited Apr. 18, 2015); *Ervin, Samuel James III*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=715&cid=999&ctype=na&instate=na> (last visited Apr. 18, 2015).

164. *See Tobias, supra* note 159, at 2163. Tobias notes:

The openings have undercut the Fourth Circuit's delivery of justice because the court was forced to operate without as many as five of the fifteen court of appeals judges whom Congress has authorized. For over thirty months, the court functioned without a quarter of its judicial complement, and for more than a year absent one-third. In fact, the court furnishes published opinions for six percent of appeals that it resolves, and the court holds oral arguments in thirteen percent, the least among the twelve regional circuits. From September 1999 until August 2003, the Fourth Circuit had no active member from North Carolina, and during the ensuing seven years merely one active judge represented the state on the court.

Id.

statistics indicate that the Fourth Circuit's cases are handled mostly by the resident active judges; resident senior judges and visiting judges participate in fewer cases than in any other federal district.¹⁶⁵

Under the Federal Rules of Appellate Procedure, each circuit adopts its own local rules regarding how cases will be set for argument and how publication decisions will be made.¹⁶⁶ In the Fourth Circuit, the publication decision is governed by Fourth Circuit Local Rule 36.¹⁶⁷ That rule provides that “[o]pinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication.”¹⁶⁸ Those standards include:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
- ii. It involves a legal issue of continuing public interest; or
- iii. It criticizes existing law; or
- iv. It contains a historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.¹⁶⁹

Fourth Circuit Rule 36 further provides that “[t]he Court will publish opinions only in cases that have been fully briefed and presented at oral argument,” and “[o]pinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion.”¹⁷⁰

165. See U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, THE JUDICIAL BUSINESS OF THE UNITED STATES COURTS OF THE SEVENTH CIRCUIT, at U.S.C.A. tbl.6 (2012), http://www.ca7.uscourts.gov/rpt/2012_report.pdf. For the twelve-month period ending on December 31, 2012, visiting and senior judges participated in about 6.9% of cases in the Fourth Circuit. *Id.* In contrast, senior or visiting judges participated in about 23.2% of cases at the Seventh Circuit. *Id.* The Ninth Circuit, which has by far the greatest caseload of the federal courts, used senior or visiting judges in about 30.6% of its cases in the same time period. *Id.*

166. See FED. R. APP. P. 32.1(a) (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like”); *id.* R. 34(a)(1) (“Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.”).

167. 4TH CIR. R. 36(a).

168. *Id.*

169. *Id.*

170. *Id.*

Additionally, “[a] judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days and an inquiry to the non-acknowledging judge’s chambers has confirmed that the opinion was received.”¹⁷¹ Fourth Circuit Rule 36(b) provides basic guidelines for unpublished opinions.¹⁷²

Because Fourth Circuit Rule 36(a) provides that all published opinions must have been “fully briefed and presented at oral argument,” the decision not to permit argument in a case is essentially a preemptive decision that the case will be unpublished.¹⁷³ In rare instances, a judge may have a case that was originally scheduled to be considered on the briefs reset for argument, but normally, a case that is not argued will not be published.¹⁷⁴ Thus, Federal Rule 34(a) is also important in the publication decision process. Federal Rule 34(a) provides, in part, that “[o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary” because “the appeal is frivolous,” “the dispositive issue or issues have been authoritatively decided,” or “the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.”¹⁷⁵

Although Federal Rule 34 may, at first glance, seem to be a rule of inclusion—that “oral argument *must* be allowed in *every* case” unless excluded by the panel—in practice, it is more a rule of exclusion.¹⁷⁶ The usual practice is that the vast majority of cases are not argued,¹⁷⁷ and the

171. *Id.*

172. *Id.* R. 36(b). Fourth Circuit Rule 36(b) provides:

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. Published and unpublished opinions are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Published and unpublished opinions are also posted on the Court’s Web site each day and distributed in electronic form to subscribers to the Court’s daily opinion lists. Published and unpublished opinions issued since January 1, 1996 are available free of charge at www.ca4.uscourts.gov. Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

Id.

173. *See id.* R. 36(a).

174. *See id.*

175. FED. R. APP. P. 34(a)(2).

176. *Id.* R. 34(a) (emphasis added).

177. *See* Jay O’Keeffe, *Behind the Scenes at the Fourth Circuit: How the Court Decides Whether to Award Oral Argument*, *DE NOVO*: VA. APP. L. BLOG (Sept. 4, 2013),

cases that are considered only on the briefs will not result in published opinions.¹⁷⁸ Thus, it does appear that the Fourth Circuit has dealt with increasing caseloads and judicial vacancies to some extent by adopting procedural changes to accommodate the work.¹⁷⁹

In the Fourth Circuit, the usual practice has been to issue most unpublished opinions per curiam so that no authoring judge is identified.¹⁸⁰ Some of the judges who have joined the court in recent years believe that the court has begun issuing more unpublished opinions with an identified author.¹⁸¹ For example, Judge Wynn previously served on the North Carolina Court of Appeals, and although it is unusual for that court to issue per curiam opinions, its rules as to nonpublication are similar to those of the Fourth Circuit.¹⁸² In my discussions with many judges, it seems that their legal backgrounds, and particularly, their prior judicial experiences, inform their approaches on whether a decision to issue an opinion as unpublished or per curiam (or both).¹⁸³

<http://www.virginiaappellatelaw.com/2013/09/articles/oral-argument/behind-the-scenes-at-the-fourth-circuit-how-the-court-decides-whether-to-award-oral-argument/> (“The Fourth Circuit hears oral argument in about 9% of the roughly 5,000 cases it considers each year.”); *United States Court of Appeals for the Fourth Circuit*, N.C. APP. PRAC. BLOG, <http://www.ncapb.com/courts/united-states-court-of-appeals-for-the-fourth-circuit/> (last visited Apr. 30, 2015) (noting that “most appeals in the Fourth Circuit are decided on the briefing alone without oral argument”).

178. See *supra* notes 170–73 and accompanying text.

179. See David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421, 432 (2010) (providing a detailed analysis of the caseloads of the Fourth Circuit from 1979 to 2008 and the procedural and systemic changes to address the increasing caseloads, including reduction of oral arguments, use of law clerks and staff counsel, and use of unpublished opinions).

180. See Interviews with Judges, U.S. Court of Appeals for the Fourth Circuit, *supra* note 125.

181. Interview with Judge, U.S. Court of Appeals for the Fourth Circuit, in Raleigh, N.C. (Nov. 26, 2013); Interview with Judge, U.S. Court of Appeals for the Fourth Circuit, in Richmond, Va. (Sept. 17, 2013).

182. Compare N.C. R. APP. P. 30(e) (providing that the North Carolina Court of Appeals may designate an opinion as unpublished if it “involves no new legal principles and . . . would have no value as a precedent”), with 4TH CIR. R. 36(a)–(b) (providing that an opinion may be published only if it “establishes, alters, modifies, clarifies, or explains a rule of law” within the Fourth Circuit, “involves a legal issue of continuing public interest,” “criticizes existing law,” “contains a historical review of a legal rule that is not duplicative,” “resolves a conflict between panels” of the circuit, or “creates a conflict with a decision in another circuit”).

183. The number of unpublished per curiam opinions issued by the federal courts is significant. See Hannon, *supra* note 14, at 238–39 (concluding that “close to two-thirds of the per curiam opinions issued by the federal circuit courts of appeals after 1970 have been

The Fourth Circuit judges are assisted by their law clerks and the staff attorney's office.¹⁸⁴ Each judge has four staff members, including either four clerks, or three clerks and one judicial assistant.¹⁸⁵ The staff attorney's office currently has approximately forty attorneys who assist in preparing cases for the panels of judges and draft opinions in cases that are not designated for oral argument.¹⁸⁶ The number of attorneys in the staff attorney's office has recently declined due to budget cuts, as those who leave are not replaced.¹⁸⁷ The judges' chambers have been forced to take on some of the duties of preparing drafts of opinions in cases that are not orally argued because of the cuts in staff counsel.¹⁸⁸ The Office of the Clerk of Court "provides case management and automation support for the court," including matters such as calendaring, appointment of counsel, and maintaining records.¹⁸⁹

B. *The Seventh Circuit Court of Appeals*

The Seventh Circuit Court of Appeals sits in Chicago, Illinois, and hears appeals from the seven federal district courts in Illinois, Indiana, and Wisconsin.¹⁹⁰ The court currently has fourteen active judges, including

unpublished opinions," and that "the vast majority of these unpublished per curiam opinions were issued from 1985 to the present").

184. See *Offices*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/about-the-court/offices> (last visited Apr. 18, 2015); see also FED. R. APP. P. 45.

185. See *Who Does What, Chambers Staff: Qs & As*, FED. JUD. CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/352> (last visited Apr. 18, 2015). The clerks who serve in a judge's chambers are often called "elbow clerks," referring to the closeness of the relationship between the judge and his or her clerks. *Id.* The clerk is "figuratively and sometimes literally, 'at the judge's elbow,' unlike other clerks and lawyers who work for the court in other capacities such as staff attorneys." *Id.*; see also *Elbow Clerk*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining an "elbow clerk" as "[a]n individual judge's personal clerk"—usually "one who works closely with the judge").

186. Beth Scherer, *What Is the Fourth Circuit's Office of Staff Counsel and What Do They Do?*, N.C. APP. PRAC. BLOG (Mar. 25, 2014), <http://www.ncapb.com/2014/03/25/what-is-the-fourth-circuits-office-of-staff-counsel-and-what-do-they-do/>.

187. For example, a job posting for a judicial clerkship on the Fourth Circuit Court of Appeals in Richmond, Virginia, notes throughout the posting that budgetary constraints may influence the number of individuals hired for the positions. See *Federal Clerkship Opportunity*, U.S. CT. APPEALS FOR FOURTH CIR. (Oct. 8, 2014), <http://www.ca4.uscourts.gov/docs/pdfs/staffattorneyvacancyoct2014.pdf?sfvrsn=4>.

188. See Interviews with Judges, U.S. Court of Appeals for the Fourth Circuit, *supra* note 125.

189. See HOOPER ET AL., *supra* note 94, at 99.

190. See *Frequently Asked Questions*, U.S. CT. APPEALS FOR SEVENTH CIR., <http://www.ca7.uscourts.gov/faqs.htm> (last visited Apr. 18, 2015); *Geographic Boundaries*

five sitting senior judges.¹⁹¹

Like the Fourth Circuit, the Seventh Circuit also has a local rule that governs the publication of opinions.¹⁹² Under Seventh Circuit Rule 32.1, the court states a straight-forward policy: “to avoid issuing unnecessary opinions.”¹⁹³ The rule further provides that “[t]he court may dispose of an appeal by opinion or order,” and opinions (including per curiam opinions) “are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit.”¹⁹⁴ Unpublished orders, on the other hand, “are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents.”¹⁹⁵ The rule allows parties to request by motion “that an order be reissued as an opinion,” provided that the motion “state[s] why this change would be appropriate.”¹⁹⁶

The Seventh Circuit’s rule, unlike the Fourth Circuit’s rule, gives almost no guidance on what the court considers in making the publication decision. The Seventh Circuit’s rule simply states the policy to avoid “issuing unnecessary opinions.”¹⁹⁷ In addition, Seventh Circuit Rule 32.1 sets forth a more detailed description of the types of dispositions that the court may issue (either an “opinion” or “order”).¹⁹⁸

This distinction may come as a surprise to some attorneys who think of opinions as either “published” opinions that have precedential value, or “unpublished” opinions that have no precedential value. But as Rule 32.1

of United States Courts of Appeals and United States District Courts, U.S. CTS., <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf> (last visited Apr. 18, 2015).

191. See *United States Court of Appeals for the Seventh Circuit*, BALLOTPEDIA, http://ballotpedia.org/United_States_Court_of_Appeals_for_the_Seventh_Circuit (last visited Apr. 18, 2015); *Contact Information*, U.S. CT. APPEALS FOR SEVENTH CIR., <http://www.ca7.uscourts.gov/contact.htm> (last visited Apr. 18, 2015).

The vacant seat was created when Judge Terence T. Evans took senior status in January 2010 (he died in 2011 and his seat has not yet been filled); additionally, Judge John Daniel Tinder plans to retire in 2015. See Amy Rabideau Silvers, *Evans, 71, Served on Federal Appeals Court*, MILWAUKEE WIS. J. SENTINEL (Aug. 11, 2011), <http://www.jsonline.com/news/obituaries/127523413.html>; Gabriella Khorasancee, *Judge John Daniel Tinder Is Retiring, Rejection Letter Reveals*, FINDLAW: SEVENTH CIR. NEWS & INFO. BLOG (Mar. 10, 2014, 1:22 PM), http://blogs.findlaw.com/seventh_circuit/2014/03/judge-john-daniel-tinder-is-retiring-rejection-letter-reveals.html.

192. 7TH CIR. R. 32.1.

193. *Id.* R. 32.1(a).

194. *Id.* R. 32.1(b).

195. *Id.*

196. *Id.* R. 32.1(c).

197. *Id.* R. 32.1(a).

198. *Id.* R. 32.1(b).

states, there are actually more nuanced designations for cases. If a researcher wants to know both the precedential value of the opinion and the identity of the judge who issued the ruling, this information may not be readily available, depending on the opinion's designation.

There are at least three types of dispositions that an appellate court may issue in addition to a simple ruling on a dispositive motion.¹⁹⁹ At the highest or most transparent level is the traditional published opinion, which is signed by one of the judges on the panel as author.²⁰⁰ Slightly below this in transparency but equal in precedential value is the per curiam published opinion, which identifies the panel, but not an authoring judge (although one of the judges was actually assigned as the author, even if a draft was prepared by staff counsel).²⁰¹ For purposes of research on the courts or coding a case for a database, it would be impossible to identify an author for these opinions.²⁰² Sometimes these opinions are issued in cases that may present a security risk to the court, and although the panel must be identified, no single judge can be blamed for the ruling.²⁰³ Both the Fourth and Seventh Circuits issue per curiam published opinions and signed unpublished opinions, but there are differences in the courts' practices. At the Seventh Circuit, the court refers to unpublished written dispositions with no identified author from cases that were not orally argued as "unpublished orders." These unpublished orders typically include a reasoned explanation of the court's ruling and may be pages, not just sentences, long; but the tradition at the Seventh Circuit is to call these "unpublished orders" and they are labeled as "orders."²⁰⁴ These are

199. See HOOPER ET AL., *supra* note 94, at 30 ("Judges have three basic options regarding how a decision of the court is provided to the public: (1) a signed published opinion; (2) a per curiam opinion; or (3) an unpublished nonprecedential opinion or order.").

200. See 7TH CIR. R. 32.1.

201. See *id.*; see also *Per Curiam*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/per_curiam (last visited Apr. 30, 2015) (defining a per curiam opinion as one "from an appellate court that does not identify any specific judge who may have written the opinion").

202. See Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (and Should We Care)?*, 32 FLA. ST. U. L. REV. 1077, 1111–17, 1079 (2005) (citations omitted) (discussing that some researchers have attempted to identify authoring judges, and in particular, which judges actually write their own opinions, based upon linguistic analysis, citation patterns, language patterns, and other features of written opinions).

203. See Interviews with Judges, U.S. Courts of Appeals for the Fourth and Seventh Circuits, *supra* note 106.

204. Searching on WestlawNext for "per curiam" opinions issued by the Seventh Circuit that were "not selected for publication" in 2014 returns zero cases. The same search for "per curiam" cases that were "not selected for publication" in 2014 on the Fourth Circuit returns four cases. Yet, a search of Seventh Circuit cases for the same time period that were "not selected for publication" but were not designated as "per curiam" returns 397 cases,

distinguished from “opinions” as well as shorter, procedural orders entered either by the clerk, or by a single judge or a panel, dealing with various motions in the case.²⁰⁵ “Unpublished orders” normally do not identify one of the panel judges as author, but the court does not refer to them as per curiam opinions or unpublished opinions, although they would seem to be de facto per curiam opinions.²⁰⁶

At the Seventh Circuit, unlike the Fourth Circuit, the default position for any case in which the parties are represented by counsel is that the case will be orally argued.²⁰⁷ Even some pro se cases are orally argued, although the time they receive will normally be limited.²⁰⁸ As at the Fourth Circuit, if a civil pro se case presents important issues, the court may on occasion appoint counsel to represent a party or parties for the appeal.²⁰⁹

Not all cases that are argued receive the same amount of time. The Seventh Circuit has “short argument” days in which each side is allotted

with the panel identified, but not the author. This search of Fourth Circuit cases in 2014 returns only forty cases.

205. See 7TH CIR. R. 32.1(b).

206. The designation of “order” versus “opinion” may also alter the cost of public access to the document in the PACER system. PACER’s Electronic Public Access Fee Schedule, issued April 1, 2013, provides free access for certain documents and to certain parties. See *Electronic Public Fee Access Schedule* (Dec. 1, 2013), https://www.pacer.gov/documents/epa_feesched.pdf. Section (8), Automatic Fee Exemptions, provides that “[n]o fee is charged for access to judicial opinions.” *Id.* As a general rule, nonparties to a case are charged ten cents per page for documents in PACER. *Id.* The document’s designation as an “order” or “opinion” is made by the issuing court. The issue of cost of public access to federal court case files is another area of dispute. Steve Schultze, a program officer for Internet Freedom at the United States Department of State, describes the problem as follows:

At some point, PACER added the option for judges to specify that a particular document was an “opinion.” When users download these documents, they are not charged. But what is an opinion? There have been years of hand-wringing over this question. Courts have been wildly inconsistent in their rate of accurately flagging opinions. The Administrative Office commissioned an expensive study. This is all ridiculous, because the law makes no distinction between fees for opinions versus other records. What’s more, in order to find the opinions in the first place, the average user has to search for them (and pay) and view the docket (and pay).

Steve Schultze, *Making Excuses for Fees on Electronic Public Records*, FREEDOM TO TINKER (Feb. 7, 2013), <https://freedom-to-tinker.com/blog/sjs/making-excuses-for-fees-on-electronic-public-records/>.

207. Compare 7TH CIR. R. 34(a)(2), with 4TH CIR. R. 36(a).

208. See SEVENTH CIRCUIT HANDBOOK, *supra* note 132, at 147–48.

209. Compare *id.* at 88, with FED. R. APP. P. 34(b).

ten minutes for argument.²¹⁰ The Office of the Circuit Executive reviews each case and recommends argument times, and the assigned judges make the final determination as to the time allotted for argument of each case.²¹¹ This flexibility in setting argument times allows the court to hear arguments in more cases that would likely not be allowed oral argument at most federal appellate courts and gives more time to the more complex cases which merit receiving the full hour. This procedure is based upon Seventh Circuit Rule 34(b)(1), which gives priority to certain types of cases.²¹² There is no official link between oral argument and publication of the opinion at the Seventh Circuit, although certainly a case that is published is more likely to have been orally argued.

The Seventh Circuit judges are assisted by their clerks and the staff attorney's office. Each associate judge has five staff chambers members, either four elbow clerks and a judicial assistant or five elbow clerks;²¹³ the chief judge has six chambers staff members.²¹⁴ The staff attorney's office currently has twenty-five attorneys who assist in preparing cases for the panels of judges and draft opinions in cases that are not designated for oral argument.²¹⁵ Like the Fourth Circuit, the Seventh Circuit Office of the Clerk of Court "provides case management and automation support for the court," including matters such as calendaring, appointment of counsel, and maintaining records.²¹⁶ In addition, the circuit executive takes an active role in screening cases and recommending oral argument times.²¹⁷ Collins Fitzpatrick, the circuit executive, has served the federal courts in the Seventh Circuit since 1971, first as a law clerk, and then as a senior staff attorney.²¹⁸ In 1976, he became the first—and so far the only—circuit

210. See Collins T. Fitzpatrick, *Changes to the United States Court of Appeals for the Seventh Circuit Over a Third of a Century*, 32 S. ILL. U. L.J. 527, 535–36 (2008).

211. See 7TH CIR. R. 34(b)(1). Thus, a typical argument day at the Seventh Circuit may include some cases that are allowed fifteen or twenty minutes per side, as well as cases that receive the traditional thirty minutes per side.

212. *Id.*

213. See *supra* note 185.

214. See *Chambers Staff: Qs & As*, *supra* note 185.

215. See HOOPER ET AL., *supra* note 94, at 135, 137; see also *Who Does What: Court Legal Staff*, FED. JUD. CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu5b&page=/federal/courts.nsf/page/355> (last visited May 10, 2015).

216. HOOPER ET AL., *supra* note 94, at 99.

217. See *id.* at 137, 140.

218. See *About the Authors: Attorney's Guide to the Seventh Circuit Court of Appeals*, ST. B. WIS., http://marketplace.wisbar.org/Pages/AK0224_Authors.aspx (last visited Apr. 29, 2015).

executive for the Seventh Circuit.²¹⁹

In my interviews at the Seventh Circuit, judges and staff alike echoed the sentiments of Don Wall, counsel to the circuit executive, who explained, “our culture here is that we give reasoned decisions for every case that is fully briefed.”²²⁰ He noted that some courts may dispose of cases in a one-line order, leaving litigants to wonder why the court made its decision, but the Seventh Circuit gives a reasoned decision in each case.²²¹ Circuit Executive Collins Fitzpatrick made almost exactly the same observation in his 2008 law-review article: “The court prides itself in writing reasoned decisions in all cases and arguing all the cases that can be argued. The Seventh Circuit is an exception among the courts of appeals on both issues.”²²²

C. Caseload Comparisons of the Fourth and Seventh Circuits

It is not possible to fully understand the work of the federal courts without considering the caseloads for each court and the types of cases that each court handles. The caseloads of the federal circuits vary greatly. For example, at the high and low ends of the circuits is the Ninth Circuit Court of Appeals, where 12,696 cases were filed from March 2013 to March 2014, and the Court of Appeals for the District of Columbia Circuit, where only 941 cases were filed during the same time period.²²³

Table 3 below provides an overview of the various ways in which the

219. For an excellent overview of the changes in the court and its procedures from 1971 to 2007, including the effects of changes in technology, see Fitzpatrick, *supra* note 210.

220. Interview with Don Wall, Counsel to the Circuit Executive for the Seventh Circuit, in Chicago, Ill. (Nov. 3, 2013).

221. *See id.*

222. Fitzpatrick, *supra* note 210, at 540 (citations omitted). Fitzpatrick’s article also provides the percentages of unpublished cases for each federal circuit for the twelve-month period ending on September 30, 2007. *See id.* at 543. At that time, the Fourth Circuit heard arguments in 8% of cases filed, while the Seventh Circuit heard arguments in 25% of cases filed. *See id.* Ninety-three percent of the Fourth Circuit’s cases were unpublished, while 55% of the Seventh Circuit’s cases were unpublished. *Id.* During that time, the Seventh Circuit had the highest publication rate of the twelve federal circuit courts of appeals and the Fourth Circuit had the lowest. *Id.* The Fourth Circuit also had the lowest rate of oral argument of the federal courts of appeals, while the Seventh Circuit had the highest rate of cases argued. *See id.* The First Circuit, which, by far, had the smallest caseload of the federal courts of appeals, heard argument in about 30% of cases filed. *See id.*

223. *See* ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS FEDERAL JUDICIAL CASELOAD STATISTICS tbl.B (2014), <http://www.uscourts.gov/statistics/table/b/federal-judicial-caseload-statistics/2014/03/31>.

Fourth and Seventh Circuits terminated cases on the merits in 2014.²²⁴

Table 3: Comparison of Cases Filed and Methods of Disposition for the U.S. Courts of Appeals for the Fourth and Seventh Circuits in 2013–2014²²⁵

Method of Disposition	Fourth Circuit	Seventh Circuit
Cases filed	5,061	2,949
Pro se filings	3,059	1,664
Cases terminated after oral argument	432	644
Appeals terminated on the merits	4,023	1,868
Written opinion/order: signed, published	217	609
Written opinion/order: signed, unpublished	473	2
Written opinion/order: reasoned, unsigned, published	7	26
Written opinion/order: reasoned, unsigned, unpublished	2,906	1,089

V. ANALYSIS OF DIFFERENCES IN RESPONSES OF THE FOURTH CIRCUIT AND SEVENTH CIRCUIT JUDGES

The Fourth and Seventh Circuit judges' responses as to jurisprudential factors were nearly the same.²²⁶ This is not surprising, as the first two factors are the most frequently cited as the primary reason for nonpublication.²²⁷ Most judges view cases that may be considered as controversial or politically sensitive based upon their facts no differently

224. Because of the differences in designation of cases filed as "opinions" or "orders," as discussed above, this Table identifies the cases by the actual document filed and not by its title. Thus, an unpublished "order" as used at the Seventh Circuit or an unpublished per curiam "opinion" would both be described in Table 3 as a "written, reasoned, and unsigned" disposition.

225. The information in Table 3 is published by the Administrative Office of the United States Courts. See ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL BUSINESS tbl.B-12 (2014), <http://www.uscourts.gov/statistics/table/b-12/judicial-business/2014/09/30>; ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.B-1 (2014), <http://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2014/06/30>.

226. For a summary of responses as to all of the publication decision factors from the interviews of judges at both courts, see *supra* Table 1.

227. See *supra* Table 1.

than those with less interesting facts. The only tendency that judges endorse as to these cases is a bit more of an inclination to publish due to the need for transparency and not wanting to be seen as trying to hide something—something that is not hidden either way, since all of the opinions are available. Indeed, some judges say that they are more likely to publish in controversial cases.²²⁸ But a published case is not only available for all to read; it also has authority as precedent, so by publication, the judge is demonstrating that he or she is willing to take a precedential position on the controversial issue. But a case with controversial facts or issues will still not be published if the principles of law involved are well established, for the same reasons as any other. In addition, some cases will be unpublished due to case-quality factors, discussed below, or collegiality factors.

Most judges on the Fourth and Seventh Circuits also consider case-quality factors in making a decision to publish.²²⁹ In some instances, the court cannot address potentially important issues raised by a case due to failure to preserve error in the court below, rule violations, or other legal missteps. But even if the case is properly before the court with its issues intact and presented to a minimum level of legal effectiveness, a judge who believes that the case has not been well argued, researched, or supported by a complete record may still have hesitation about publication. As Judge Wilkinson puts it, “you need to know what you don’t know. When I am on the bench, I am aware of the great unknowns.”²³⁰ No judge wants to publish a precedential case that will run afoul of established but overlooked law, or which will disrupt the practices and expectations of the legal community or public in a way that the Court failed to appreciate due to the poor presentation of the case.

The most significant differences in the judges’ responses came from the factors in the last category: collegiality.²³¹ These factors attempt to capture a bit of the courts’ cultures, and how the cultures of the two courts differ. Part of this difference has undoubtedly developed due to the disparity in caseloads and court staff. Judges and staff on both courts readily note this difference. One Seventh Circuit judge noted that the ability to hear more cases and publish more opinions is “a luxury that we have here” because the court has a lighter caseload than many federal

228. See Interviews with Judges, U.S. Courts of Appeals for the Fourth and Seventh Circuits, *supra* note 106.

229. See *supra* Table 1.

230. Telephone Interview with Judge J. Harvie Wilkinson III, *supra* note 1.

231. See *supra* Table 1.

appellate courts.²³² The Fourth Circuit simply has a heavier caseload, but almost the same number of judges, and despite the claims of members of the court that going for many years without a full complement of judges did not influence their work, it is difficult to believe that the long-term open seats had no effect on the way that the court handles its cases.²³³ Like the Seventh Circuit, the Fourth Circuit has gotten its work done, but its procedures are different.²³⁴ The Fourth Circuit's procedures have enabled it to deal with its heavy caseload and to fulfill its constitutional duties, but these procedures allow for fewer oral arguments and result in fewer published cases.²³⁵

Customs and traditions are pervasive in all courts, not just the federal appellate courts. Some customs are obvious, such as the procedures the courts follow during oral arguments. Judges normally sit in a particular order based upon seniority. In the Fourth Circuit, the judges come down from the bench after each argument to greet the attorneys in each case. Many of these customs and traditions address how the court performs its work and how the judges work together. Although these types of traditions exist in all workplaces, they may be even more important in a court. Each judge is literally her own boss. Each judge operates her chambers as she sees fit. Federal judges do not face the risk of demotion or termination. Although courts have chief judges who handle the administrative and organizational needs of the court and supervise court staff, the chief judge is not a supervisor of the judges in the usual sense. So the customs and traditions of a particular court—the court culture—are essential for the collegiality and efficient functioning of the court. Some of the court's traditions or customs are embodied in its local rules or written internal procedures, but many are unwritten—they are passed on in an informal way from the older judges to the newer judges, and they are supported and maintained by the staff of the court. Some customs are merely ceremonial, but other customs actually dictate how the judges do their work—how cases are assigned, how cases are circulated from one judge to another, and how judges communicate with one another about a case that is being written.

Court culture and customs are reflected in the official written rules and procedures, but the written rules do not capture the entire process. Court culture plays a large role in how the judges perceive and practice the

232. Interview with Judge, U.S. Court of Appeals for the Seventh Circuit, in Chicago, Ill. (Nov. 3, 2013).

233. *See supra* notes 159–65 and accompanying text; *see also supra* Table 3.

234. *See supra* notes 166–210 and accompanying text.

235. *See supra* notes 166–78 and accompanying text.

factors that influence publication decisions. Each court has its own culture surrounding the decisions regarding publication, and each judge has his or her own understanding of that culture.²³⁶ Some of these customs and practices undoubtedly develop from the necessity of dealing with the caseloads, but they also develop based upon the history and personalities of each court. They develop based upon the particular caseloads of each court, which differ based on the geographical location of the district courts from which it receives appeals, as the court creates procedures to deal with heavy caseloads in particular areas. They differ based upon the prior judicial experiences brought to the court by new judges, and they may change over time as caseloads and personnel change.

CONCLUSION

Differences in workloads, combined with the decision-making styles of the judges and the court culture, lead to the disparity in publication rates between the Fourth and Seventh Circuit Courts of Appeals. The workload contributes to the creation of the courts' culture, and then the courts' culture reinforces the organizational methods of dealing with the workload. Judges on federal courts typically have long tenures, and they tend to work together for many years in close-knit communities of judges, clerks, and staff. Although both courts do the same thing—hear appeals and write opinions—each has developed its own methods of doing so. Seemingly mundane procedural details, and not necessarily the legal merits of the case, influence whether a case will or will not end up as a published opinion.

The fact that an opinion is unpublished does not mean that it is unimportant²³⁷ to the jurisprudence of the jurisdiction,²³⁸ or to research on

236. Edwards & Livermore, *supra* note 4, at 1915–17 (citations omitted). Judge Harry Edwards notes that the attitudinal model, which characterizes judges as ideologically “left” or “right,” fails “to comprehend the importance of assessing judges’ work in the context of the judiciary’s institutional norms.” *Id.* at 1916–17 (citing Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes, Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING* 1, 4–5 (Cornell W. Clayton & Howard Gillman eds., 1999)). “There is a process of socialization and acculturation during which new judges join the judiciary’s culture in which respect for law is accorded a high value.” *Id.* at 1917. Or, as Songer notes, decisions regarding publication may be based upon “largely unarticulated assumptions that shape the perceptions of judges about the importance of various cases which are derived from the socialization, values and experiences of the various judges.” Songer, *supra* note 11, at 313.

237. Judges recognize that each case is vitally important to the parties and counsel in that case, but that not all cases are important to the jurisprudence of the circuit.

the behavior of the courts and judges themselves. That may have been true when courts first began issuing unpublished opinions, but as caseloads have increased, the practical bar for publication has moved up higher and higher. The substantive content of the caseloads of the Fourth and Seventh Circuits, even if different in numbers, is not so dissimilar that one could conclude that the Fourth Circuit simply gets a much higher number of frivolous appeals, pro se cases, *Anders* brief cases, or other cases that would not typically be considered as meriting publication. There is no reason to believe that the quality of the attorneys appearing before the Fourth Circuit is inferior to those before the Seventh Circuit or that the Fourth Circuit cases would present such a dearth of important legal issues that the difference in publication rates could be explained simply by the quality and types of cases coming before the court.

The importance of the internal court culture in the work of a court cannot be overstated, but it has been almost entirely ignored in most of the empirical research on the federal appellate courts. This omission is not surprising, as court culture is difficult to study or quantify. Some of these difficulties with empirical research on the federal courts have been examined by Judge Harry T. Edwards.²³⁹ Because researchers focus on a few of the more readily quantifiable features of judges, such as political party of the appointing president, Judge Edwards notes that this research leaves out such essential factors in decision-making that the results of the research are subject to serious question.²⁴⁰ He notes that panel deliberation is extremely important,²⁴¹ but that this feature is not only nonquantifiable, it is unavailable since it is confidential.²⁴² Given the importance of the many factors that may be involved in the publication decision, one judge noted that research based only on the published cases “is easy research, reporting

238. Why some cases are unpublished is simply a mystery, and Justices on the United States Supreme Court have, on rare occasions, commented on this. *See supra* note 14.

239. *See Edwards, supra* note 101, at 1640; Edwards & Livermore, *supra* note 4.

240. Edwards, *supra* note 101, at 1640–41 (citations omitted).

241. *See id.* at 1641–43. *But see* EPSTEIN ET AL., *supra* note 39, at 61 (citing Edwards & Livermore, *supra* note 4, at 1949). But Judge Posner believes that judicial deliberation is “overrated.” *Id.* at 308. He describes deliberations as having a “curiously stilted character,” since this occurs only after oral arguments and in a format that

reflects the potential awkwardness of a freewheeling discussion among person who are not entirely comfortable arguing with each other because they were not picked to form an effective committee, and who as an aspect of the diversity that results from the considerations that shape judicial appointments may have sensitivities that inhibit discussion of issues involving race, sex, religion, criminal rights, immigrants’ rights, and other areas of law that arouse strong emotions.

Id. at 62.

242. Edwards, *supra* note 101, at 1641–43.

on what something looks like, not what it is. If the premise is wrong, the conclusion will be wrong.”²⁴³

Although the personalities of the judges and the panel deliberations may defy empirical study, a court’s procedures and organization influence its publication rates, and these things can—and should—be studied. Researchers and courts should consider how procedural and organizational changes may have unintended consequences for the jurisprudence.

For example, Judge Wynn described how some changes in the procedures of the North Carolina Court of Appeals and Supreme Court of North Carolina changed the way cases were assigned for oral argument, which ultimately led to a transition in the way that life-imprisonment cases are considered.²⁴⁴ Prior to December 1995, cases in which a defendant was sentenced to life imprisonment were appealed directly to the North Carolina Supreme Court and all were orally argued, but the 1995 amendment to section 7A-27(a) of the North Carolina General Statutes provided that only capital cases in which the death penalty was actually imposed would be appealed directly to the supreme court, thus decreasing the caseload of the supreme court and increasing that of the court of appeals.²⁴⁵ At first, the court of appeals continued to hold oral arguments for all life-imprisonment cases, just as the supreme court had done. But over time, the court of appeals stopped hearing oral arguments on all life-imprisonment cases, and sometimes these cases are now even considered as “fast track” cases. Judge Wynn noted that “the bar seems to be unfazed by this.”²⁴⁶ But this was a fundamental change in the way that the court has dealt with cases of life imprisonment, driven by a combination of increasing caseloads and changes in the court’s internal procedures, and not by the legal merits of the cases themselves.²⁴⁷ Life in prison is still life in prison, and the substance of the law is unchanged; but the court changed its procedures, and now these cases are more likely to be unpublished.

Changes to court procedures to address workload may lead to unintended consequences in the development of the law. One of the primary procedural differences between the Fourth and Seventh Circuits is the point at which the decision as to publication is made and the ways that the cases go through the triage process.²⁴⁸ There is also a difference in the point at which the decision regarding publication is made; the decision is

243. Interview with Judge James A. Wynn, Jr., *supra* note 63.

244. *Id.*

245. N.C. GEN. STAT. § 7A-27(a) (2013).

246. Interview with Judge James A. Wynn, Jr., *supra* note 63.

247. *See id.*

248. *See supra* note 208 and accompanying text.

normally made at the Fourth Circuit when cases are designated for oral argument.²⁴⁹ It seems that when there is more direct judicial involvement in the case-triage process, more cases may end up being argued and issued as published opinions. Moreover, the later in the process that the publication decision is made, the more likely that an opinion may be published, as the judges may realize while researching and drafting the opinion that a case presents questions worthy of publication that may have been initially overlooked. Courts should consider the potential effects of their procedures on the level of scrutiny given to cases and how procedures may favor or disfavor publication.

These differences in case processing are reflected in each circuit's official rules and internal operating procedures regarding oral argument and publication, but there are also subjective factors influencing the triage and publication decisions. In my interviews and surveys, I found that the general understanding and customs of court members as to the publication decision, part of the court culture, are also quite different. But with both courts, the factors that determine the publication decision clearly encompass more than the official publication rules. Because of the many factors that judges consider, and the varying weight each judge may give to a particular factor, publication rates even between judges on the same court tend to vary.²⁵⁰

Because of the information that can be hidden in the publication decisions and depending upon the issue that the researcher is considering, researchers should consider including unpublished cases, to the extent possible. Whether unpublished cases need to be considered will depend on the particular issue being researched, as well as the circuit or judges being studied. A database that includes only the published opinions for 2012 from the Seventh Circuit still includes 41.5% of its cases, a substantial and perhaps representative sample, while including only published opinions from the Fourth Circuit would be 10.8% of its cases, which is not likely a representative sample. It may be that databases of cases that focus on

249. See *supra* note 173 and accompanying text.

250. See Choi & Gulati, *Choosing the Next Supreme Court Justice*, *supra* note 25, at 42. As Choi and Gulati note:

There are significant differences in the caseloads across the circuits, but the one commonality is that the burdens are overwhelming. They are so overwhelming that almost no judge can hope to provide a publication-worthy statement of reasons in every case that comes before the judge. Some judges, however, provide published statements of reasons in more cases than others.

See id. (citation omitted).

ideologically charged cases, such as the Sunstein database,²⁵¹ are even more likely to be influenced by other factors that should be considered in the research. Some judges may tend to avoid publication based on a belief that if the law is well established, there is no need to stir the pot by publishing an opinion about a controversial issue,²⁵² while others tend to publish these cases simply because they are controversial.²⁵³

The reasons that judges decide to publish an opinion may contain essential information about the way the court works and how the judges decide cases. For this reason, any study of judicial behavior that relies only upon published opinions should be scrutinized carefully. Depending on the particular issue being studied, the exclusion of unpublished opinions may lead to erroneous conclusions, and the potential importance of the unpublished cases may vary based on the particular court issuing the opinion, and even based on the judge. Published opinions are the tip of the iceberg, but unpublished opinions are the bottom. Sailors ignore the bottom of the iceberg to their peril. Judges and researchers may wish that they could ignore unpublished opinions, since there are so many, but unpublished opinions comprise the majority of the work of the federal appellate courts and should not be ignored.

Table 4: Changes in the Publication Decision Process

Change in the publication decision process over time	Fourth Circuit (Number of judges)	Seventh Circuit (Number of judges)
Lesser tendency to publish	1	0
Greater tendency to publish	4	1
No change in tendency to publish	2	4
Frequency of recommendations to other judges regarding publication		
Rarely or occasionally	6	5
Never	1	0

251. For example, the second database used in *The Behavior of Federal Judges* was compiled by Cass Sunstein and others (Sunstein database) and includes “all the published court of appeals opinions from 1995 (plus some from earlier years) and 2001 in fourteen subject-matter areas believed to have significant ideological stakes, such as abortion, capital punishment, and racial discrimination.” See EPSTEIN ET AL., *supra* note 39, at 157. The authors, Epstein, Landes, and Posner updated the Sunstein database to 2008, adding age-discrimination cases. *Id.*

252. See *supra* note 222 and accompanying text.

253. See *supra* note 222 and accompanying text.