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## "Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals

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# “DOWNRIGHT INDIFFERENCE”<sup>†</sup>: EXAMINING UNPUBLISHED DECISIONS IN THE FEDERAL COURTS OF APPEALS

Merritt E. McAlister\*

*Nearly 90 percent of the work of the federal courts of appeals looks nothing like the opinions law students read in casebooks. Over the last fifty years, the so-called “unpublished decision” has overtaken the federal appellate courts in response to a caseload volume “crisis.” These are often short, perfunctory decisions that make no law; they are, one federal judge said, “not safe for human consumption.”*

*The creation of the inferior unpublished decision also has created an inferior track of appellate justice for a class of appellants: indigent litigants. The federal appellate courts routinely shunt indigent appeals to a second-tier appellate process in which judicial staff attorneys resolve appeals without oral argument or meaningful judicial oversight. For the system’s most vulnerable participants, the promise of an appeal as of right often becomes a rubber stamp: “You lose.”*

*This work examines the product of that second-class appellate justice system by filling two critical gaps in the existing literature. First, it compiles comprehensive data on the use of unpublished decisions across the circuits over the last twenty years. The data reveal, for the first time, that the courts’ continued—and increasing—reliance on unpublished decisions has no correlation to overall caseload volume. Second, it examines the output of the second-tier appellate justice system from the perspective of the litigants themselves. Relying on a procedural justice framework, this work develops a taxonomy of un-*

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† RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING ITS ORAL ARGUMENTS 31 (2017).

\* Assistant Professor of Law, University of Florida Fredric G. Levin College of Law. For thoughtful discussions and generous feedback, I thank Jonathan Nash, Ron Krotoszynski, J.J. Prescott, Allan Erbsen, Rebecca Hollander-Blumoff, Tara Leigh Grove, Laura Rosenbury, Darren Hutchinson, Lea Johnston, Danny Sokol, Mark Fenster, Pamela Bookman, Andrew Hammond, Michael Wolf, Danaya Wright, Stephanie Bornstein, Peter Molk, Mae Quinn, and participants at the 2019 Michigan Law Junior Scholars Conference, the 2019 Junior Faculty Federal Courts Workshop, the 2019 University of Richmond Law School Junior Faculty Forum, the 2019 University of Florida Levin College of Law Summer Workshop Series, and the 2018 Southeastern Junior-Senior Scholars Workshop. I am grateful to the editors of the *Michigan Law Review* for exceptional care and thought during the editing process and to Kimbrell Hines for excellent research assistance. All errors are my own.

*published decisions and argues for minimum standards for reason-giving in most unpublished decisions.*

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#### INTRODUCTION

During the first week in October 2016, the U.S. Court of Appeals for the Fourth Circuit issued 104 decisions in pending appeals.<sup>1</sup> Two of those decisions made law;<sup>2</sup> the rest, which were “unpublished” dispositions, did not. Three cases received oral argument. Sixty-nine of the 104 dispositions involved pro se appellants pursuing civil rights claims, seeking disability benefits, launching a variety of collateral attacks on state and federal convictions, seeking sentence reductions, pursuing asylum claims, and bringing unidentified “civil” actions. Of the decisions the court issued in pro se appeals that rejected the appeal (or, once, that vacated the judgment<sup>3</sup>), only twenty-one

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1. The data discussed in this paragraph derive from a review of decisions culled through the interactive search feature on the U.S. Court of Appeals for the Fourth Circuit’s website. The data are on file with the *Michigan Law Review*.

2. *Simms ex rel. C.J. v. United States*, 839 F.3d 364 (4th Cir. 2016); *McCray v. Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016).

3. *United States v. Dickerson*, 663 F. App’x 265 (4th Cir. 2016) (per curiam).

of sixty-nine revealed any independent decisionmaking by the appellate court.<sup>4</sup> For the rest—or in 70% of the pro se appeals resolved that week—the Fourth Circuit either affirmed “for the reasons stated by the district court” or simply found “no error” (without further elaboration).<sup>5</sup>

If that’s shocking, it shouldn’t be. The Fourth Circuit is not an outlier. Nearly 90% of merits decisions from the federal courts of appeals look nothing like what law students read in casebooks.<sup>6</sup> Over the last fifty years, federal courts have increasingly relied on the so-called “unpublished decision” to combat a caseload volume “crisis.”<sup>7</sup> These decisions are not precedential and make no law;<sup>8</sup> they are often short, perfunctory, unsigned opinions drafted for the benefit of the parties, not the public.<sup>9</sup> Even their greatest judicial defender once referred to unpublished decisions as “not safe for human consumption.”<sup>10</sup>

The crisis that created this inferior class of appellate work, however, has abated; today, the caseload volume of the federal courts of appeals appears to

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4. The Fourth Circuit dismissed eleven of the pro se appeals on procedural grounds. When doing so, the court always explained the reason for its decision (e.g., for lack of a timely appeal or final judgment or because of an appeal waiver). *See, e.g., Green v. Stevenson*, 669 F. App’x 154 (4th Cir. 2016) (per curiam).

5. *See, e.g., Teague v. Aslett*, 669 F. App’x 145 (4th Cir. 2016) (per curiam). Litigants with lawyers received more robust responses to their appeals, but the court nevertheless offered no independent reasoning for its decision in three of the thirty-five lawyered appeals.

6. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-12 (2018) [hereinafter JUDICIAL BUSINESS (year)].

7. Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 & n.9 (2011) (tracing origins of the “crisis of volume” to describe the “heavy caseload” of the courts of appeals).

8. *See* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1436 n.4 (2004) (discussing the private nature of unpublished decisions). Because many “unpublished decisions” are widely available, it is best to think of the terms “published” and “unpublished” as synonymous with “precedential” and “nonprecedential.” *See, e.g., Scott E. Gant, Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 708 (2006) (“Today the designation of an opinion as ‘unpublished’ refers to its status as nonprecedential.”). *But see* Michael Kagan et al., *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 698–99 (2018) (examining data that show that a significant percentage of unpublished merits decisions in immigration appeals are not publicly available on Westlaw). Because the widespread availability of “unpublished decisions” remains in some doubt and because it is the term the Administrative Office of the U.S. Courts uses, I will continue to use the term “unpublished,” even if some scholars have embraced “nonprecedential” instead.

9. Alex Kozinski, a prominent proponent of the unpublished decision, explained that the unpublished decision is “a letter to the parties letting them know that the court thought about their case and understands the issues.” Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36, 38. In 2017, Kozinski resigned after being accused of sexual misconduct by numerous women, including former law clerks. Maura Dolan, *9th Circuit Judge Alex Kozinski Steps Down After Accusations of Sexual Misconduct*, L.A. TIMES (Dec. 18, 2017, 7:00 PM), <https://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html> [<https://perma.cc/W63F-RWEK>].

10. Kozinski, *supra* note 9, at 37.

be receding.<sup>11</sup> But the inferior work remains—and, worse yet, it has birthed an inferior appellate justice system.<sup>12</sup> In seven of the twelve geographic circuits, unpublication rates hover at or over 90%.<sup>13</sup> Judicial staff attorneys—a position lacking the cachet of a federal clerkship—review and resolve appeals destined for nonpublication without significant judicial oversight or the benefit of oral argument.<sup>14</sup> Judges are too busy to do more than (hopefully) ensure the correct result in these cases.

Traditional appellate process—including oral argument and judicial scrutiny—continues for the system’s haves. But for its have-nots, the promise of an appeal as of right has become little more than a rubber stamp: “You lose.” Data, historical accounts, and anecdotal evidence all suggest that the unpublished decision revolution aligns closely with the rise of pro se appeals—the appellate justice system’s “have-nots.” Appeals from these vulnerable litigants occupy half of the federal appellate docket,<sup>15</sup> but they surely receive far less than half of judges’ attention. Instead, resource-strapped courts shift their attention to more complex and well-lawyered civil disputes.

Unsurprisingly, the unpublished decision—perhaps the most prominent feature of second-tier appellate process—has been the target of significant scholarly criticism.<sup>16</sup> But much of that criticism has attacked unpublished decisions categorically.<sup>17</sup> That attack has failed to persuade busy courts to

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11. See *infra* Section I.B (discussing caseload statistics).

12. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275–76 (1996) (describing two-track system of federal appellate process); see also Pether, *supra* note 8, at 1460–61 (similar); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668–70 & n.3 (2005) (same).

13. See *infra* Figure 2.

14. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 345–54 (2011) (describing role of judicial staff attorneys).

15. See JUDICIAL BUSINESS tbl.B-9 (2018).

16. While advocating for lower-court court-packing, Steven Calabresi recently identified the swell of nonprecedential decisions as “an atrocious symptom of the caseload problem.” Memorandum from Steven G. Calabresi, Professor, Nw. Univ. Sch. of Law & Shams Hirji, J.D. 2017, Nw. Univ. Sch. of Law, to Senate & House of Representatives 7 (Nov. 7, 2017), <https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf> [<https://perma.cc/M4FR-UT3R>] (internal capitalization and emphasis omitted). Another scholar observed: “[T]he proliferation in American courts of the mass destruction of opinions is so horrible for so many reasons that it is hard to keep track.” Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1607 (2005).

17. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir.) (holding that court’s publication rules violated Article III), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000); Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808 (2018) (arguing that at least some unpublished decisions violate retroactivity principles); Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003) (arguing that unpublished decisions violate common-law principles); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757

abandon the practice; instead, it continues to proliferate. In the meantime, the creation of the unpublished decision has led to pervasive decisional atrophy—atrophy that has been lamented but largely unexamined. Although the "lower quality of unpublished opinions may be the most important of the costs of limited publication,"<sup>18</sup> it has been nearly forty years since any scholar seriously examined the substance of unpublished decisions, which now dominate the output of the federal courts of appeals.<sup>19</sup>

In September 2017, the most influential federal appellate judge—Richard Posner of the U.S. Court of Appeals for the Seventh Circuit—reinvigorated this debate by focusing our attention to what he viewed as pervasive systemic injustice over how the federal courts handle indigent appeals. After his abrupt resignation, Posner told the *New York Times* that "most judges regard these people"—pro se and indigent litigants—"as kind of trash not worth the time of a federal judge."<sup>20</sup> To highlight the problem, Posner self-published a book detailing the extent of the federal courts of appeals' reliance on staff attorneys and the "downright indifference of most judges to the needs of pro se's."<sup>21</sup> In Posner's view, "it [is] imperative—the imperative of basic decency—that the orders that judges issue in pro se cases, together with any supplemental documents, be complete, sufficient, and intelligible to the pro se litigants and not just to the judges."<sup>22</sup>

Although the controversy Posner's work stirred may have drowned out his message,<sup>23</sup> his indictment hit the mark.<sup>24</sup> Judicial indifference to the ap-

(1995) (arguing that unpublished decisions pose systemic threat to principles of stare decisis); Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 958–60 & nn.14–19 (2009) (collecting scholarship describing separation-of-powers, due process, and First Amendment concerns with unpublished and nonprecedential decisions); Richman & Reynolds, *supra* note 12, at 275 (arguing that unpublished decisions violate judicial adjudicatory norms).

18. William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 606 (1981). As the late Judge Stephen Reinhardt once observed: "Those who believe we are doing the same quality work that we did in the past are simply fooling themselves." Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52, 52; see also Richman & Reynolds, *supra* note 12, at 293–95 (describing degradation of quality of decisionmaking resulting from use of unpublished decisions).

19. Reynolds & Richman, *supra* note 18.

20. Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html> [<https://perma.cc/88E7-X4SW>] (quoting Posner as saying, "[a]bout six months ago . . . I awoke from a slumber of 35 years" and "suddenly realized" that "people without lawyers are mistreated by the legal system").

21. RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING ITS ORAL ARGUMENTS 31 (2017).

22. *Id.* at 20–21.

23. See, e.g., Jonathan H. Adler, *Richard Posner's 'Bats--- Crazy' New Book*, WASH. POST: VOLOKH CONSPIRACY (Sept. 21, 2017), <https://www.washingtonpost.com/news/volokh->

pellate system's most vulnerable litigants has become commonplace.<sup>25</sup> Even if Posner rightly called our attention to “the separate-but-equal appellate review that pro [se] litigants receive,”<sup>26</sup> others have questioned how Posner's proposed solution—better and clearer judicial decisions in pro se cases—would benefit pro se litigants.<sup>27</sup>

This work grapples with that question by considering reason-giving across all unpublished decisions. Decisional atrophy disproportionately affects pro se litigants because their cases are more likely to receive the second-class treatment that produces the poorly or lightly reasoned unpublished decisions that Posner finds so problematic. Some features of a two-tier appellate justice system may be necessary: reliance (to some extent) on judicial staff, the use of unpublished decisions, and the reduction of oral argument, for example. For present purposes, I stipulate that some type of appellate triage system may be a wise use of judicial resources. But the question of decisional atrophy and the erosion of reason-giving in unpublished decisions deserves special attention—regardless of how we might design that triage system.

Some decisional atrophy was expected as the appellate courts abandoned lawmaking norms in their embrace of unpublished decisions.<sup>28</sup> In a common-law system, reason-giving is effectively lawmaking and thus an essential requirement of published, precedential decisions.<sup>29</sup> But in an appellate sys-

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conspiracy/wp/2017/09/21/richard-posners-bats-crazy-new-book/ [https://perma.cc/BEH8-PCGW]. Most of the criticism Posner received concerned his “recount[ing] his disputes with his former benchmates in excruciating detail” and choosing “to publish all manner of material, including memos written by staff attorneys and email correspondence among the judges.” *Id.*

24. Although I agree with Posner's bottom line, some of his reasoning condescends to the people he aims to help. See, e.g., POSNER, *supra* note 21, at 20 (“Pro se's rarely are well educated or intellectually sophisticated . . .”); *id.* at 21 (“I may have created the impression that I am ‘soft’ on pro se's, and I am, rather, though only in part is this because of their frequent intellectual and educational deficiencies . . .”).

25. Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97, 114 (2016) (“It is difficult to address prisoner-brought cases without running into an avalanche of ill will lobbed at prisoners' attempts to seek justice through civil litigation.”).

26. Matthew Stiegler, *Posner's New Book Is Bananas, but You Might Want It Anyway*, CA3BLOG (Sept. 18, 2017), <http://ca3blog.com/judges/posners-new-book-is-bananas-but-you-might-want-it-anyway/> [https://perma.cc/J5X4-FN4S].

27. Katherine A. Macfarlane, *Posner Tackles the Pro Se Prisoner Problem: A Book Review of Reforming the Federal Judiciary*, 83 MO. L. REV. 113, 126 (2018).

28. The abandonment of the lawmaking norm is itself deeply problematic. But others have written thoughtfully on this issue. See, e.g., Cappalli, *supra* note 17, at 759 (arguing that “the American legal system suffers from the practices of appellate judges in choosing to label the bulk of their actions as non-precedential—choices that defy the wisdom of the common law”). At this point, unpublished decisions are here to stay; the goal of this work is, instead, to initiate a dialogue on better ways of doing unpublished decisions.

29. See William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1725 (2005) (explaining that under the common-law appellate model, “judges hear[] oral arguments, confer[] with their colleagues on the panel, and sometimes with the help

tem dominated by *nonprecedential* decisions, reason-giving can undermine efficiency goals. If a court is not establishing precedent, a reasoned explanation in an unpublished decision may take time away from work on (presumably more important) published decisions—or so the efficiency rationale for unpublished decisions goes.<sup>30</sup> To maximize efficiency, indeed, we might expect courts to say nothing at all when handing down unpublished dispositions.

Scholarly work in this area thus has been insensitive to these two foundational yet competing considerations: the efficiency interests that unpublished decisions may properly serve and the procedural justice effects of decisions that slam shut courthouse doors on vulnerable litigants. Although some have observed—and even lauded—the efficiency benefits of un-

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of a single clerk, [write] fully reasoned, precedential, published opinions in nearly all cases”); cf. Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 105–12 (2007) [hereinafter Mashaw, *Reasoned Administration*] (discussing role of the right to reasons in administrative law); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 20 (2001) [hereinafter Mashaw, *Small Things*] (discussing failure to provide adequate reasons as a ground for reversal of an administrative order).

More broadly speaking, scholars and judges alike have historically described judicial reason-giving in absolute terms. See Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 655 (1980) (“Every judge should be required to give his reasons for a decision, and these reasons should be sufficient not only to explain the result to the litigants but also to enable other litigants to comprehend its precedential value and the limits to its authority.”); see also Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412 (1978) (“The adjudicator should *explain* his decision in a manner that provides a substantive reply to what the parties have to say.”); Richman & Reynolds, *supra* note 12, at 285 n.58 (“In our law . . . the exercise of a power to speak authoritatively as an interpreter carries with it an obligation to explain the grounds upon which the interpreter gives that authoritative judgment.” (alteration in original) (quoting Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 838 (1991))); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 768 (1983) (“[T]he courts’ opinions should contain reasoned explanations of their decisions to lend them legitimacy, permit public evaluation, and impose a discipline on judges.”).

30. See, e.g., K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 418 (2001) (“[S]ome decisions do have the potential to play a more significant role in shaping future decisions. Courts should be permitted to spend additional time in producing these decisions.”); William H. Pryor, Jr., Opinion, *Conservatives Should Oppose Expanding the Federal Courts*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html> [<https://perma.cc/G9L3-ZKNR>] (“Today, courts use unpublished opinions to issue quick, reasoned decisions in routine cases based on settled precedent. For example, thousands of petitions to review deportations and denials of Social Security benefits turn on discrete facts determined by administrative law judges; hearing oral arguments and issuing published opinions in most would only delay decisions that should be speedy.”).



published decisions,<sup>31</sup> no scholar has considered how procedural justice experiences might inform the content and process of unpublished decisions.

In “general legal parlance,” “procedural justice . . . refers to the fairness of a process by which a decision is reached.”<sup>32</sup> There is a rich body of literature on normative procedural justice theory.<sup>33</sup> But I am more interested in a “bottom-up”<sup>34</sup> understanding of procedure. For that view, what matters more is “the *subjective* assessments by individuals [in the justice system] of the fairness of a decision making process.”<sup>35</sup> Although little work has been done to understand the subjective experience of appellate litigants in particular, Tom R. Tyler’s groundbreaking work<sup>36</sup> on other touchpoints with the justice system offers us some view into how unpublished decisions may be received by their intended audience: the parties themselves. Based on extensive social psychology work, Tyler has identified core procedural justice values—principally, participation, dignity, respect, and the neutrality and trustworthiness of the decisionmaker<sup>37</sup>—that inform individual perceptions of procedural fairness.

A cautious extrapolation of Tyler’s work to the appellate context suggests that procedural justice experiences turn, in substantial part, on the extent of judicial process afforded the appellant and the extent of reasons given for the appellate decision. We can easily perceive considerable tension, then,

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31. See *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001) (disagreeing with *Anastoff*); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 178–79 (1999) (“Whereas academicians tend to see unpublished opinions as causing a variety of systemic problems, judges tend to see them as a necessary, and not necessarily evil, part of the job.” (footnote omitted)); Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 409 (1994) (discussing “several advantages” of limited publication regimes); Christian F. Southwick, Note, *Unprecedented: The Eighth Circuit Repaves Antiquas Vias with a New Constitutional Doctrine*, 21 REV. LITIG. 121 (2002) (evaluating policy arguments).

32. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3.

33. E.g., Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 280 (2004).

34. Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1527 (2019) (articulating a view of “bottom-up” procedural scholarship that “follow[s] poor litigants through systems of civil justice,” including, “perhaps most importantly,” by “interviewing . . . litigants themselves”).

35. Hollander-Blumoff & Tyler, *supra* note 32, at 3 (footnote omitted). As explained more fully below, see *infra* notes 145–146 and accompanying text, I am sensitive to the well-founded critique that many criminal justice scholars and critical race theorists have lodged at procedural justice work and its legitimacy theory. See generally, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

36. See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) [hereinafter TYLER, WHY PEOPLE OBEY THE LAW]; Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) [hereinafter Tyler, *Procedural Justice*]; see also *infra* notes 150–163 and accompanying text (discussing Tyler’s work).

37. See *infra* notes 147, 150–152 and accompanying text (discussing core procedural justice values in law and psychology).

between the importance of appellate procedural justice experiences and the efficiency rationale of unpublished decisions (and the second-tier appellate justice system itself). Unpublished decisions with the greatest procedural justice effects—fully explained decisions issued after oral argument—are resource intensive for courts to issue, thereby defeating the goals of an unpublication scheme.

My work is the first to plumb this tension. I do so, first, by bringing much-needed empirical work on the use of unpublished decisions up to date with an examination of the last twenty years’ worth of data on the federal courts of appeals’ decisional practices.<sup>38</sup> This empirical work both unsettles the historical efficiency narrative for unpublished decisions and highlights a correlation between pro se litigation and unpublished decisions. Second, I consider the procedural justice effects of unpublished decisions—especially those that omit independent reasons for the appellate court’s judgment, as many unpublished decisions do.

Ultimately, I will show that the time-saving rationale for unpublished decisions is mostly a myth—one that has insulated thousands of appellate decisions from public scrutiny, stripped them of any precedential value, and deprived litigants of a meaningful response to their appeals. I contend that the failure of appellate courts to provide reasoned explanation for many unpublished decisions is both marginalizing and (potentially) legitimacy threatening<sup>39</sup>—a consequence that Tyler warns may follow when courts are insensitive to procedural justice concerns.<sup>40</sup>

This Article proceeds in four parts. Part I traces the landscape of unpublished decisions, including the institutional pressures that created the unpublished decision and the ways the unpublished decision has been used over time and across the circuits. This Part also examines empirical data on the continued use of unpublished decisions across the circuits, despite a decrease in overall caseload volume and some remarkable efficiency statistics.

From there, I consider more closely the output of the second-tier appellate justice system by examining what unpublished decisions look like on the ground and how they might be received by the parties. Part II frames this inquiry by establishing a procedural justice lens for unpublished decisions.

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38. This Article focuses on *merits* decisions from the U.S. courts of appeals. That is a significant limitation in two respects: I do not consider nonmerits appellate decisions or decisions from state appellate courts. The federal appellate courts issue a significant number of procedural terminations every year, but data tracking the publication status of those resolutions are not generally available. Likewise, very little data are available on the use of unpublished decisions at the state level, which is a common and varied practice.

39. I use “legitimacy” here in both a sociological and a moral sense—not necessarily in a legal sense; my argument does not turn on whether any particular unpublished decision has been wrongly decided (and therefore is arguably legally illegitimate). See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005) (discussing and describing different concepts of legitimacy).

40. See TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 36, at 162 (“Procedural justice is the key normative judgment influencing the impact of experience on legitimacy.”).

Part III then articulates a taxonomy of unpublished decisions based on procedural justice values, including the degree of participation by litigants and reason-giving by the courts of appeals.

Part IV explores this Article's central thesis: that, to further procedural justice values and avoid the marginalization attendant in their absence, appellate courts should almost always offer independent reasons for their decisions, even nonprecedential ones. Finally, I briefly conclude by recommending that our federal courts of appeals give renewed attention to the quality of their unpublished decisions and the harm they may unwittingly inflict on the decision's recipients.

## I. THE HISTORY, DEVELOPMENT, AND USE OF THE UNPUBLISHED DECISION

The history of the unpublished decision reveals the forces at play in its creation.<sup>41</sup> That history is more troubling than the popular efficiency narrative suggests. Unpublished decisions emerged in response to a caseload crisis of a particular kind—an increase in prisoner litigation during the 1950s and 1960s. From the outset, the most vulnerable federal litigants were the impetus for unpublished adjudications—a trend that appears to have continued into the present, as the second section of this Part highlights.

### A. *A Short History of the Unpublished Decision*

Although limited publication has been a topic of discussion since the 1940s,<sup>42</sup> its history begins in earnest in 1964.<sup>43</sup> That year, the Judicial Conference of the United States<sup>44</sup> first recommended “that judges publish only those opinions ‘which are of general precedential value.’”<sup>45</sup>

Two concerns drove that recommendation. First, by the early part of the twentieth century, everyone—judges, lawyers, academics, and law librarians—began expressing concern over the burgeoning decisional law in the

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41. William Reynolds and William Richman have produced the most comprehensive and probing scholarship on the use of unpublished decisions, beginning in 1978. See Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2390 (2014) (“[N]o one has contributed more to this field than [Richman and Reynolds].”). Their work was recently consolidated into an excellent book, WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013).

42. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1169 (1978).

43. Dragich, *supra* note 17, at 761 (discussing ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964)).

44. The Judicial Conference was created by Congress in 1922 and frames policy guidelines for administration of the federal courts. 28 U.S.C. § 331 (2012).

45. Dragich, *supra* note 17, at 761 (quoting ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 43, at 11 (adopting resolution “[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct”).

United States.<sup>46</sup> There was too much case law for anyone to master, effectively search, or house. As one judge put it a century ago: “The law library of the future staggers the imagination as one thinks of multitudes of shelves which will stretch away into the dim distance . . . .”<sup>47</sup> Thankfully, technological innovations unforeseen at the time ultimately would moot this concern.

Second, the federal courts began to face a different kind of “crisis of volume”: a caseload crisis.<sup>48</sup> Between 1960 and 1965, the number of appeals filed in the federal courts nearly doubled.<sup>49</sup> By 1970, the volume had tripled.<sup>50</sup> The trend would continue. Between 1945 and 1990, the number of appeals filed in the courts of appeals increased *fifteen-fold*.<sup>51</sup> The appellate caseload growth rate outpaced new filings in the district courts; litigants were not just filing more cases—they were appealing more often.<sup>52</sup> Concurrently, the number of authorized judgeships increased by almost 50%, but that increase failed to keep pace with the rapid caseload growth.<sup>53</sup>

That growth followed on the heels of a dramatic expansion of federal rights through congressional and judicial action. Since the 1960s, Congress has continuously expanded federal criminal and civil jurisdiction.<sup>54</sup> Increased litigiousness,<sup>55</sup> coupled with Warren Court decisions that expanded

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46. Reynolds & Richman, *supra* note 42, at 1168–69 (describing concerns over growing volume of decisional law).

47. John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 158 (1915).

48. See Huang, *supra* note 7, at 1112 n.9 (describing “crisis of volume”); see also Vladeck & Gulati, *supra* note 12, at 1668 & n.2 (describing caseload volume crisis).

49. DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 15 (2000).

50. *Id.*

51. JOSEPH F. WEIS, JR., ET AL., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (1990), <https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf> [<https://perma.cc/QYM8-ZPTD>].

52. In 1945, litigants appealed one in forty final judgments. *Id.* By 1990, litigants appealed one in eight. *Id.* Today, the appeal rate is roughly the same (13.8%). Compare JUDICIAL BUSINESS tbl.C-3B (2018) (district court civil cases terminated), and JUDICIAL BUSINESS tbl.D (2018) (district court criminal cases terminated), with JUDICIAL BUSINESS tbl.B (2018) (number of appeals commenced).

53. See ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS ADDITIONAL AUTHORIZED JUDGESHIPS, <http://www.uscourts.gov/sites/default/files/appealsauth.pdf> [<https://perma.cc/5BRB-54US>]. In 1960, there were sixty-eight authorized judgeships; by 1968, Congress authorized an additional twenty-five permanent judgeships, four temporary judgeships, and four temporary to permanent judgeships. *Id.*

54. See Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1270 (1996) (recognizing Congress’s role in expansion of federal appellate docket).

55. See Marjorie Lakin & Ellen Perkins, *Realigning the Federal Court Caseload*, 12 LOYOLA L.A. L. REV. 1001, 1001 & n.3 (1979) (describing increased litigiousness resulting from “a number of socioeconomic changes” during 1950s, 1960s, and 1970s, including greater access to the court system and “rising expectations of the poorer, more disadvantaged sectors of society”).

criminal and civil rights, also affected federal dockets.<sup>56</sup> Especially important was *Monroe v. Pape*,<sup>57</sup> which opened the door to civil liability under 42 U.S.C. § 1983 for constitutional violations by state actors who abuse their office.<sup>58</sup> Since that 1961 decision, federal civil rights actions under § 1983 “bec[a]me a major part of the work of the federal courts.”<sup>59</sup>

These docket changes put extraordinary pressure on the federal judiciary.<sup>60</sup> That pressure had to go “*somewhere*,”<sup>61</sup> and the judiciary had a number of available solutions. They could have asked Congress for help—authorize more judges and more funding proportionate to the caseload increase. They didn’t.<sup>62</sup> Judges could have reduced the time they spent on all cases: “[T]he federal appellate courts clearly could not have continued to give every case a leisurely review.”<sup>63</sup> They didn’t exactly do that, either. Instead, they developed an “Appellate Triage model,” by which the federal courts embraced procedural and administrative reforms to institute a two-track or two-tier system of appellate justice.<sup>64</sup>

Those administrative reforms involved three interconnected changes. First, judges began writing fewer precedential or lawmaking decisions, relying instead on shorter nonprecedential dispositions.<sup>65</sup> Second, courts began holding fewer oral arguments, especially in cases that would not lead to published or precedential decisions.<sup>66</sup> And, finally, judges began relying on “ad-

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56. Among the changes the Warren Court brought was an expansion of the federal habeas corpus remedy. See, e.g., *Kaufman v. United States*, 394 U.S. 217 (1969) (authorizing habeas corpus relief to state prisoners asserting violation of Fourth Amendment rights based on *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule for Fourth Amendment violations against states)).

57. 365 U.S. 167 (1961).

58. *Monroe*, 365 U.S. at 172, 187 (holding that Congress intended § 1983 “to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position”).

59. Michael L. Wells et al., *Constitutional Remedies: Section 1983 and Related Doctrines*, in *CASES AND MATERIALS ON FEDERAL COURTS* 15, 15 (3d ed. 2015).

60. Between 1960 and 2010, filings per authorized judgeship in the geographic courts of appeals swelled from 57.3 to 340.1. RICHMAN & REYNOLDS, *supra* note 41, at 8.

61. Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 *STAN. L. & POL’Y REV.* 57, 61 (2016).

62. There is a significant debate over the soundness of the judiciary’s reluctance to embrace expansion of its ranks. Compare Richman & Reynolds, *supra* note 12, at 334–39 (arguing that reluctance to embrace expansion reflects judicial elitism), and *id.* at 297–300 (summarizing judicial opposition to expanding judiciary), with Tobias, *supra* note 54, at 1275–80 (identifying and defending “detrimental consequences” on expanding appellate judiciary), and Levy, *supra* note 41, at 2402–08 (arguing that Richman and Reynolds’s proposed cure—expanding the judiciary—is impractical, and recommending other, administrative changes).

63. Levy, *supra* note 41, at 2395.

64. RICHMAN & REYNOLDS, *supra* note 41, at xii (discussing the creation of the “Appellate Triage model”).

65. *Id.* at 10–21 (discussing critical changes in publication practices across the circuits).

66. *Id.* at 83–94 (describing trend away from holding oral argument in every appeal).

ditional decision makers"—principally law clerks and central staff attorneys—to perform judicial work, primarily to help with unpublished and nonargued cases.<sup>67</sup> These administrative and procedural changes have continued unabated.<sup>68</sup>

With respect to unpublished decisions, by 1978, every circuit had adopted so-called "publication plans"<sup>69</sup>—a somewhat ironic name given that the purpose of these plans was to publish far fewer decisions. Although there was variation among these plans,<sup>70</sup> most plans addressed four distinct aspects of the unpublished decision revolution: (1) whether to authorize summary dispositions (i.e., one-word or perfunctory decisions); (2) criteria for publication of court decisions; (3) procedures for determining which decisions should be published; and (4) limitations on the citation of unpublished decisions.<sup>71</sup>

Initially, the last of these—limitations on citation—was the most controversial.<sup>72</sup> Scholars persuasively argued that no-citation rules violated the First Amendment.<sup>73</sup> Others identified thorny ethical issues such rules created for attorneys, including the scope of an attorney's obligation to research unpublished decisions and whether an attorney must advise clients about known unpublished decisions.<sup>74</sup>

Efforts at reform were equally controversial, as the reporter for the Advisory Committee on the Federal Rules of Appellate Procedure has detailed.<sup>75</sup> The Committee mulled over possible rules to address unpublished decisions,

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67. *Id.* at 97–111 (discussing administrative changes within the courts of appeals, including growth of judicial staff to help resolve appeals).

68. Some have questioned whether the courts have also responded in outcome-affecting ways, including by reducing the quality of their output to respond to increased demand. See Lavie, *supra* note 61, at 66–67 (discussing potential outcome-affecting changes); see also Huang, *supra* note 7 (finding that spikes in caseload crisis led to temporary reduction in reversal rates).

69. Reynolds & Richman, *supra* note 42, at 1170–73 & nn.24–34 (describing development of circuit rules).

70. *Id.* at 1173 (recognizing that the plans were "not easily categorized").

71. See *id.* at 1173–81 (discussing key features of circuits' publication plans).

72. That controversy would continue well into the 2000s. 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, 1458–90 (2005) (exploring "controversy" over efforts to reform no-citation rules).

73. See, e.g., Charles L. Babcock, *No-Citation Rules: An Unconstitutional Prior Restraint*, LITIGATION, Summer 2004, at 33; Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287 (2001).

74. See, e.g., David S. Caudill, *Parades of Horribles, Circles of Hell: Ethical Dimensions of the Publication Controversy*, 62 WASH. & LEE L. REV. 1653 (2005); see also J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27 (2005); Shenoa L. Payne, Note, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723 (2008).

75. See Schiltz, *supra* note 72, at 1433–58 (recounting "saga" around efforts to consider and reform local no-citation rules).

sparking widespread disagreement over whether the proposed rule should address the precedential effect of unpublished decisions.<sup>76</sup> After years of study and negotiation, the Advisory Committee ultimately recommended and passed a compromise rule, which received Supreme Court approval and took effect on December 1, 2006.<sup>77</sup> Under Rule 32.1, no circuit may restrict the citation of unpublished decisions issued after January 1, 2007.<sup>78</sup> The rule was silent, however, on the most controversial issue at the time: what, if any, precedential effect unpublished decisions should have. The circuits were left to assign that effect on their own. Whether by judicial decision, local rule, or internal operating procedure, in every circuit unpublished decisions are not precedential.<sup>79</sup>

Rule 32.1 was the last—and only—reform of the circuits' publication practices. But it did not end the debate over the use of unpublished decisions, which have continued to proliferate in the decade since Rule 32.1. Scholars, too, have criticized persistently the courts' ongoing reliance on the unpublished decision, especially as an integral feature of a second-tier system of appellate justice. William Richman and William Reynolds, the leading scholars on unpublished decisions, authored a 2013 book, *Injustice on Appeal: The United States Courts of Appeals in Crisis*,<sup>80</sup> as a capstone to thirty-five years' worth of work on the subject of unpublished decisions. The title says it all.

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76. *Id.* Initially, the project was much broader, going as far as questioning the use of unpublished decisions themselves. *Id.* at 1439. That effort was met with almost unanimous resistance from the chief judges. *Id.* at 1439–40. As Chief Judge Harry T. Edwards of the D.C. Circuit stated conclusively, “This is a terrible idea.” *Id.* at 1439.

77. FED. R. APP. P. 32.1 advisory committee’s notes (2006).

78. FED. R. APP. P. 32.1.

79. 1ST CIR. R. 32.1.0 (“An unpublished judicial opinion . . . will [be considered] for [its] persuasive value but not as binding precedent.”); 2D CIR. R. 32.1.1 (“Rulings by summary order do not have precedential effect.”); 3D CIR. I.O.P. 5.1–.3 (“There are two forms of opinions: precedential and not precedential.”); 5TH CIR. R. 47.5.4 (“Unpublished opinions . . . are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case . . .”); 7TH CIR. R. 32.1(b) (“Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents.”); 8TH CIR. R. 32.1A (“[Unpublished opinions] are not precedent.”); 9TH CIR. R. 36-3(a) (“Unpublished dispositions . . . are not precedent . . .”); 10TH CIR. R. 32.1 (“Unpublished decisions are not precedential, but may be cited for their persuasive value.”); 11TH CIR. I.O.P. 6 (“Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent.”); D.C. CIR. R. 36(e)(2) (“[A] panel’s decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.”); *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007) (“[A]n unpublished decision . . . is not precedentially binding under the doctrine of stare decisis, but is considered by us for its persuasive value only.”); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219 (4th Cir. 2006) (“[The court] ordinarily do[es] not accord precedential value to [its] unpublished decisions . . . [which] are ‘entitled only to the weight they generate by the persuasiveness of their reasoning.’” (quoting *Hupman v. Cook*, 640 F.2d 497, 501 (4th Cir. 1981))).

80. RICHMAN & REYNOLDS, *supra* note 41.

Richman and Reynolds brought the second-class appellate justice system into the light.<sup>81</sup> They explained that the traditional appellate model—what they call “the full Learned Hand Treatment”<sup>82</sup>—had become reserved only for “important” cases brought by “serious counsel.”<sup>83</sup> Only the elite could ordinarily access first-tier justice, which featured oral argument and reasoned, published decisions written by (or at least carefully overseen by) judges.<sup>84</sup> Litigants who are “poor, without counsel, and with a boring, repetitive problem” receive only “second-hand treatment.”<sup>85</sup> As a result of the procedural and administrative changes described above,<sup>86</sup> Richman and Reynolds powerfully<sup>87</sup> claim that the federal appellate courts have become certiorari courts—that is, courts with discretionary and not mandatory dockets (despite 28 U.S.C. § 1291’s command<sup>88</sup> to the contrary).<sup>89</sup>

The late Penelope Pether’s work sharpened Richman and Reynolds’s stinging indictment of the federal appellate courts. Relying on historical evidence from the Fourth Circuit<sup>90</sup> and public statements from Judge M. Margaret McKeown,<sup>91</sup> Pether contends that the second-tier appellate justice system was, at least in some respects, created by design—a claim that Richman and Reynolds have been reluctant to make.<sup>92</sup> The appellate courts,

81. See *id.* at 119–20 (describing tracks of appellate justice).

82. *Id.* at 119.

83. *Id.*

84. *Id.* at 119–20.

85. *Id.* at 120.

86. See *supra* notes 60–64 and accompanying text (describing administrative changes that created the appellate triage system).

87. See Levy, *supra* note 41, at 2400 (explaining that, even if Richman and Reynolds offer an imperfect analogy, it is “difficult to overstate the significance of [their] contribution with this analysis”).

88. 28 U.S.C. § 1291 (2012) (“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .”).

89. See RICHMAN & REYNOLDS, *supra* note 41, at 120. Not all final judgments create an appeal as of right for prisoners. See Catherine T. Struve, *The Federal Rules of Inmate Appeals*, 50 ARIZ. ST. L.J. 247, 292 (2018) (explaining that although “[i]nmate appeals from final judgments in civil cases are treated as ‘appeals as of right’ governed by Appellate Rule 4,” in truth “a significant segment of such appeals—namely, those brought by prisoners seeking postconviction habeas or § 2255 relief—are in actuality appeals by permission”).

90. See *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091, 1093–94 (4th Cir. 1972) (incorporating 1968 memorandum from circuit’s chief judge to Federal Judicial Center explaining that the court had too many postconviction appeals to handle with traditional appellate process).

91. Pether, *supra* note 8, at 1436–37 n.5, 1465 (describing statements from Judge Margaret McKeown from Audiotope: What Is “Authority”? Panel Presentation, held at the Association of American Law Schools (Jan. 3–6, 2001)).

92. Richman & Reynolds, *supra* note 12, at 277 (“We do not believe that the transformation of the federal appellate courts into certiorari courts dispensing justice unequally has taken place by design.”). In their later work, however, Richman and Reynolds come fairly close to ascribing intentionality to judges: “This unilateral change in the circuit courts’ function



Pether explains, redistributed their resources “as a response to judicial concern about significantly increased appeals in both civil rights and pro se prisoner cases.”<sup>93</sup> As McKeown said, the “real reason” for the unpublished decision was that courts were afraid they “were going to drown” under the increasing number of civil rights and prisoner cases.<sup>94</sup>

Over time, the courts of appeals have institutionalized the second-tier process through local rules and internal operating procedures.<sup>95</sup> Some circuits have distinct procedures for handling prisoner appeals,<sup>96</sup> immigration appeals,<sup>97</sup> and pro se appeals.<sup>98</sup> All circuits rely on a centralized staff attorneys’ office to evaluate and resolve a significant percentage of their docket.<sup>99</sup> Those staff attorneys typically operate independently from the judges for whom they draft decisions; their work is overseen, instead, by a supervising staff attorney.<sup>100</sup> Most rarely have any face time with the judges in their circuit.<sup>101</sup> Staff attorneys work almost exclusively on cases not tracked for oral argument, and they are all devoted to resolving pro se appeals.<sup>102</sup>

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must be seen as judicial activism of the highest order, involving not merely tinkering with some sociopolitical hot-button issue, but rather with the role of the courts themselves.” RICHMAN & REYNOLDS, *supra* note 41, at 115. Indeed, they acknowledge that their “thirty-plus years of study have left [them] with anger and despair over the creation and jealous maintenance of a system that underserves the nation and shortchanges the poor and powerless.” *Id.* at ix.

93. Pether, *supra* note 8, at 1465.

94. *Id.* at 1465 n.138 (quoting Audiotape, *supra* note 91 (statement of Judge Margaret McKeown)).

95. See, e.g., 5TH CIR. I.O.P. 34 (describing court’s screening process); 9TH CIR. R. E(1) (describing process for classification of cases); 11TH CIR. I.O.P. 34(1) (describing court’s process for preparation of screened or nonargued appeals); D.C. CIR. I.O.P. I.B.3 (describing duties of staff attorneys in court’s legal division).

96. E.g., 4TH CIR. R. 34(b) (describing informal briefing process for noncapital habeas corpus cases and cases involving pro se appellants); 4TH CIR. R. 21(c), 24 (describing rules related to prisoners’ payment of costs and fees on appeal); see also Struve, *supra* note 89, at 289–300 (describing case management procedures for prisoner appeals).

97. E.g., 2D CIR. R. 34.2(a)(1) (placing immigration appeals on nonargument calendar).

98. E.g., 4TH CIR. R. 34(b) (describing informal briefing process for noncapital habeas corpus cases and cases involving pro se appellants); 8TH CIR. I.O.P. D(2) (describing nonargument screening panels for pro se appeals).

99. POSNER, *supra* note 21, at 49–61, 164–65 (describing screening processes across the circuits and use of judicial staff attorneys in that process). Most circuits also rely on staff attorneys to screen all appeals (notably, the Tenth Circuit does not). *Id.* at 56, 164–65.

100. See *id.* at 162–67 (detailing staff attorney procedures across all circuits).

101. See *id.* at 166–67 (concluding that only Seventh, Ninth, and D.C. Circuit staff attorneys have significant face time with judges).

102. *Id.* at 164–65.

B. *The Widespread Use of the Unpublished Decision*<sup>103</sup>

The creation of the unpublished decision swiftly eroded the lawmaking function of the federal courts of appeals. By 1985, the courts of appeals were publishing only 40.6% of their merits decisions.<sup>104</sup> By 1991, the courts were publishing barely more than 30% of their decisions.<sup>105</sup> Not every circuit embraced the unpublished decision revolution to the same extent, however. In 1991, the spread between the court with the highest publication rate (at the time, the First Circuit) and the lowest (the Fourth Circuit, as it is still) was more than *fifty points*.<sup>106</sup> By 1997, the nationwide publication rate would be only 23.5%.<sup>107</sup> As Figure 1 shows, the use of the unpublished decision has continued to increase steadily over the last two decades. The year ending on September 30, 2016 was the high-water mark for nonpublication across the circuits: 88.7% of all merits decisions from the courts of appeals were unpublished.<sup>108</sup>

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103. Data from this Section and from Appendices A and B are drawn from the statistical resources available through the website for the Administrative Office of the U.S. Courts, *Statistics & Reports*, U.S. CTS., <http://www.uscourts.gov/statistics-reports> [<https://perma.cc/6ESC-B5XG>]. Throughout this Article, “all circuits” or the “federal courts of appeals” excludes the U.S. Court of Appeals for the Federal Circuit. The Administrative Office does not report data on the Federal Circuit’s unpublished decisions. Accordingly, my focus is on the twelve geographic circuit courts with general appellate jurisdiction over final judgments, and any general reference to the courts should be understood to exclude the Federal Circuit. The Federal Circuit does rely on unpublished decisions and summary affirmances; both practices have been thoughtfully examined in the unique context of the Federal Circuit. *See, e.g.*, Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law by Saying Nothing?*, 71 VAND. L. REV. 765 (2018) (examining use of summary affirmances in decisions on patentable subject matter); Andrew Hoffman, Comment, *The Federal Circuit’s Summary Affirmance Habit*, 2018 B.Y.U. L. REV. 419 (examining Federal Circuit’s summary affirmance practice).

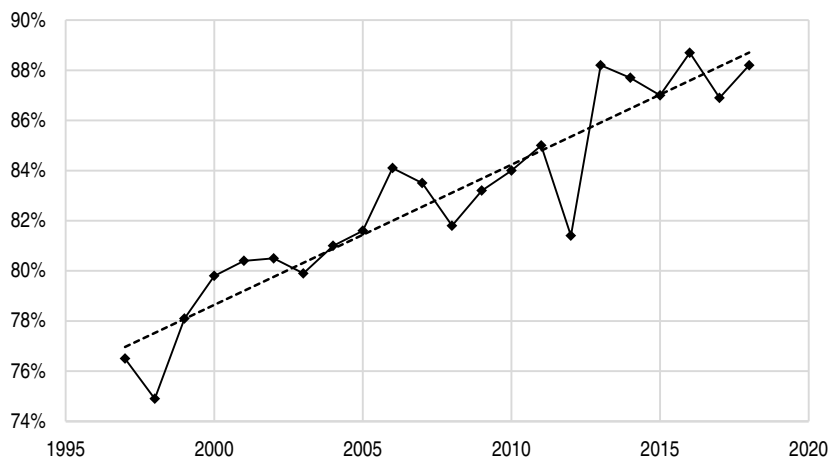
104. Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 204 (2001) (compiling statistical data, including before official reporting began in 1981). Reynolds and Richman conducted a limited one-year study in 1978 and 1979 that suggests the unpublication rate was already over 60% by 1979. Reynolds & Richman, *supra* note 18, at 587.

105. Hannon, *supra* note 104, at 204.

106. *Id.*

107. JUDICIAL BUSINESS tbl.B-12 (1997).

108. JUDICIAL BUSINESS tbl.B-12 (2016).

FIGURE 1<sup>109</sup>Annual Unpublication Rate of Merits Decisions  
Across All Circuits Since 1997

The year ending September 30, 2016 was also the year the Fourth Circuit—almost perennially the leader in unpublished decisions<sup>110</sup>—crossed the 95% unpublication threshold for the first time.<sup>111</sup> In every geographic circuit except for one, the publication rate has dropped over time (i.e., the unpublication rate has risen).<sup>112</sup> As the data captured in Appendix A reveal, the D.C. Circuit is the only outlier,<sup>113</sup> perhaps owing to its special status as the so-called second-highest court in the land.

Decisional atrophy is also widespread. Unpublication rates hover at or over 90% in seven of the twelve geographic circuit courts: the Second Circuit, the Third Circuit, the Fourth Circuit, the Fifth Circuit, the Sixth Circuit, the Ninth Circuit, and the Eleventh Circuit.<sup>114</sup> But, as Figure 2 shows, there is also some notable disparity in the use of unpublished decisions. The mar-

109. JUDICIAL BUSINESS tbl.B-12 (1997–2018).

110. Only twice in the last twenty years has another circuit issued a greater percentage of unpublished decisions than the Fourth Circuit: in both the year ending September 30, 2013 and the year ending September 30, 2017, the U.S. Court of Appeals for the Eleventh Circuit barely edged out the Fourth Circuit. JUDICIAL BUSINESS tbl.B-12 (2013); JUDICIAL BUSINESS tbl.B-12 (2017).

111. JUDICIAL BUSINESS tbl.B-12 (2016).

112. See Appendix A.

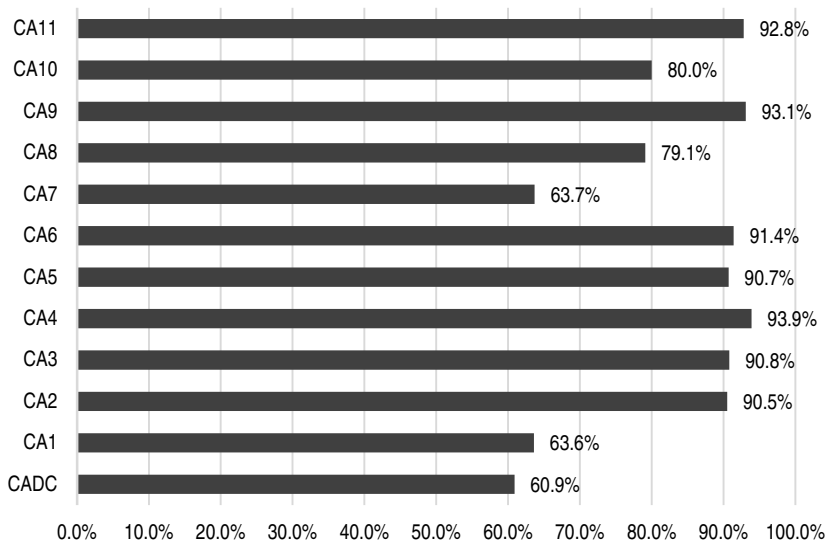
113. While it may be tempting to exclude the D.C. Circuit from this analysis given its unique caseload, I will not do so here for one important reason: the D.C. Circuit is the only federal appellate court in which the rate of pro se litigation has risen while the publication rate has also risen. See Appendix A, Figure A-1.

114. See Appendix A.

gin between the leaders in unpublication and their sister circuits is significant: no other circuit’s unpublication rate crossed the 80% mark in 2018.

FIGURE 2<sup>115</sup>

Unpublication Rate of Merits Decisions by Circuit in  
Year Ending September 30, 2018



While use of unpublished decisions has continued to increase over time, overall caseload volume has not. It appears that the “crisis” that led to the creation of unpublished decisions has plateaued, if not receded. Figure 3 reflects the nationwide caseload volume trend. That downward trend is consistent with the volume of appeals across most individual circuits, as Appendix B demonstrates. The Ninth Circuit is the only court that has experienced noticeable caseload growth over the last two decades,<sup>116</sup> but recent years’ data suggest that trend, too, is reversing.<sup>117</sup> Overall, courts are seeing

115. JUDICIAL BUSINESS tbl.B-12 (2018).

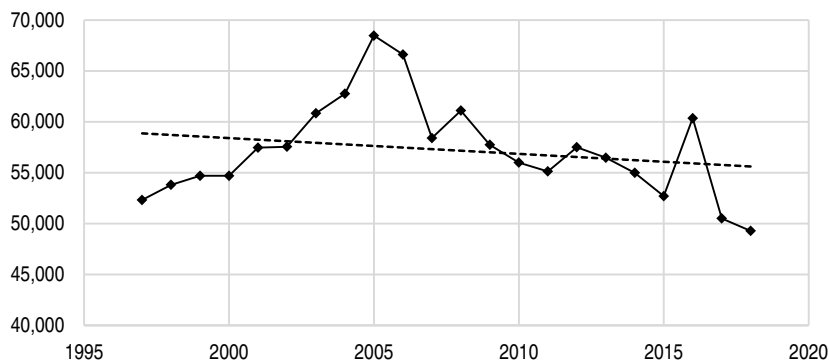
116. See Appendix B, Figure B-11. At first blush, the trend for the Fourth Circuit appears either slightly positive or nearly flat. See Appendix B, Figure B-5. That trend line becomes negative if the data for 2016 are removed. Appendix B, Figure B-6. That year was an outlier for reasons discussed below. See *infra* note 118. (Similarly, trend lines for other circuits would become more negative if 2016 data were removed.)

117. See JUDICIAL BUSINESS tbl.B (1997–2018); see also Appendix B, Figure B-11. The U.S. Court of Appeals for the Ninth Circuit has experienced caseload growth due to its increased volume of immigration appeals; after the terrorist attacks on September 11, 2001, the Bush Administration abruptly streamlined deportation proceedings, which affected the Ninth Circuit significantly. See Huang, *supra* note 7, at 1121–26 (exploring increased immigration appeals as a stressor in both the Second and Ninth Circuits). The data bear this out: beginning

fewer appeals year-over-year, even though they continue to issue more unpublished decisions year-over-year.

FIGURE 3<sup>118</sup>

Federal Appeals Commenced Across  
All Circuits Annually Since 1997



Despite receding caseload volumes, several of the courts remain very busy—including a few of the circuits that rely most heavily on unpublished decisions. Compare Figure 2, which details the unpublication rate across circuits, with Figure 4 below, which tracks the number of appeals filed per authorized judgeship by circuit in the year ending September 30, 2018. The Fifth Circuit, Ninth Circuit, and Eleventh Circuit face the heaviest workload

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in 2001, the number of administrative appeals in the Ninth Circuit increased sixfold in the span of four years. JUDICIAL BUSINESS tbl.B-9 (2001–2005). Although current numbers are only three times those of the late 1990s, the significant increase in volume has had lasting effect. JUDICIAL BUSINESS tbl.B-9 (1997–2018).

The Second Circuit—the other circuit that experienced a caseload spike resulting from an influx of post-September 11, 2001, immigration appeals, Huang, *supra* note 7, at 1121—has experienced a slightly negative overall case-volume trend, even taking into account that short-term crisis. See Appendix B, Figure B-3.

118. JUDICIAL BUSINESS tbl.B (1997–2018).

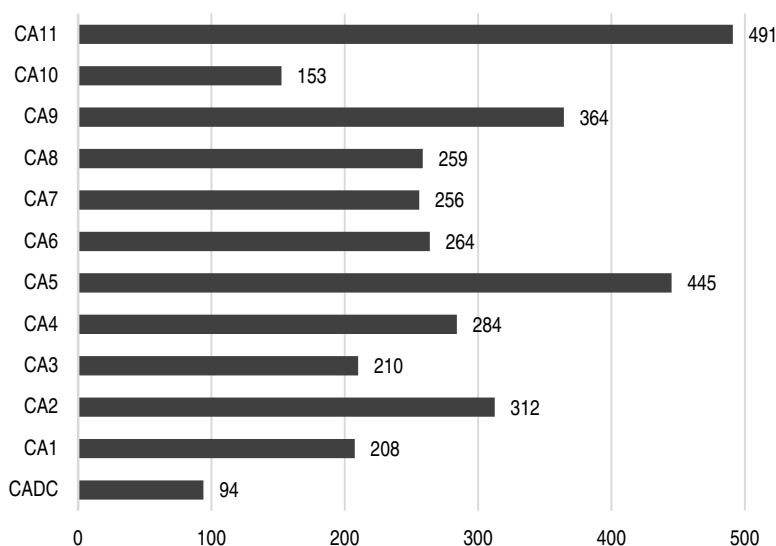
The spike in 2016, the third-to-last data point in Figure 3, reflects a significant increase in original appellate proceedings resulting from the U.S. Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which declared the residual clause of the Armed Career Criminal Act unconstitutionally vague, and *Welch v. United States*, 136 S. Ct. 1257 (2016), which declared the *Johnson* ruling retroactive. JUDICIAL BUSINESS (2016), <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2016> [https://perma.cc/8ES4-V7M8] (explaining impact of *Johnson* and *Welch*).

The high-water mark of 2005 reflects a significant spike in criminal appeals, original habeas corpus petitions, and prisoner petitions following the U.S. Supreme Court's decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), which affected state and federal sentencing law. See JUDICIAL BUSINESS 13 (2005), [http://www.uscourts.gov/sites/default/files/2005judicialbusiness\\_0.pdf](http://www.uscourts.gov/sites/default/files/2005judicialbusiness_0.pdf) [https://perma.cc/5XMF-5LN3].

per authorized judge and also have among the highest rates of unpublication.<sup>119</sup> These circuits’ workloads far exceed the Judicial Conference’s benchmark of 255 cases per judge.<sup>120</sup> As important, however, is that several circuits with very high unpublication rates have manageable—if not outright modest—workloads compared to some of their sister circuits. In particular, the Third Circuit, the Fourth Circuit, and the Sixth Circuit appear to have time to do more reason-giving—at least, if we compare their caseload volumes against the Fifth Circuit and the Eleventh Circuit.

FIGURE 4<sup>121</sup>

Appeals Commenced per Authorized Judgeship by Circuit for the  
Year Ending September 30, 2018

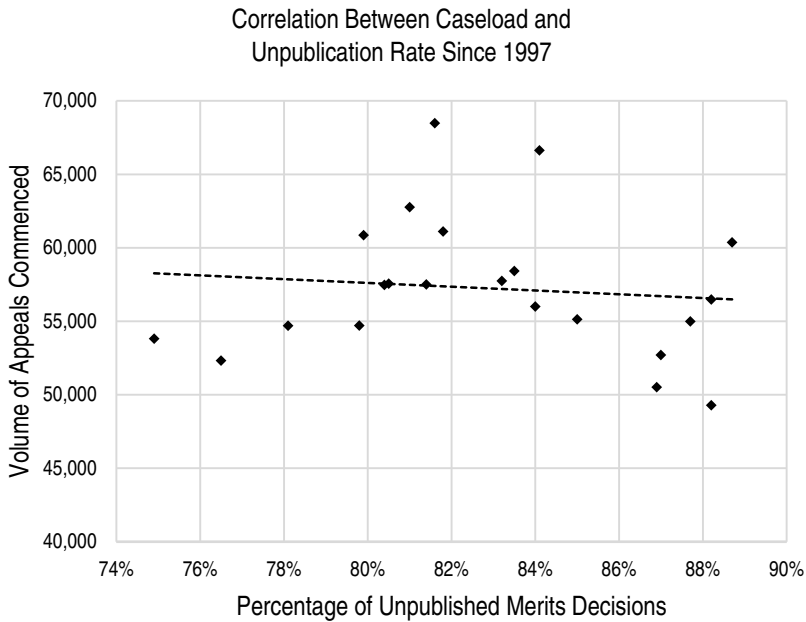


119. I have not accounted for judicial vacancies and their potential effect on workload in this Article. Because vacancies shift over time, and may be mitigated by senior-status judges and visiting judges, the effect of vacancies is difficult to quantify. For example, of the thirteen vacancies on the courts of appeals at the end of the reporting year in September 30, 2018, all but two had taken senior status, thus likely mitigating some of the consequence of the vacancies. See *Judicial Vacancy List for October 2018*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2018/10/vacancies> [<https://perma.cc/CTK5-T25N>]. Nationally, senior-status judges handle more than 15% of judicial work. Lisa M. Holmes et al., *Neither Gone nor Forgotten*, 95 JUDICATURE 227, 231 (2012).

120. WEIS ET AL., *supra* note 51, at 110.

121. JUDICIAL BUSINESS tbl.B-9 (2018); ADMIN. OFFICE OF THE U.S. COURTS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. COURTS OF APPEALS, <https://www.uscourts.gov/sites/default/files/appealschronol.pdf> [<https://perma.cc/359Y-JDKF>].

What should be apparent by now is this: caseload volume appears to have a weak correlation, if any, with unpublication rates. The publication rate has not risen while caseload volumes have dropped; the circuits that issue the most unpublished decisions are not necessarily the busiest courts. A simple comparison (Figure 5) plotting the volume of appeals nationally against the percentage of unpublished decisions over time confirms that there is no correlation between overall caseload volume and publication rates. Whatever is driving the continued increase in unpublication, it is not, in fact, caseload volume.

FIGURE 5<sup>122</sup>

If appeal volume has no correlation with publication rate, as Figure 5 indicates, we might wonder what—other than habit or convenience—might be driving the ever-increasing unpublication rate.<sup>123</sup> We know that a perceived increase in prisoner and pro se litigation precipitated the development of the unpublished decision in at least some judicial circuits.<sup>124</sup> We might expect,

122. Compare JUDICIAL BUSINESS tbl.B (1997–2018), with JUDICIAL BUSINESS tbl.B-12 (1997–2018).

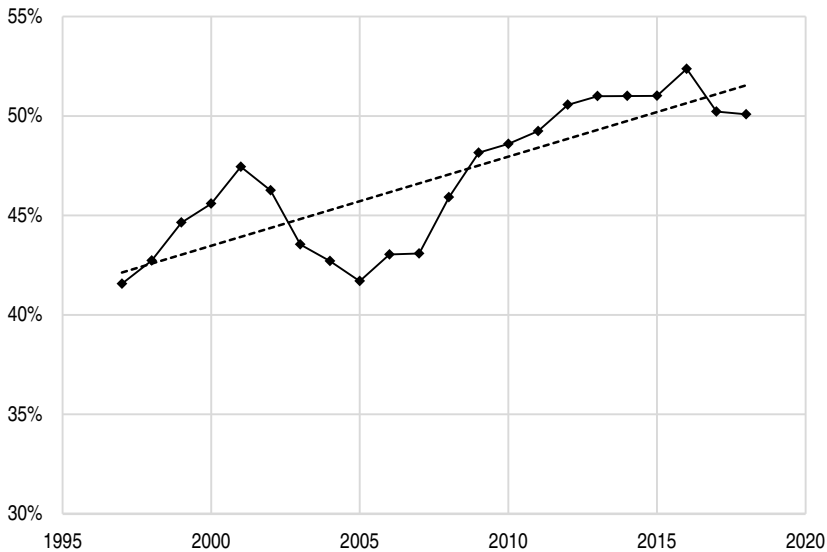
123. This is not to say that other workload considerations may not drive the trend toward more unpublication. Cases may have become more complex, thus consuming more judicial effort. Overall caseload volume, however, is perhaps the most obvious—and the easiest to test—proxy for workload as a driver of unpublication.

124. See *supra* text accompanying notes 93–94 (discussing historical evidence that unpublication grew in response to increased prisoner litigation).

then, that pro se litigation continues to play a role in the use of unpublished decisions. The data generally support that suggestion. Whereas overall case-load volume has decreased over the last two decades, pro se litigation has not. Today, in almost every circuit pro se litigation is a greater percentage of the courts’ workload than it was two decades ago. Figure 6 shows the national trend, while Appendix A contains circuit-by-circuit data.

FIGURE 6<sup>125</sup>

Percentage of Appeals Filed by Pro Se Litigants  
Across All Circuits Annually Since 1997



Pro se litigation in the federal appellate courts predominately involves prisoner litigation—that is, habeas corpus claims and federal civil rights claims from federal and state prisoners. Together, these proceedings accounted for approximately 47% of pro se appeals in the year ending September 30, 2018, as Figure 7 shows. Additionally, original proceedings, which include petitions for extraordinary relief, original habeas corpus proceedings, and requests for permission to appeal,<sup>126</sup> accounted for approximately 18% of pro se appellate proceedings. The next largest category was “private”

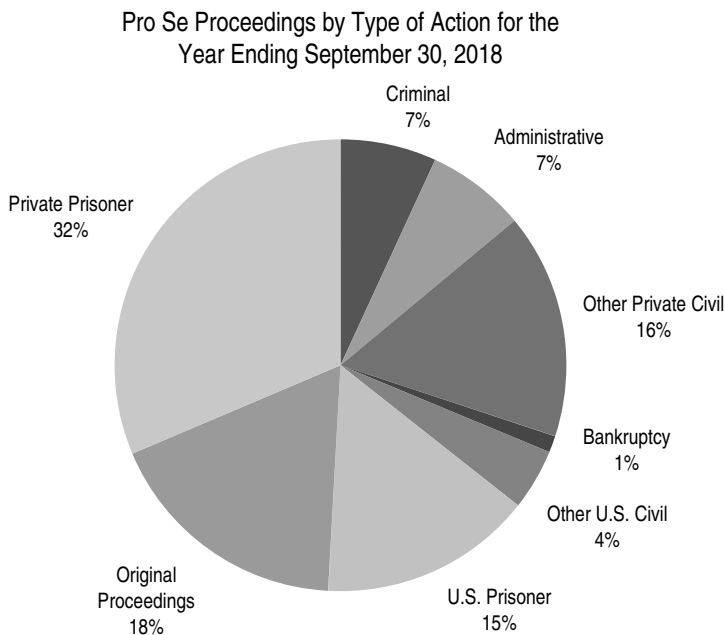
125. See JUDICIAL BUSINESS tbl.B-9 (1997–2018). For circuit-by-circuit data, see Appendix A.

126. FED. R. APP. P. 21; 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3968 (3d ed. 2008); *id.* § 3968.1.



(i.e., nonfederal) civil proceedings, which includes claims against state actors by nonprisoners.<sup>127</sup>

FIGURE 7<sup>128</sup>



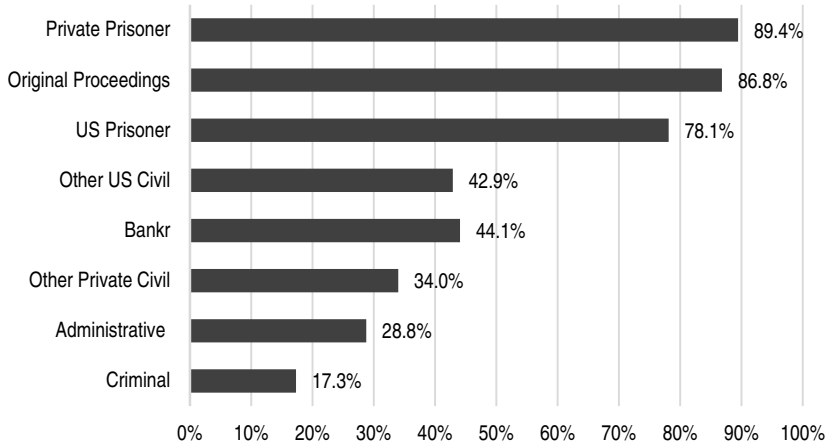
Unsurprisingly, the vast majority of prisoner appeals commence pro se; the same is true for the vast majority of original proceedings and miscellaneous applications, as Figure 8 reflects (based on data from the year ending September 30, 2018). Notably, nearly 45% of bankruptcy appeals involve pro se appellants, even though bankruptcy appeals make up only a small fraction of pro se appeals overall. And nearly 30% of administrative proceedings—which include Social Security disability and immigration matters—involve pro se litigants. Pro se appellate litigation therefore predominately involves prisoner, civil rights, habeas corpus, and other civil proceedings affecting vulnerable communities (including individuals in economic distress, without permanent status in the United States, and with health crises or disabilities).

127. The Administrative Office reports the following categories of proceedings: criminal, U.S. prisoner petitions, other U.S. civil, other private civil, bankruptcy, administrative agency appeals, and original proceedings and miscellaneous applications. JUDICIAL BUSINESS tbl.B-9 (2018).

128. *Id.*

FIGURE 8<sup>129</sup>

Percentage of Pro Se Litigants by Type of Proceeding  
for the Year Ending September 30, 2018



Unlike general caseload volume, pro se appeal volume positively correlates with the ever-increasing reliance on unpublished decisions, as Figure 9 demonstrates.<sup>130</sup> As the percentage of pro se litigation as a fraction of the whole grows, so, too, does the unpublication rate.<sup>131</sup>

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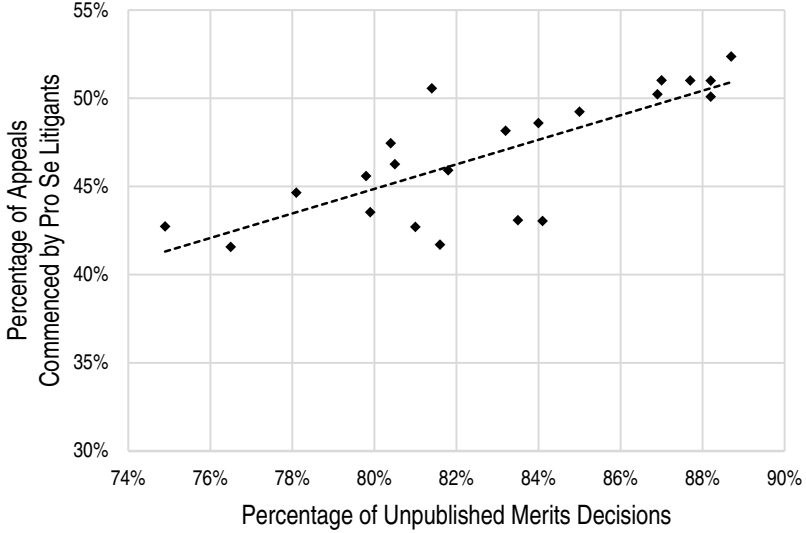
129. *Id.*

130. *Cf.* David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421, 439 (2010) (identifying “increase in . . . pro se appeals filed in the Fourth Circuit since 1979” as a “likely factor” in the “remarkable decrease in published opinions”).

131. Administrative Office data are not sufficiently granular to determine what percentage of unpublished decisions involve pro se litigants. Future empirical work will address this question.

Figure 9<sup>132</sup>

Correlation Between Percentage of Pro Se Appeals and Unpublication Rate Since 1997



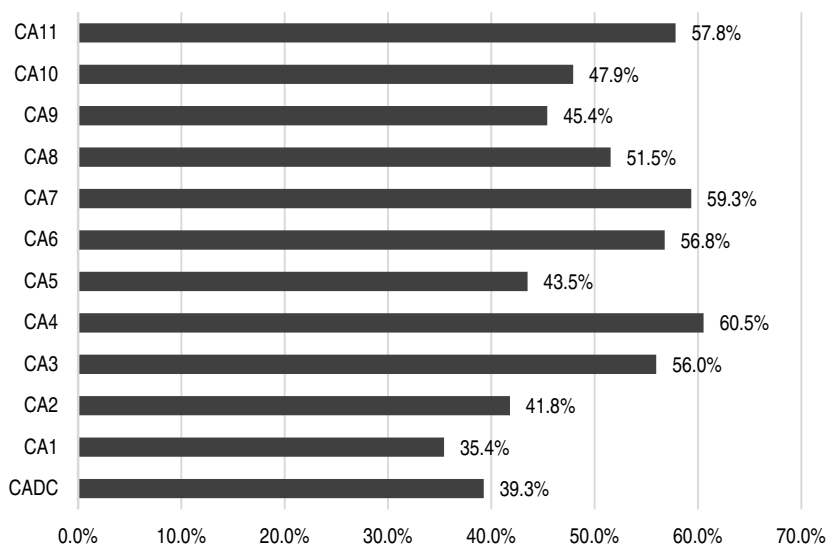
With a few notable exceptions, those circuits handling the highest percentage of pro se litigation also issue more unpublished decisions. Figure 10 identifies the percentage of pro se appeals commenced in each circuit in the year ending September 30, 2018.

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132. Compare JUDICIAL BUSINESS tbl.B-9 (1997–2018), with JUDICIAL BUSINESS tbl.B-12 (1997–2018).

FIGURE 10<sup>133</sup>

Percentage of Appeals Commenced Pro Se by Circuit in  
Year Ending September 30, 2018



Unsurprisingly, the Eleventh Circuit and the Fourth Circuit saw the highest overall percentage of pro se litigation. But the court with the next highest percentage of pro se litigation—the Seventh Circuit—had one of the highest *publication* rates among the circuits (the third highest in 2018). Only the D.C. Circuit and the First Circuit surpassed the Seventh Circuit in percentage of published merits decisions in 2018—two circuits with significantly lighter pro se dockets. Conversely, the Second Circuit, which had a very high unpublication rate (90.5% in 2018), had among the lowest percentage of pro se appeals. That suggests that pro se litigation may not be driving the Second Circuit’s high unpublication rate. Even though the increase in pro se litigation positively correlates with the increase in unpublished decisions nationally, we should be mindful that correlation is not causation. Any number of local customs or practices—many of which Marin Levy’s work chronicles—might affect particular publication schemes.<sup>134</sup>

Finally, we might also expect the circuits that rely the most on unpublished decisions to move more swiftly, as conventional wisdom suggests that unpublished decisions save judicial time and resources. That is true, for the most part, as Figure 11 shows. But two circuits with high unpublication

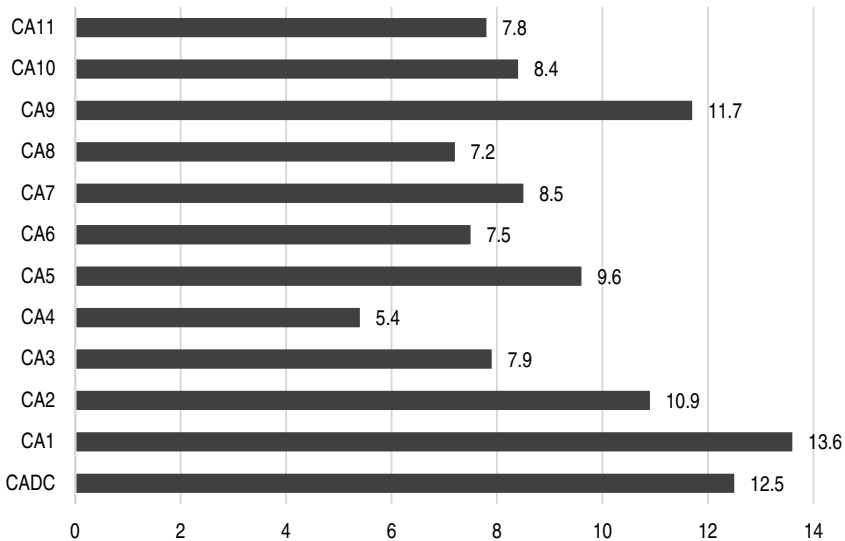
133. JUDICIAL BUSINESS tbl.B-9 (2018).

134. See Levy, *supra* note 14, at 368–73 (examining circuits’ different case management priorities and how they affect court processes).

rates (the Second and the Ninth) move more slowly than peer circuits with high unpublication rates. And, it turns out, the converse is not necessarily true: some courts with high *publication* rates—especially the Seventh Circuit—also move relatively quickly. Figure 11 charts the 2018 median circuit disposition time in months from the notice of appeal to a merits decision. Overall, although caseload volume remains high, and courts remain busy,<sup>135</sup> they also appear to have adjusted to a new normal; their decisional times are generally reasonable and even unexpectedly fast in some circuits (the Fourth Circuit, for example).<sup>136</sup> Most courts act relatively quickly, even those courts with high caseload volumes per judge (e.g., the Eleventh Circuit). These median decision times suggest that, on balance, some courts may have privileged speed and efficiency over decisional quality.

FIGURE 11<sup>137</sup>

Median Time in Months from Notice of Appeal to Decision by Circuit in the Year Ending September 30, 2018



135. See *supra* Figure 4.

136. The Fourth Circuit resolved appeals more than twice as fast as several of its sister circuits, and its disposition time is a full month and a half faster than the next most efficient court. The Fourth Circuit's speed may be aided by truncated briefing rules in *pro se* and non-capital prisoner appeals, which shorten the briefing schedule and relieve the appellee of the obligation to file a brief. 4TH CIR. R. 34(b).

137. JUDICIAL BUSINESS tbl.B-4 (2018).

At bottom, empirical data complicate the popular efficiency narrative that unpublished decisions are a needed solution to a widespread caseload management problem. Our federal courts of appeals remain very busy, to be sure, but they also increasingly rely on unpublished decisions despite a reduction in caseload volume over the last decade. And if, as I discuss in Part III, we have any concerns over the decisional quality of unpublished decisions, it also appears that many courts have time to do more. Indeed, something else may be afoot. Anecdotal, historical, and some empirical evidence suggest that unpublished decisions—and the decisional atrophy that has come with them—may reflect another kind of caseload “problem”: an ongoing and continuing flood of appeals from pro se litigants.

No doubt, many pro se appeals present routine, meritless, and even potentially frivolous issues.<sup>138</sup> Perhaps a perfunctory decision is a proper sanction for a frivolous appeal. But other procedures exist to police frivolous appeals.<sup>139</sup> We must be cognizant that every pro se appeal involves a critical touchpoint between vulnerable litigants and governmental authority—a moment that calls for us to think carefully about the message unpublished decisions send to the litigants who receive them. In the next Part, I turn to the psychological procedural justice literature to begin that appraisal.

## II. PROCEDURAL JUSTICE VALUES AND THE APPELLATE PROCESS

Although now freely citable in the federal appellate courts,<sup>140</sup> unpublished decisions are not written for a public audience and do not serve a lawmaking function. These are “letter[s] to the parties,” according to the judges who issue them.<sup>141</sup> Because unpublished decisions retain persuasive value—at least insofar as the decision itself is persuasively reasoned—they nevertheless do have public value.<sup>142</sup> For present purposes, however, I will take courts at their word that unpublished decisions serve a private audience and are not intended for public scrutiny.<sup>143</sup> If that’s true, we must evaluate

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138. These categories are not equivalent. For example, meritless litigation—as opposed to frivolous litigation—has systemic value. See Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L. J. 1191, 1225–26 (2014) (describing what meritless litigation contributes to law, including development and clarification of law and regulation of behavior, among other contributions).

139. See FED. R. APP. P. 38 (“If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”). I am not advocating that courts use Rule 38 more. I invoke Rule 38 only to point out that, if the courts are using perfunctory decisions to discourage frivolous appeals from frequent filers, surely there is a more direct—and, importantly, more transparent—means to accomplish that goal.

140. FED. R. APP. P. 32.1.

141. Kozinski, *supra* note 9, at 38.

142. See *supra* note 79 (discussing precedential effect of unpublished decisions across circuits).

143. I do not agree that unpublished decisions should receive no public scrutiny (nor that they are intended solely for a private audience). But I do not need to take on that issue to de-

unpublished decisions by a different yardstick: our assessment should consider the subjective experience of the litigant who receives the unpublished decision in response to her appeal. That is the kind of inquiry that the law and psychology literature on procedural justice affords.<sup>144</sup> This Part explores core procedural justice experiences and how they might map onto the appellate process.

I am mindful of the thoughtful critique of psychological procedural justice work from criminal justice scholars and critical race theorists.<sup>145</sup> That scholarship has illuminated how a focus on procedural fairness and fair treatment may obscure (and worse, further) systemic inequality and structural ostracization, thwart systemic change, and undervalue the effects of substantive outcomes on the system's most vulnerable participants.<sup>146</sup> I am not tackling substantive outcomes here, nor do I intend to suggest that reason-giving might be a fix (either partial or complete) for any of these deeply troubling issues. One problem with unpublished decisions, however, is their potential to marginalize, adding to the grave systemic and structural injustices that many litigants on the receiving end of these decisions already face. So, ultimately, my claim is far more limited: how appellate courts treat vulnerable litigants should trouble us, regardless of the outcome in any particular case. Decisions devoid of any positive procedural justice experiences carry the potential to inflict harm; they marginalize vulnerable litigants seeking relief in a court that is, effectively, their last resort. Reason-giving, I will argue, is one way to create a fairer, more humanizing process, even if it will not address structural inequities or change outcomes.

If this is, as I suggest, a worthy goal, then psychological procedural justice literature can provide us with a window into how litigants might receive appellate decisions and be affected by appellate process. As Rebecca Hollander-Blumoff details, psychological research has “provided robust empiri-

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fy my thesis. We can presume that courts write in good faith for a private audience while questioning whether those private “letters” disserve procedural justice values.

144. See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134 (2011) (“For psychologists, measuring subjective perceptions of procedural justice is important because this measurement captures individuals’ real experiences of fairness or unfairness of the legal system, as opposed to the effects that the system’s architects might think or expect to be likely products of the system’s structure and rules.”).

145. The procedural justice frame can mask structural injustices and, at worst, imply racist conceptions of criminality—especially in the context of police–citizen contact. See Bell, *supra* note 35, at 2061 (“Deploying legitimacy theory and procedural justice as a diagnosis and solution to the current policing crisis might even imply, at some level, that the problem of policing is better understood as a result of African American criminality than as a badge and incident of race- and class-based subjugation.”).

146. See *id.* at 2081–82 (discussing critiques of procedural justice’s legitimacy theory for policing) (citing Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1468 (2016); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 189 (2005); and William J. Stuntz, *Essay, Local Policing After the Terror*, 111 YALE L.J. 2137, 2174 (2002)).

cal evidence that individuals care deeply about the fairness of the process by which decisions are made, apart from considerations about the outcome of the decision.”<sup>147</sup> That is not to say that outcomes are irrelevant to litigants, but it is to say that the treatment litigants receive matters *independently*.<sup>148</sup> This is an especially important observation in the context of appellate process, where appellants frequently lose and where some kinds of appellants almost always lose.<sup>149</sup>

Tom R. Tyler’s influential work has identified four primary considerations that contribute to an individual’s judgment about the fairness of the process she receives.<sup>150</sup> Those include: “(1) how much voice and opportunity to be heard the party believes she has experienced, (2) neutrality of the forum, (3) the trustworthiness of the decisionmaker, and (4) the degree to which the individual has been treated with dignity and respect.”<sup>151</sup> Although other considerations may affect a person’s subjective experience of justice, these experiences are core to the perception of a fair decisionmaking process.<sup>152</sup>

The first of these experiences—voice and opportunity to be heard—generally accords with normative procedural justice theory.<sup>153</sup> Tyler’s research suggests that the extent of one’s participation is “an important deter-

147. Hollander-Blumoff, *supra* note 144, at 132. Originally, researchers believed people cared about procedural justice because people *really* cared about outcomes. *Id.* at 131. Later work has suggested that procedural justice matters because fair treatment by authority figures affects self-esteem and improves group value, or because people find it difficult to assess outcomes and depend on process as a heuristic for form judgments about the outcome received. *Id.* at 137.

148. *See id.* at 137 (citing Tom R. Tyler & E. Allen Lind, *A Relational Model of Authority in Groups*, 22 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 143–44 (1992)).

149. In the year ending September 30, 2017, the reversal rate across all federal courts of appeals was 9.4%; the reversal rate in federal prisoner appeals was 3.9%; the reversal rate in nonfederal prisoner appeals was 4.9%. *See* JUDICIAL BUSINESS tbl.B-5 (2017).

150. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 *INT’L J. PSYCHOL.* 117, 121 (2000).

151. Hollander-Blumoff, *supra* note 144, at 135 (citing Tyler, *supra* note 150, at 121).

152. *Id.*; *see also* TYLER, *WHY PEOPLE OBEY THE LAW*, *supra* note 36, at 73 (noting that citizens are responsive not only to outcomes but also “to their own judgments about the fairness of the way . . . judges make decisions”). Tyler’s work originally relied on data gathered in the late 1980s in Chicago, but he has since replicated his results with nationalized data from 2012. *See* Tom R. Tyler, *Understanding the Force of Law*, 51 *TULSA L. REV.* 507, 511 (2016) (book review) (discussing Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 *PSYCHOL., PUB. POL’Y & L.* 78 (2014)).

153. *See, e.g.*, Solum, *supra* note 33, at 280 (arguing that without “participation rights,” including the right to be told the reasons for a decision, a litigant “cannot be assured that the proceeding considered [her] view of the law and facts”); *see also* Hollander-Blumoff, *supra* note 144, at 143 (“From a theoretical perspective, the explanations for why procedural justice and procedural due process matter largely dovetail, falling into one of two camps, instrumental or dignitary.”).



minant of whether people feel that procedural justice has occurred.”<sup>154</sup> Significantly, individuals appear to value participation even when “they are aware that their participation will not meaningfully affect the decision.”<sup>155</sup>

Tyler’s work also suggests that “[a]uthorities can enhance the acceptance of their decisions by the way they present them to affected parties.”<sup>156</sup> He suggests that a judge tell litigants that “the citizen’s views were considered but (unfortunately) could not influence the decision made.”<sup>157</sup> What is important (according to Tyler) is that a litigant *believes* her voice has been considered, regardless of her actual ability to affect the outcome.<sup>158</sup>

As for the neutrality and trustworthiness of the decisionmaker, “the quality of decision making” plays a pivotal role in individual perceptions of procedural fairness.<sup>159</sup> “People think that decisions are being more fairly made when authorities are neutral and unbiased and make their decisions using objective indicators, not their personal views.”<sup>160</sup> Thus, “evidence of even-handedness and objectivity” is important, but so too is “openness and explanation, because it provides [the court] an opportunity to communicate evidence that [its] decision making is neutral.”<sup>161</sup> Similarly, people are more trusting of the motives of decisionmakers when “they feel they can understand” the decisions.<sup>162</sup>

Reasoned explanations matter not only as an indicator of trustworthiness and neutrality but also as a sign of dignity and respect.<sup>163</sup> Again, Tyler’s descriptive work comports with normative assessments of fair process.

154. See Hollander-Blumoff, *supra* note 144, at 135.

155. *Id.* at 136.

156. TYLER, *WHY PEOPLE OBEY THE LAW*, *supra* note 36, at 149.

157. *Id.*

158. *Id.* at 149–50 (noting that procedural justice effects are maintained “only if citizens believe that their concerns are being considered by decision-making authorities. If their views are not considered, citizens will not believe that authorities are attempting to deal with them in a reasonable way, and long-term allegiance will be called into question” (citation omitted)).

159. Tom R. Tyler, *Procedural Justice*, *supra* note 36, at 298; see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 143–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing “reasoned elaboration” as cornerstone of legal process).

160. Tyler, *Procedural Justice*, *supra* note 36, at 298.

161. *Id.*

162. *Id.* at 299. From a normative perspective, the obligation of reason-giving has been explored in a number of ways, including (1) as a feature of the theory of precedent, Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 636–37 (1995); (2) as a “reasoned elaboration” requirement in the process of adjudication, see Eisenberg, *supra* note 29, at 412; (3) as an aspect of procedural justice, Mashaw, *Reasoned Administration*, *supra* note 29, at 103; and (4) as one of the requirements of the judicial duty of candor, see Richard H. Fallon, Jr., *Essay, A Theory of Judicial Candor*, 117 *COLUM. L. REV.* 2265 (2017). For a deeply thoughtful comparative analysis of the role of reason-giving in judicial decisionmaking, see Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 *WASH. & LEE L. REV.* 483, 505 (2015).

163. Tyler, *Procedural Justice*, *supra* note 36, at 299.

Scholars who have endorsed the dignitary view of procedure likewise have long recognized that procedure serves many functions, including, as Judith Resnik has said, "to instruct about and to act out the political system, to legitimate decisions of the state, to dignify the participants, and to make meaningful the interaction between individuals and the state."<sup>164</sup> "Being subject to judicial authority that is unreasoned is to be treated as a mere object of the law or of the political power, not a subject with independent rational capacities."<sup>165</sup> As Frederick Schauer has explained: "[G]iving reasons is . . . a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one."<sup>166</sup>

There has been little work exploring the experience of procedural justice in the specific context of appellate litigation.<sup>167</sup> That is a gap that needs filling, and it cautions against too much extrapolation based on Tyler's trial-level work. That said, therapeutic justice scholars have seized on Tyler's observations to attack the "per curiam affirmance"—the one-word decision ("affirmed").<sup>168</sup> Amy Ronner and the late Bruce Winick have observed that dismissive appellate decisions leave appellants "with the feeling (correct or incorrect) that the court did not take the contentions made (at considerable expense) with any degree of seriousness."<sup>169</sup>

164. Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 619 (1985). Jerry Mashaw has explored extensively the potential dignitary value of participation. See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981) (arguing that the "effects of process on participants" matters in "judging the legitimacy of public decisionmaking"); see also JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 172–82 (1985).

165. Cohen, *supra* note 162, at 505 (citing Eisenberg, *supra* note 29, at 426).

166. Schauer, *supra* note 162, at 658. Reason-giving "is the antithesis of authority. When the voice of authority fails, the voice of reason emerges. Or vice versa. . . . And reasons are what we typically avoid when the assertion of authority is thought independently important." *Id.* at 637.

167. Dan Simon and Nicholas Scurich have done empirical work to measure laypeople's sensitivity to judicial decisionmaking and reason-giving. See Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL LEGAL STUD. 709 (2011). Their study concludes that people are relatively indifferent to judicial reasoning when they agree with the court's decision, but they are sensitive to judicial reasoning when they disagree with the decision. *Id.* at 719. Perhaps surprisingly, laypeople preferred decisions that offered no reasons to those that offered a curt reason for a result. *Id.* Simon and Scurich's work does not take into account the subjective experience of litigants themselves.

168. Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 500–01 (2000) (discussing work of Tyler, among others).

169. *Id.* at 500; see *id.* at 505 (advocating decisionmaking that "sen[ds] [the appellant] a message that the court heard his voice, giving him a form of validation"); see also Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 48 (1999). I am mindful of the well-founded critiques of the therapeutic justice field, especially its ambiguous terminology and lack of theoretical precision. See, e.g., E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 531–35 (2012); Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Crim-*

The limited descriptive work available on the subjective experience of appealing parties confirms the insights drawn from Tyler's broader project. Scott Barclay interviewed 125 civil litigants about their expectations in the appellate process as part of a project exploring clashes between lawyers and clients.<sup>170</sup> Although his work involved represented litigants, one theme that emerged was that litigants were not as outcome focused on appeal as their lawyers.<sup>171</sup> While readily acknowledging that taking an appeal was a long shot, or even a losing battle, appellants pursued appeals for "other goals"—including "retribution, storytelling and participating in changing the system."<sup>172</sup> Some perceived "justice" not as success in their particular case, but as "a change in approach in future cases for similarly-situated litigants."<sup>173</sup> It was "the ability to tell their stories in court, not in some other forum, that [was] critical"; the litigant who takes an appeal—even one she knows she will very likely lose—does so "in order to have her story taken seriously by the decisionmakers in her case."<sup>174</sup>

Undoubtedly, not every appellant approaches her appeal with these goals in mind, and the appellant's expectations as to reason-giving may vary depending on the extent of process received at the trial court level. But Tyler's work gives us a reason to believe that the process afforded individual litigants at the appellate stage may have independent significance. More broadly, Tyler argues that the experience of procedural fairness is "the primary factor mediating the impact [of an individual's] experience on views about [judicial or legal] legitimacy."<sup>175</sup> When "people feel unfairly treated when they deal with legal authorities, they then view the authorities as less legitimate and as a consequence obey the law less frequently in their everyday lives."<sup>176</sup> Natural persons, as opposed to the corporate appellants who dominate the first tier, may be more affected by these experiences.<sup>177</sup> And society's most vulnerable members—including the poor and the prisoners who often proceed pro se on appeal<sup>178</sup>—may experience procedural justice

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*inal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 547–50 (2007).

170. Scott Barclay, *A New Aspect of Lawyer-Client Interactions: Lawyers Teaching Process-Focused Clients to Think About Outcomes*, 11 CLINICAL L. REV. 1, 1 (2004).

171. *Id.* at 10 (observing that lawyers, as they are ethically obligated, "focus upon the likely outcomes of legal claims," while their clients "appear to focus on various aspects of the litigation process rather than legal outcomes").

172. *Id.* at 5, 9.

173. *Id.* at 9.

174. *Id.* at 8.

175. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 36, at 107.

176. *Id.* at 108.

177. See Hollander-Blumoff, *supra* note 144, at 148–49.

178. For those who are incarcerated, the appellate process affords an opportunity for what Alexandra Lahav has termed "recognition respect." Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1670–71 (2016) (asserting that litigation can be understood as a performance of self-government and that recognition respect is a core

failures more acutely, as they injure self-esteem and threaten group inclusion.<sup>179</sup>

We need not agree, however, that procedural justice failures at the appellate stage threaten judicial legitimacy to see that those failures nevertheless carry the potential to marginalize. Because there are so few touchpoints between litigants and the court during the appellate process, what courts say to the appealing party may be especially important. Decisions that fail to show appellants respect, to further basic dignitary aims, and to demonstrate the independence of the decisionmaker from the district court send a clear message: You and your problems are not worth the court’s time. It’s not hard to imagine the marginalizing effect of those decisions, even when the outcome on appeal is beyond dispute.

### III. A PROCEDURAL JUSTICE TAXONOMY OF UNPUBLISHED DECISIONS

Both the extent of appellate process and the quality of the unpublished decision are likely to affect the procedural justice experience of litigants in the appellate justice system. A focus on these critical experiences draws our attention to both the extent of participation afforded the appellant during the appellate process and the extent of reasons given in unpublished decisions, which signal the court’s respect for the litigant as well as its independence, trustworthiness, and neutrality.<sup>180</sup>

These two focal points—participation and reason-giving—return our attention to the interplay between first-tier and second-tier appellate justice.<sup>181</sup> First-tier appellate process involves oral argument and judicial scrutiny.<sup>182</sup> Second-tier process, on the other hand, involves no oral argument and little judicial oversight, as staff attorneys do the heavy lifting.<sup>183</sup> First-tier appeals

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attribute of that performance). Because a prisoner has lost many legal rights through incarceration, “the right to file a court action might be said to be his remaining most ‘fundamental political right, because [it is] preservative of all rights.’” *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

179. See TYLER, *WHY PEOPLE OBEY THE LAW*, *supra* note 36, at 176.

180. See *supra* notes 150–152 and accompanying text (discussing Tyler’s work on procedural justice values and identifying core values and experiences).

181. See *supra* notes 81–89 and accompanying text (discussing Richman and Reynolds’s work on first-tier and second-tier appellate justice); see also Richman & Reynolds, *supra* note 12, at 275–76 (describing two-track system of modern federal appellate decisionmaking); see also Vladeck & Gulati, *supra* note 12, at 1668 & n.2 (following Richman and Reynolds’s two-track approach).

182. Richman & Reynolds, *supra* note 12, at 281–82; see also POSNER, *supra* note 21, at 162–63 (observing that circuit staff attorneys generally do not draft opinions or work up cases argued orally; the Seventh Circuit is an exception).

183. See Richman & Reynolds, *supra* note 12, at 290; see also Levy, *supra* note 14, at 345–46 (“In many of the cases that are not tracked for argument, staff attorneys ‘work up’ the case, meaning that they prepare a memorandum and draft a disposition.”). Judges rarely meet in person to discuss “second-tier” cases (either with each other or with the staff attorney who worked it up), and they usually vote on an outcome after reviewing the material in a serial fashion on their own. See *id.* at 344–53 (describing process for nonargument cases in D.C. Cir-

often, but not always, end in published, reasoned decisions; second-tier appeals almost always end in unpublished decisions.<sup>184</sup> These distinct processes inform any procedural justice assessment of unpublished decisions.

“First-tier” appeals—those that benefit from judicial attention and oral argument—are likely to have positive procedural justice effects, as litigants are able to participate more actively in the appellate process through oral argument. In “second-tier” appeals, however, the only procedural justice experience between the litigant and the court is the decision itself. Because of the difference in process, reason-giving is arguably even more important in second-tier unpublished decisions; it is the court’s only opportunity to convey that the party has been heard and that the court has acted independently, neutrally, and respectfully.

In this Part, I classify four types of unpublished decisions: the *publishable decision*, the *memo decision*, the *avoidant decision*, and the *Kafkaesque decision*.<sup>185</sup> This taxonomy focuses on those features of the process that may enhance or undermine procedural justice experiences. It categorizes unpublished decisions by the quality of their reason-giving and the extent of process that produced each decision (that is, whether the appeal received “first-tier” or “second-tier” treatment).

#### A. *The Publishable Decision*

The *publishable decision* is just that: a decision that could have, and arguably should have, been published. These are decisions that look like law-making decisions; they often satisfy the various criteria for publication,

cuit, First Circuit, Second Circuit, Third Circuit, and Fourth Circuit; in only the D.C. Circuit, which has the lowest number of appeals of the five, did judges meet with staff attorneys to discuss nonargument cases); see also POSNER, *supra* note 21, at 166–67 (staff attorneys meet with judges in Seventh Circuit and Ninth Circuit as well).

184. See Levy, *supra* note 14, at 363–64 (observing that “[a]lmost all of the published opinions in all of the circuits come from cases that are calendared for oral argument” even though some of those appeals “ultimately are decided solely on the briefs”).

185. Although this taxonomy is the first of its kind, others have described the content of unpublished decisions in similar terms. In Pether’s posthumous work, she says in a footnote:

Nonprecedential opinions take three forms: (i) those which give reasons for the court’s decision that make them virtually indistinguishable from precedential opinions, except to the extent that they may be, in some jurisdictions, characteristically briefer, (ii) short opinions with circular reasoning, essentially saying “we affirm the trial court’s decision because the appellant doesn’t fit within the relevant rule”; and (iii) the so-called AWOPs (Affirmed Without Opinion), or one-word opinions reversing the court below.

Penelope Pether, *Strange Fruit: What Happened to the United States Doctrine of Precedent?*, 60 VILL. L. REV. 443, 450 n.51 (2015).

My taxonomy differs in that I group (ii) and (iii) as functionally similar, and then I subdivide that larger category based on whether the appeal received oral argument (i.e., first-tier treatment), which is an important procedural justice consideration. I also carve out a new category of presumptively superior unpublished decisions, the *memo decision*, which is responsive to an appellant’s arguments on appeal but may not have the detail of a precedential decision—a category that presumably is part of Pether’s group (i).

including reversing the decision below, discussing a legal or factual issue of public interest, establishing a new rule of law, modifying an existing rule of law, or applying an established rule in a novel context.<sup>186</sup> That such decisions are not published may be alarming and suggestive of unpublication gamesmanship.<sup>187</sup> But, for present purposes, these decisions are superior to other kinds of unpublished decisions because they have the greatest procedural justice effects.

A prototypical—and somewhat infamous<sup>188</sup>—example is the Fourth Circuit’s decision in *Austin v. Plumley*.<sup>189</sup> In that decision, the Fourth Circuit vacated and remanded a district court decision that had denied a writ of habeas corpus to a West Virginia prisoner who claimed he was entitled to a presumption of judicial vindictiveness during his resentencing.<sup>190</sup> The vacatur of a denial of habeas corpus relief is an exceptional outcome; that same year, the Fourth Circuit reversed less than 3% of state prisoner petitions like Mr. Austin’s.<sup>191</sup> The Fourth Circuit’s decision in *Austin* was eighteen pages long, and, according to the court, involved a “unique scenario” of “first impression.”<sup>192</sup> It even drew a (short) dissent.<sup>193</sup> Nevertheless, it was not published.

*Austin* sparked a dissent from the denial of certiorari from Justice Thomas when West Virginia sought review in the Supreme Court.<sup>194</sup> In addition to criticizing the Fourth Circuit on the merits, Justice Thomas, joined by Justice Scalia, also faulted the court for hiding its reasoning and result in an unpublished decision: “It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating

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186. See, e.g., 6TH CIR. I.O.P. 32.1(b) (describing criteria for publication).

187. More benevolently, these cases may implicate the concerns with decisionmaking in multimember courts that Cass Sunstein highlighted in Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995). See also *infra* note 200 (discussing Sunstein’s work on decisionmaking by multimember bodies).

188. See, e.g., Adam Liptak, *Courts Write Decisions that Elude Long View*, N.Y. TIMES (Feb. 2, 2015), <https://www.nytimes.com/2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedent.html> [<https://perma.cc/7NVM-HZXV>]; Richard M. Re, *On Not Creating Precedent in Plumley v. Austin*, PRAWFSBLAWG (Feb. 2, 2015, 11:33 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/02/on-not-creating-precedent-in-plumley-v-austin.html> [<https://perma.cc/835V-P2P5>]; Debra Cassens Weiss, *Are Some Opinions Unpublished to Avoid Review? Thomas Dissent Highlights the Issue*, A.B.A. J. (Feb. 4, 2015, 6:15 AM), [http://www.abajournal.com/news/article/are\\_some\\_opinions\\_unpublished\\_to\\_avoid\\_review\\_thomas\\_dissent\\_highlights\\_the/](http://www.abajournal.com/news/article/are_some_opinions_unpublished_to_avoid_review_thomas_dissent_highlights_the/) [<https://perma.cc/VV67-5AV8>].

189. 565 F. App’x 175 (4th Cir. 2014).

190. *Austin*, 565 F. App’x at 187, 190–91.

191. JUDICIAL BUSINESS tbl.B-5 (2014).

192. *Austin*, 565 F. App’x at 186.

193. *Id.* at 193 (Shedd, J., dissenting).

194. *Plumley v. Austin*, 135 S. Ct. 828 (2015) (Thomas, J., dissenting from the denial of certiorari).

binding law for the Circuit.”<sup>195</sup> According to Justice Thomas, under either the Fourth Circuit’s own publication rules or “any standard” for publication, *Austin* should have been published.<sup>196</sup>

*Austin v. Plumley* is also an excellent example of something else: a judicial Pygmalion of sorts. It is an appeal that may have been destined for second-tier treatment—an appeal from the denial of habeas corpus relief, a routine event in the federal appellate courts. But perhaps an industrious staff attorney, law clerk, or judge uncovered a compelling issue while screening the appeal. Indeed, the Fourth Circuit appointed counsel on appeal for Mr. Austin and heard oral argument, transforming the appeal into one fit for first-tier treatment in all respects—except for the court’s surprising (and perhaps inexplicable)<sup>197</sup> failure to designate its decision for publication.

The *publishable decision* thus is any unpublished decision that employs reasoned elaboration substantially similar to a lawmaking decision. These decisions are the product of first-tier appellate process, including full briefing and oral argument. Some publishable decisions will draw a dissent or concurrence—another indicator of the decision’s publication-worthiness. In short, the *publishable decision* is an unpublished decision that really should have been published. From a procedural justice standpoint, these decisions may be as satisfying as any published decision, given the remote possibility that the litigant affords any significance to the publication decision itself. Publishable decisions are surely problematic for other reasons, but for present purposes they are not.

### B. *The Memo Decision*

When the courts of appeals began issuing unpublished decisions, they likely had what I categorize as the *memo decision* in mind: a relatively short, yet nevertheless responsive, appellate decision.<sup>198</sup> The *memo decision* is a de-

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195. *Id.* at 831. The strategic implications of the publishable decision are beyond the scope of this Article, and the topic has been cogently examined elsewhere. See Ben Grunwald, *Strategic Publication*, 92 TUL. L. REV. 745 (2018) (arguing that a divided panel might utilize “strategic publication” as a bargaining tool in reaching a decision).

196. *Austin*, 135 S. Ct. at 831 (Thomas, J., dissenting). The Court’s more conservative justices are not the only ones to have voiced concern about the temptation to use selective publication to hide appellate decisions from further review. Justice Blackmun expressed concern over the practice in 1991, and Justice Stevens worried about it in 2006. See Liptak, *supra* note 188.

197. Justice Thomas appears to have correctly concluded that the decision satisfied the Fourth Circuit’s publication standard. The Fourth Circuit will publish decisions “only if the opinion satisfies one or more of the standards for publication,” which include a decision that “establishes, alters, modifies, clarifies or explains a rule of law” within the Fourth Circuit. 4TH CIR. R. 36(a). *Austin* likely satisfied this standard, which the vacatur itself suggests (if not compels).

198. Indeed, in a 1968 memorandum to the Federal Judicial Center, Chief Judge Clement Haynsworth originally described the Fourth Circuit’s unpublished decision as a “succinct[]” decision that would “always adequately[] state[] the facts, the contentions, and the reasons for the conclusion,” even when the appeal was “frivolous.” *Jones v. Superintendent, Va. State*

cision that (1) identifies the issues on appeal and (2) explains why the appellant’s arguments succeed or (more often) fail. It is self-contained and self-referential; the public and the litigants can understand (and evaluate the correctness of) the order on its face (even if we must consult cited law). But, importantly, memo decisions issue without the benefit of oral argument; these are, quintessentially, second-tier appeals. Unlike the *Kafkaesque decision* discussed below, however, these decisions have some positive procedural justice effects.

Here is a good example of a memo decision from the Eleventh Circuit in a second-tier, *pro se* appeal. I quote this decision at length to set up an important contrast with the other categories of decisions:

Martha Edgerton appeals *pro se* the summary judgment in favor of the City of Plantation and against her complaint of employment discrimination on the basis of race, sex, and retaliation. Edgerton argues that she presented sufficient evidence of pervasive racial and sexual harassment to support her complaint of a hostile work environment and of retaliation. We affirm.

We review a summary judgment *de novo*. . . .

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee with respect to the “terms, conditions, or privileges of employment, because of” her race or sex. To establish a *prima facie* case of a hostile work environment, an employee must prove that she belongs to a protected group; that she has been subject to unwelcome harassment; that the harassment was based on a protected ground, such as race or sex; that the harassment was severe or pervasive enough to alter the terms and conditions of her employment; and that her employer is responsible for the harassment under a theory of vicarious or direct liability. The requirement that the harassment be “severe or pervasive” contains both an objective and a subjective component. “Thus, to be actionable, this behavior must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceives . . . to be abusive.” In evaluating the objective severity of the alleged harassment, we consider the frequency of the conduct; its severity; whether the conduct was threatening or humiliating, or was instead an isolated offensive utterance; and whether the conduct unreasonably interfered with the employee’s performance. . . .

. . . .

The district court committed no reversible error when it entered summary judgment in favor of the City and against Edgerton’s complaint

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Farm, 465 F.2d 1091, 1095 (4th Cir. 1972) (appending Chief Judge Haynsworth’s memorandum); *see id.* (“[T]he case is affirmed, reversed, or remanded by a memorandum decision, which quite sufficiently states the facts, the contentions, and the Court’s resolution of the legal questions presented . . . .” (alteration in original)); *see also* ROMAN L. HRUSKA ET AL., COMM’N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, *reprinted in* 67 F.R.D. 195, 258 (1975) (“[W]e recommend that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision.”).



of racial and sexual harassment. Edgerton alleged that she was racially or sexually harassed at most about once a month, but several of the alleged incidents were not harassing. For example, Edgerton complained, “Robert Krogman aggressively confronted me at the copier/printer workstation area by physically snatching papers from my hand.” She also alleged that Krogman called her to his cubicle and showed her a “pin-up” of his wife in a bikini. And Edgerton alleged that “Mr. Jones made a comment that, you know, ‘The founding fathers paved the way for people in this country.’” Edgerton also complained that Richard Maher left a Rosemary plant on her desk and said, “Now you have to date me.” And she complained about overhearing Jones tell a crew worker that he was “dicking around,” but Edgerton offered no evidence that Jones’s comments were directed toward her. Edgerton was never threatened. Any offensive conduct was isolated and appears to have occurred during a relatively small part of her workday. These incidents do not establish a hostile work environment.

....

Edgerton also argues for the first time that she received ineffective assistance of counsel and that the City engaged in misconduct before the district court, but we ordinarily will not review arguments raised for the first time on appeal. And no exception to that general rule applies here.

**AFFIRMED.**<sup>199</sup>

In this decision, the Eleventh Circuit has concisely explained the nature of the case, the issues on appeal, the governing law, and the application of that law to key facts. Ms. Edgerton will know why she lost: the conduct of which she complained did not satisfy the Eleventh Circuit’s hostile work environment test because the conduct was neither severe enough nor pervasive enough; the other issues were raised too late. Ms. Edgerton will know the basis of the court’s decision from reading the face of the opinion, and so, too, would any member of the public who stumbles upon the court’s decision. Indeed, the public might even learn something from the case—namely, that conduct like what the court described is not unlawful in the workplace.

*Memo decisions*, therefore, (1) identify the issues on appeal; (2) state the relevant legal rules that govern those issues; and (3) explain how those governing rules apply to key facts. These decisions disclose at least some of the court’s own reasoning and can stand on their own, without reference to the district court’s decision. But, unlike publishable decisions, these are cases that (1) do not benefit from oral argument; (2) provide a shorter, more perfunctory analysis; and (3) have no concurrence or dissent. The procedural justice effects of these decisions may not be as great as the publishable decision—in part, because oral argument has not occurred—but they do demonstrate responsiveness to the appellant and respect for her arguments. These decisions arguably demonstrate some independence from the district court

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199. *Edgerton v. City of Plantation*, 682 F. App’x 748 (11th Cir. 2017) (internal citations omitted).

by offering the appellant a direct and (somewhat) responsive answer to her appeal. These decisions are the gold standard for second-tier appeals.

### C. *The Avoidant Decision*

Not all unpublished decisions look like the one the Eleventh Circuit issued in Ms. Edgerton’s appeal. Many say far less. These facially under-reasoned decisions do little to advance procedural justice values—unless the litigant benefited from another procedural justice experience (e.g., oral argument) along the way. These next two Sections describe unpublished decisions that, standing on their own, may marginalize litigants by failing to engage in responsive and independent reason-giving during the appellate process. What separates the two categories, however, is whether they are the product of first-tier appellate process—an experience that can offset an otherwise poor procedural justice experience.

Courts issue what I describe as “facially under-reasoned” decisions in different contexts. These are decisions that fail to provide the basic information provided in the *memo decision* (issues, relevant law, simple application of law to key facts). By describing these decisions as “under-reasoned,” I do not imply that these decisions are ill-informed or even wrong; rather, that label describes the failure of the issuing court to disclose any independent reasoning or issue a facially comprehensible decision. The only way to decipher “under-reasoned” decisions is by way of reference to another decisionmaker’s (the district court’s or administrative law judge’s) decision.

As indicated, I think there are two very different kinds of under-reasoned unpublished decisions that serve markedly different purposes: one decision—the *avoidant decision*—serves to avoid; another—the *Kafkaesque decision*—serves to dismiss. The avoidant decision issues in appeals in which we might have expected the court to issue a published (or at least a publishable) decision, but the court ultimately hides its work—and perhaps intentionally so.<sup>200</sup>

A good example is the Eleventh Circuit’s decision in *Henry v. City of Mt. Dora*.<sup>201</sup> *Henry* involved the question whether *Heck v. Humphrey*<sup>202</sup> bars actions under 42 U.S.C. § 1983 when a writ of habeas corpus is not available as

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200. I do not ascribe a negative connotation to intentionality. The dynamics of a multi-member appellate panel may make it much more difficult to reach consensus on reasons in some cases—a challenge that district court judges do not face. Cass Sunstein has identified “special problems of public justification” that arise in the context of multimember judicial bodies like the federal courts of appeals. Sunstein, *supra* note 187, at 1746. In such bodies, he contends that incompletely theorized agreements have a significant advantage, for they “allow[] a convergence on particular outcomes by people unable to reach anything like an accord on general principles.” *Id.* Sunstein explains further that incompletely theorized agreements allow judges to live with one another and show each other “a measure of reciprocity and mutual respect.” *Id.* Judges, “perhaps even more than ordinary people,” might rightly avoid directly challenging “one another’s deepest and most defining commitments.” *Id.* at 1746–47.

201. 688 F. App’x 842 (11th Cir. 2017) (per curiam), *cert. denied*, 138 S. Ct. 676 (2018).

202. 512 U.S. 477 (1994).

a federal constitutional attack on a state criminal conviction (in that case, a juvenile adjudication).<sup>203</sup> That issue is a complex one that had split the federal circuits six to four.<sup>204</sup> On March 30, 2016, an Eleventh Circuit panel heard oral argument in *Henry*.<sup>205</sup> Sixteen months later, the panel resolved the appeal like this: “Having heard oral argument and carefully reviewed the record, we find no reversible error in the district court’s order dismissing plaintiff’s § 1983 false arrest claims against the above officers. We therefore AFFIRM the district court’s order of dismissal.”<sup>206</sup> Whatever caused the delay—perhaps panel disagreement over how to approach the issue—the court resolved the dispute without saying much of anything.

The Eleventh Circuit is not the only court to use under-reasoned, non-precedential decisions as a judicial shortcut in novel, important, or complex cases.<sup>207</sup> Nearly a decade ago, the hot issue in Justice Sotomayor’s Senate confirmation process was her participation in *Ricci v. DeStefano*,<sup>208</sup> a summary decision by the Second Circuit affirming—“substantially for the reasons stated” by the district court—the rejection of a reverse discrimination suit brought by white New Haven firefighters.<sup>209</sup> The case had been orally argued, was high-profile, and involved controversial reverse discrimination law. At the rehearing stage, other members of the Second Circuit called the panel to task for hiding the basis of the decision (or avoiding thorny issues).<sup>210</sup>

*Avoidant decisions* thus are facially under-reasoned decisions in first-tier appeals. The avoidant decision bears the features of ordinary appellate process, including oral argument and counsel (appointed, where necessary). But the resulting decision says very little, and may slip below the radar as a perfunctory unpublished decision—perhaps precisely as the “avoidant” panel intended. Although these decisions may lack the hallmarks of independent judicial thought, trustworthiness, and neutrality (because the court of appeals has not sufficiently explained its result), the process that has been af-

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203. Petition for Writ of Certiorari at i, *Henry v. City of Mt. Dora*, 688 F. App’x 842 (11th Cir. 2017) (No. 17-652).

204. *See id.* at i, 11, 16.

205. Response in Opposition to Petition for Writ of Certiorari at 8, *Henry v. Livingston*, 138 S. Ct. 676 (2018) (mem.) (No. 17-652), 2017 WL 5991760.

206. *Henry*, 688 F. App’x at 842. In four sentences, the court also explained the nature of the underlying claims. *Id.*

207. *See, e.g., In re Complaint of Omega Protein, Inc. v. Brumfield*, 672 F. App’x 510 (5th Cir. 2017).

208. 264 F. App’x 106 (2d Cir. 2008), *rev’d*, 557 U.S. 557 (2009).

209. *See Grunwald, supra* note 195, at 746–48 (discussing controversy over the *Ricci* decision).

210. *Ricci v. DeStefano*, 530 F.3d 88, 94–96 (2d Cir. 2008) (Cabranes, J., dissenting). The Eleventh Circuit’s decision in *Henry* issued without remark; the *Henry* appellants sought rehearing en banc, but no active Eleventh Circuit judge requested the requisite court poll. *Henry v. City of Mt. Dora*, No. 15-11351-CC (11th Cir. Aug. 2, 2017) (order denying petition for rehearing en banc).

forded to the appellant may have an offsetting procedural justice benefit. Like the publishable decision, avoidant decisions may also be problematic for other reasons, but they are not as troubling on the procedural justice scale as the final category of decision: the Kafkaesque decision.

#### D. *The Kafkaesque Decision*

The worst of the worst is the *Kafkaesque decision*. That term captures the central feature of these decisions: Kafkaesque decisions are largely unexplained; they may point in circular directions (back to the district court); and they are issued by seemingly anonymous bureaucrats (judges on a remote appellate panel) in a seemingly indifferent fashion.<sup>211</sup> Although the avoidant decision discussed above is similarly cursory, it is less anonymous (issued after oral argument) and may further systemic values by deferring tricky issues. With the Kafkaesque decision, the upshot is pure efficiency and the message is quite different: “You lose because we say so.” These decisions appear to further no procedural justice value; they are an exercise in rote docket clearing.

It is easiest to spot Kafkaesque decisionmaking in the wholly unreasoned decision—the one-word affirmance (“affirmed”). The Administrative Office of the U.S. Courts tracks such decisions as those issued “without comment.” In the year ending September 30, 2018, half of the Eighth Circuit’s<sup>212</sup> merits decisions were issued “unsigned, without comment.”<sup>213</sup> No other circuit even came close to the Eighth Circuit’s numbers; the Third Circuit reports the next largest number of “without comment” decisions, but it only issued such decisions eighty-five times (out of 1,778, or 4.6%).<sup>214</sup>

211. See FRANZ KAFKA, *THE TRIAL* 83 (David Wyllie trans., Dover Publications 2009) (1925) (“[T]he first documents [filed with the court] would be very important . . . Unfortunately, though, . . . the first documents submitted are sometimes not even read by the court. . . . [They] are usually mislaid or lost completely, and even if they do keep them right to the end they are hardly read . . . This is all very regrettable, but not entirely without its justifications.”); see also Jon Connolly & Marc D. Falkoff, *Habeas, Informational Asymmetries, and the War on Terror*, 41 SETON HALL L. REV. 1361, 1361–62 (2011) (“[W]e now use the adjective ‘Kafkaesque’ to describe a situation in which an individual is trapped in a seemingly capricious system that refuses to explain or justify itself, and over which he is powerless. The central feature of the Kafkaesque scenario [is] being trapped by an opaque authority that reveals no information . . .” (footnote omitted)).

212. In the Eighth Circuit, the court may use its summary procedures when: (1) judgment “is based on findings of fact that are not clearly erroneous”; (2) a jury’s verdict is supported by sufficient evidence; (3) an administrative order is supported by substantial evidence; and (4) no error of law exists. 8TH CIR. R. 47B. A summary decision can—but need not—say anything more than “AFFIRMED.” *Id.*

213. JUDICIAL BUSINESS tbl.B-12 (2018).

214. *Id.* The year before—the year ending September 30, 2017—the Ninth Circuit issued 1,184 of its 7,456 merits decisions (or 15.9%) “without comment.” JUDICIAL BUSINESS tbl.B-12 (2017). But in 2018, it reported issuing *no* “without comment” merits decisions. JUDICIAL BUSINESS tbl.B-12 (2018). So, too, did three other circuits: the D.C. Circuit; the Fourth Circuit, and the Tenth Circuit. *Id.*

Those numbers suggest that the Kafkaesque decision may be isolated to the Eighth Circuit. But the numbers deceive.<sup>215</sup> What some circuits report as “without comment” decisions, others may describe as “reasoned” (also the Administrative Office’s term).<sup>216</sup> The Administrative Office defines “reasoned” decisions as those that “expound the law as applied to the facts of the case and detail the judicial reasons upon which the judgment is based”; although the Administrative Office does not define “without comment” decisions, presumably that category includes only decisions that do not meet this threshold.<sup>217</sup> Regardless, circuits self-report data, raising questions as to the reliability of these statistics (which the following discussion underscores).<sup>218</sup>

For present purposes, the distinction between “reasoned” and “without comment” is what separates the *memo decision* from the *Kafkaesque decision* in my taxonomy. Only those decisions that evidence some form of independent appellate decisionmaking—that is, decisions that identify the issues on appeal, explain controlling law, and apply that law to key facts—are facially “reasoned” appellate decisions. Those decisions that do not satisfy these requirements are not *facially* reasoned. I emphasize “facially” because the court’s decision may in fact be fully reasoned, but the court has chosen not to make those reasons public.

Perhaps more controversially, for present purposes I would also classify an unpublished decision that relies solely on the district court’s decision for its “reason” as facially under-reasoned and thus a Kafkaesque decision. Some scholars have suggested that a reason-through-incorporation decision may satisfy any reason-giving norm at the appellate stage, provided the district court’s decision is itself sufficiently reasoned.<sup>219</sup> From a procedural justice

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215. See *infra* notes 220–232 (illustrating difference between a purportedly reasoned and unreasoned decision in two circuits). Although more work is needed to understand the breadth of the use of unreasoned unpublished decisions, the work that has been done suggests that nearly all courts rely on summary procedures to some extent. See, e.g., Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157, 162 (finding that between 1989 and 1996, the Third Circuit disposed of approximately 60% of its docket using summary orders).

216. See JUDICIAL BUSINESS tbl.B-12 (2018) (identifying categories of written opinions as “signed”; “reasoned, unsigned”; and “unsigned, without comment”).

217. JUDICIAL BUSINESS tbl.B-12 n.1 (2018).

218. See Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733, 1746–47 (2005) (noting that “diverse specificity of ‘without comment’ resolutions” and disparate circuit record-keeping procedures make it difficult to compare usefully self-reported circuit “without comment” disposition data).

219. Scholars who have considered the reasoned-through-incorporation appellate decision have generally approved of its use. See Gulati & McCauliff, *supra* note 215, at 163 n.24 (“[W]e think there is an important distinction between dispositions that provide no reasons and those that provide some reasons, no matter how minimal. Assuming that the most minimal disposition is nothing more than an ‘affirmed based on the district court’s rationale’ or ‘affirmed based on our opinion in case *x*’ there is still something that an expert lawyer could work with in constructing an *en banc* or *certiorari* petition.”); see also PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 252–53 (1976) (approving of the use of a similar decision from the Fourth Circuit when “every issue raised on the appeal was discussed and decided in the opin-

perspective, however, I disagree for two reasons: First, a reason-through-incorporation decision may be received as the functional equivalent of an unexplained decision. Put differently, some readers will assume that the court issuing an unexplained decision agreed with the district court and its reasons—even if a holding is distinct from the reasons given for that holding. Second, the reason-through-incorporation decision lacks both the responsiveness to the appellate arguments and the independence from the district court that are foundational to positive procedural justice experiences.

Let me explain these points by comparing a decision issued under the Eighth Circuit’s summary procedures and one issued by the Fourth Circuit that was classified as “reasoned.”<sup>220</sup> Consider, first, this decision from the Eighth Circuit:

PER CURIAM.

Clayton Walker appeals following the district court’s dismissal of his pro se civil complaint. Having carefully reviewed the record and the parties’ briefs, we find no error warranting reversal. We therefore affirm the judgment entered in favor of defendants.

*See* 8th Cir. R. 47B.<sup>221</sup>

This decision does not tell us anything about the case (other than that it is “civil”), does not identify the issues on appeal, and does not reveal the basis for the appellate decision (other than that the appellate court found “no error warranting reversal”). Although this decision uses more than one word, it is facially unreasoned; it offers no reason for rejecting Mr. Walker’s appeal—again, other than that the court has not found an “error warranting reversal.”<sup>222</sup>

Now compare the Eighth Circuit’s decision in Mr. Walker’s appeal with the Fourth Circuit’s treatment of the following pro se appeal—one of the

ion below”); Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1647 n.33 (2005) (“In those cases in which the district court itself provided a written explanation of its decision, of course I see no objection to an explanation simply incorporating that reasoning by reference (e.g., ‘For the reasons expressed by the court below, we affirm.’) if the district court opinion was published, or by adopting and reprinting it if it was not published by the district court.”).

220. Available clerk’s annotations suggest that the decision discussed would have been classified as a “without comment” decision. *See* Search Results of All June 2017 Opinions in the U.S. Court of Appeals for the Eighth Circuit Database, <http://media.ca8.uscourts.gov/cgi-bin/opnByMM.pl?theMM=06&theYY=2017&A1=Get+Opinions> [https://perma.cc/AP7S-SCCG] (describing *Walker* appeal as “Civil case. Dismissal affirmed without comment.”). The Fourth Circuit self-reports that it issues no “without comment” decisions. JUDICIAL BUSINESS tbl.B-12 (2017).

221. *Walker v. Harmon*, 689 F. App’x 463 (8th Cir. 2017) (per curiam).

222. The court’s language—“no error warranting reversal”—could be read to suggest that the court found error, but that the error identified did not require reversal (i.e., that the decision could have been affirmed on alternative grounds). *See id.* We have no way of knowing whether that is a fair (or accurate) reading of the court’s short decision.

twenty-four pro se appeals it handled in the same way during the week of October 3, 2016<sup>223</sup>:

PER CURIAM:

Anthony W. Perry appeals the district court's order dismissing his civil action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Perry v. United States*, No. 8:14-cv-02862-TDC (D. Md. June 3, 2015). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED<sup>224</sup>

Again, the court does not explain the nature of the case (other than that it is "civil"), does not identify the issues on appeal, and does not (directly) explain the basis for its decision. Similarities aside, there is a critical difference between the two: the Fourth Circuit has explained expressly that it "affirm[s] for the reasons stated by the district court," but the Eighth Circuit has not.<sup>225</sup>

I contend, first, that the reason-through-incorporation decision is only marginally better than the otherwise silent decision. Let's consider these examples from the appellant's perspective. It is doubtful that the Fourth Circuit's additional verbiage makes much of a difference to Mr. Perry. He might still rightly feel that the court has not seriously considered the issues he has raised on appeal. Mr. Perry and Mr. Walker each have received roughly the same answer to their appeals from the two different courts. Although we (the public) do not know whether the district court issued a decision in Mr. Walker's Eighth Circuit appeal, Mr. Walker knows the answer to that question (it did).<sup>226</sup> Having received the Eighth Circuit's cursory decision, Mr. Walker may have reached the same conclusion that the Fourth Circuit reached explicitly: the district court got it right and said all that needs to be said. The only meaningful difference between the two is that one makes explicit what may be implicit in the other (that the appellate court agreed with the lower court).

The implicit-incorporation reading is a reasonable one, I contend, especially where the appellant lacks contextual clues to suggest a different basis for the appellate court's decision. That is how a federal court would ordinari-

223. *See supra* Introduction (discussing data from Fourth Circuit's resolution of 104 cases during the first week of October 2016).

224. *Perry v. United States*, 669 F. App'x 113 (4th Cir. 2016) (per curiam).

225. *Compare id.*, with *Walker*, 689 F. App'x 463 (affirming the district court's decision without citing its reasoning).

226. *Walker v. Harmon*, No. CIV. 15-05037-JLV, 2016 WL 5376185 (D.S.D. Sept. 26, 2016). Notably, Mr. Walker (like Mr. Perry) received a relatively robust response from the district court; the district court decisions likely satisfied whatever procedural justice expectations we might have for district court reason-giving. It is conceivable that such reasoned responses blunted the effect of the appellate decisions.

ly read an otherwise silent affirmance. For federal habeas corpus review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), courts “presume that the unexplained decision adopted the same reasoning” as a lower court—unless that presumption can be overcome by other clues as to the basis of the court’s decision (e.g., briefing on alternative grounds for affirmance).<sup>227</sup> Therefore, unless the appellant has reason to think that the court might have affirmed for another reason, the appellant may reasonably conclude that the appellate court has implicitly incorporated the district court’s reasoning in its otherwise summary decision.

This brings me, however, to the core procedural justice problem with reasoning through incorporation (whether implicit or explicit): the reasons the district court gave for the result may be an unsatisfactory answer to an appeal of that decision.<sup>228</sup> As important, an appellate decision that relies solely on the district court’s reasoning also reveals no independence on the part of the appellate court; the court appears, instead, to be in lockstep with the district court.

Further, appeals are not supposed to parrot what occurred in the trial court; often, the district court’s decision, standing on its own, will not sufficiently answer or respond to the arguments raised on appeal. In any appeal, the appellant must identify alleged errors in the district court’s reasoning or decision.<sup>229</sup> To say only that the district court was correct does not, then, explain why the errors alleged are not, in fact, errors. Decisions that look only

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227. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (“[In the context of AEDPA, federal courts should] presume that the unexplained decision adopted the same reasoning. But the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court’s decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.”); see also *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

228. One may perceive some tension between these points: How can we presume incorporated reasoning, as the Supreme Court does, if, as I argue, the lower court’s decision cannot, standing on its own, answer many appeals? Putting aside my disagreement with *Ylst* and the perverse incentives it creates, *Ylst* and its progeny are grounded in the federalism concerns that animate federal habeas corpus review of state convictions. See *Ylst*, 501 U.S. at 807 (Blackmun, J., dissenting) (incorporating the reasons of his dissent in *Coleman v. Thompson*, 501 U.S. 722, 758–74 (1991), including criticism of the Court’s promotion of federalism at the price of other values). That incorporated reasoning may be a natural way to read unexplained decisions does not mean it is a desirable form of appellate decisionmaking; the Supreme Court’s decisions in this area reflect a reluctance to demand more from state appellate courts—a concern not present here.

229. Federal Rule of Appellate Procedure 28 requires appellants to state “the issues presented for review.” FED. R. APP. P. 28(a)(5). “The purpose of the rule is to definitely and separately point out the errors complained of in order to clearly define and confine the issues on appeal.” *N.Y. Cas. Co. v. Young Men’s Christian Ass’n.*, 119 F.2d 387, 389 (8th Cir. 1941). Appellate practitioners advise that appeals “must be packaged in an entirely new way to be effective in this new forum.” David F. Herr & Cynthia F. Gilbertson, *Improving the Odds on Appeal*, BENCH & B. MINN., August 2003, at 17, 17–18; see also Jennifer S. Carroll, *Appellate Specialization and the Art of Appellate Advocacy*, FLA. B.J., June 2000, at 107, 107 (“To best understand exactly what appellate practice is, one must first understand what it is not. Simply stated, appellate practice is *not* trial practice.”).



to the district court to explain away an appeal ultimately lack independence from the original decisionmaker and are unresponsive to the appeal itself.

Consider this discussion from an unpublished decision in the Third Circuit, in which the court emphasized that arguments on appeal should respond to the district court decision and be distinct from the arguments advanced in the lower court:

On appeal, Ream [the appellant] has not responded to the evidentiary deficiencies identified by the District Court. Instead, she has apparently cut-and-pasted nearly the entirety of the summary judgment brief she filed in the District Court, without the courtesy of tailoring her arguments to conform to the appellate context. . . .

. . . .

Upon review . . . we have little to add to the District Court's analysis. Indeed, Ream has not identified a single flaw in the District Court's cogent reasoning. We will therefore affirm the order granting summary judgment for substantially the reasons set forth in the District Court's summary judgment opinion. Counsel is cautioned to take greater care in future briefs filed with this Court.<sup>230</sup>

In a footnote, the court recognized that

at times, an argument presented to the District Court will be reiterated on appeal, and that the judicious use of cutting-and-pasting may be both efficient and appropriate. Here, however, Counsel's approach of importing a trial brief wholesale without modifying it to respond to the deficiencies raised by the District Court was entirely inappropriate.<sup>231</sup>

Although preservation rules limit the ability of appellants to raise *new* arguments on appeal, the *Ream* decision highlights that ordinarily appeals are responsive to the district court's decision and appellate decisions are responsive to the arguments made on appeal. Only when no new ground has been trodden, the Third Circuit suggests, might it be sufficient to rely on the district court's decision alone as a sufficient response to the appeal. Because the *Ream* appellant failed to offer "any direct response" to the district court, there was nothing new for the appellate court to say. *Ream* suggests that decisions based on the district court's reasoning alone should be the exception—not the rule. And *Ream* further suggests that when appellants fail to do their job (that is, to respond to the district court), the best response is to say so.

All this to say: Has Mr. Perry really received a better decision than Mr. Walker? Is Mr. Perry's procedural justice experience superior to Mr. Walker's because the Fourth Circuit has expressly embraced the reasoning of the district court (and the Eighth Circuit did not)? Later events suggest an an-

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230. *Ream v. Pa. Dep't of Human Servs.*, 738 F. App'x 83, 84 (3d Cir. 2018) (footnote omitted).

231. *Id.* at 84 n.1.

swer: Mr. Perry filed a rehearing petition and asked for his filing fee back.<sup>232</sup> Neither appellant received a response from the court that offered any suggestion that the court (1) heard and considered the arguments each had made on appeal; (2) engaged in neutral decisionmaking (by explaining its own thought process); (3) exercised independent judgment; or (4) viewed the issues presented as worthy of its time or attention. Whether told directly or implicitly that the district court’s decision suffices, neither appellant has received a direct response. Neither has any reason to believe that he has been heard, that the court has, in fact, considered his arguments. By failing even to identify the issues on appeal, the court gave the appellant no reason to believe that it even understood the arguments he made (or, worse, even read the briefs).<sup>233</sup>

I do not want to leave you with the impression that Mr. Perry and Mr. Walker had meritorious appeals; they did not. Nor was the briefing in their appeals effective. But they are representative of the class of appellants who receive Kafkaesque decisions. Some of those appellants will have more meritorious appeals. But for my argument in Part IV to have any force, I must question whether courts can and should say more even in cases like Mr. Perry’s and Mr. Walker’s.

The extent of the use of Kafkaesque decisions is beyond the scope of this Article.<sup>234</sup> Suffice it to say that even in circuits that claim to issue no decisions “without comment,” use of Kafkaesque decisions is widespread. The Fourth Circuit, which issued the decision in Mr. Perry’s appeal discussed above, is a good example. Although the Fourth Circuit reports that it never issues decisions “without comment,” it issues decisions like the one Mr. Perry received frequently—indeed, daily (at least twenty-three others the week Mr. Perry received his decision). Before 1971, when the Federal Judicial Center first observed that “too many opinions are being printed,”<sup>235</sup> the Fourth

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232. Petition for Rehearing and Petition for Rehearing en banc at 2, *Perry v. United States*, 669 F. App’x 113 (4th Cir. Nov. 15, 2016) (No. 16-1129) (“If this Court affirms closure, remit \$1000.00 to me and send the entire docket to the Federal District Court of the District of Columbia. I paid that money for a hearing on my claims not as a giveaway to the state.”).

233. See Richman & Reynolds, *supra* note 12, at 282–83 (“When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case . . .”).

234. Although examining the extent of the courts of appeals’ use of the Kafkaesque decision is a project for another day, I note anecdotally that Kafkaesque decisions can be found to varying degrees in numerous circuits. In addition to the Fourth Circuit and Eighth Circuit examples discussed above, see, for example, *Zaharescu v. JPMorgan Chase Bank, N.A.*, 696 F. App’x 827 (9th Cir. 2017); *AYDM Associates, LLC v. Town of Pamela*, 692 F. App’x 78 (2d Cir. 2017); *Robinson v. Guberman*, No. 16-2330, 2017 WL 5197125, at \*1 (1st Cir. Mar. 13, 2017); *United States v. Arvelo-Negron*, No. 15-1949 (1st Cir. Mar. 2, 2017); *Shakir v. Jim Murray Financial*, 674 F. App’x 421 (5th Cir. 2017); and *Fobbs v. Maiorana*, 676 F. App’x 298 (5th Cir. 2017).

235. FED. JUDICIAL CTR., ANNUAL REPORT 7 (1971), <https://www.fjc.gov/sites/default/files/2012/AnnRep71.pdf> [<https://perma.cc/XA4D-7K3G>].

Circuit had issued twenty-one decisions in which it explained that a judgment was affirmed for the reasons given by a district court or district judge.<sup>236</sup> Notably, those twenty-one decisions spanned nearly a century (the earliest was 1888, before the Fourth Circuit itself existed),<sup>237</sup> and every single one was published or reported—meaning, it was printed in the official Federal Reporter and had precedential value.<sup>238</sup> Since 1971, however, the court has issued more than 22,500 opinions stating that it was affirming for the reasons given by the district court or district judge.<sup>239</sup> More than 96% of those decisions have issued since 1990.<sup>240</sup> Only about 500 of those decisions were published.

In sum, the *Kafkaesque decision* has the following features: it is a perfunctory decision that either affirms without giving any reason or affirms on the basis of the district court's decision alone. The Kafkaesque decision lacks any suggestion of independent decisionmaking, and it is nonresponsive to the arguments made on appeal. It does not identify the issues on appeal or explain why the appellate arguments are wrong. It is also inscrutable to the public. Kafkaesque decisions reflect the barest appellate process, and they are the most problematic unpublished decisions from a procedural justice perspective.

#### IV. REASON-GIVING IN UNPUBLISHED DECISIONS

Some unpublished decisions raise greater procedural justice concerns than others. *Publishable decisions*, which are almost indistinguishable from published decisions, may be problematic from a precedential or lawmaking perspective, but they otherwise reflect independence from the district court, respect for the litigant, and responsiveness to the appellant's arguments. *Kafkaesque decisions*, on the other hand, do the opposite. The *memo decision* appears to be an appealing alternative to the barebones and unresponsive *Kafkaesque decision*, but it too is far from perfect. Arguably, the *avoidant de-*

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236. The Fourth Circuit uses boilerplate language to resolve many appeals. To determine the history of that practice, I searched the Fourth Circuit database on Westlaw using the following search terms for each decade after 1970, adjusting the date range for the relevant decade: advanced: ((affirm! /4 reason! /4 "district court" "district judge")) & DA(aft-12-31-1970 & bef 01-01-1980).

237. *McLane v. United States*, 35 F. 926, 927 (C.C.D. Md. 1888) (“[W]e are of opinion that the decision of the district court should be affirmed; and the reasons submitted in the district court in support of its judgment, in its opinion filed in the cause, are so well considered and ample to sustain its judgment, that no further opinion is required in the case, and a decree will be signed affirming that judgment.”).

238. See, e.g., *id.*

239. See *supra* note 236 (discussing Westlaw search process). Some of the search results possibly captured cases where a judge might have stated that she would affirm for the reasons given by the district court, while also explaining her analysis in some depth. Such formulation would have been used before publication practices changed, and the data suggest that formulation was used sparingly before the 1970s.

240. Only 29 such decisions issued in the 1970s; 744 issued in the 1980s.

*cision* has some institutional value without undermining the litigant’s procedural justice experience—even if an avoidant decision may be a relatively unsatisfying end to the appellate process. This Part articulates and defends a minimum reason-giving expectation for most unpublished decisions, with an eye toward furthering procedural justice values in interactions between vulnerable litigants and the federal appellate courts. I argue that independent reasons for rejecting an appeal should almost always be given when oral argument is not; otherwise, unpublished decisions threaten to undermine essential procedural justice values at the appellate stage.

#### A. *The Argument Against Kafkaesque Decisions*

The argument for reason-giving in most unpublished decisions is not hard: where the litigant has had no other touchpoint with judicial authority in the appellate process, the reasons given to explain the result are the court’s only opportunity to further procedural justice values. The decision itself is the most meaningful touchpoint in the process; to the extent appellate courts strive to meet procedural justice goals, reason-giving shows litigants respect, allows for meaningful participation, and demonstrates the decisionmaker’s independence and trustworthiness.

Decisions that lack these basic elements of fair process—as Kafkaesque decisions do—must serve other, weightier interests if they are to have any place in the appellate justice system. Kafkaesque decisions do not. In her thoughtful work on reason-giving, Mathilde Cohen identifies three core objections to a reason-giving norm: reason-giving (1) takes too much time,<sup>241</sup> (2) “yield[s] insincerity and artificiality,”<sup>242</sup> and (3) undermines institutional values.<sup>243</sup> None of these reasons against reason-giving offers shelter to the Kafkaesque decision.

Let’s start with the first, which may be the most obvious in this context: reason-giving takes enormous time—time that the unpublished decision was meant to save. Shortchanging reason-giving in some circumstances frees up resources for careful reason-giving in others. Harder cases get more time and resources, at the expense of the easy cases. Especially from a procedural instrumentalist’s perspective, that may be a reasonable—even a desirable—distribution of resources. Why reinvent the wheel? But even the instrumentalist might have some concern that a court’s failure to engage in independent reasoning might create opportunities for error.<sup>244</sup> A reason-giving

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241. Cohen, *supra* note 162, at 522–25.

242. *Id.* at 522.

243. *Id.* at 514–17.

244. At least for a time, there was concern among judges that unpublished decisions should not be cited because the staff attorneys who wrote them were “kids that are just out of law school” who were “sloppy or wrong”—hardly a ringing endorsement for the accuracy of unpublished decisions. See Macfarlane, *supra* note 25, at 129 (quoting Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 6, 17 (2007)) (discussing perceptions of staff attorneys’ work).

discipline can ensure accuracy,<sup>245</sup> and that discipline is most effective when the decisionmaker attempts to work through her own reasoning<sup>246</sup>—a process that also serves to signal the independence of the decisionmaker.

Consider, for example, the Supreme Court's recent decision in *Welch v. United States*,<sup>247</sup> involving the retroactive application of the Court's decision in *Johnson v. United States*,<sup>248</sup> which had held that a portion of the Armed Career Criminal Act<sup>249</sup> was unconstitutionally vague.<sup>250</sup> The Eleventh Circuit had denied the appellant, who was proceeding pro se,<sup>251</sup> a certificate of appealability<sup>252</sup> on the retroactivity issue—a standard that required an Eleventh Circuit judge to conclude that no “reasonable jurist[] could debate whether . . . the petition should have been resolved in a different manner . . .”<sup>253</sup> To deny the relief Mr. Welch sought, the court had to conclude that it was “beyond all debate” that he was not entitled to relief.<sup>254</sup> The Eleventh Circuit presumably did so based on the reasoning of the district court's decision alone, because it offered no reasons for the denial of a certificate of appeal-

245. In the process of giving reasons, a judge may discover that the decision “just won't write,” where a result that may have seemed justifiable “cannot survive the journey to written form.” Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1318 (2008) (“Most judges, like others to have opined on the subject, buy into the notion that writing provides an important discipline on thought.”). Chad Oldfather's work largely confirms this intuition: a reason-giving discipline may benefit accuracy—at least in some cases. *See id.* (“Our study of the relationship between writing and cognition suggests that this understanding [of the use of written decisions as a constraint on judicial decisionmaking] is largely appropriate. Legal decisionmaking, much like solving the Tower of Hanoi, often requires thought to proceed in logical steps, such that a decisionmaking process with a written component could be expected to increase its effectiveness.”).

246. One might point out that, more often than not, the person who works through the reasons given to support a particular decision is a judicial staff attorney, not a judge. *See supra* text accompanying notes 99–102 (discussing the role of staff attorneys). If the actual “decisionmakers” have worked through their reasons in a private memorandum that accompanies the perfunctory public unpublished decision, then the question of reason-giving is ultimately a question of disclosure, not a question of accuracy. *But see supra* note 244 (discussing concern over judicial staff errors and sloppiness). The instrumentalist may find the mere existence of the private memorandum sufficient to allay any concerns over accuracy, but my procedural justice lens necessarily takes a less instrumental view.

247. 136 S. Ct. 1257 (2016).

248. 135 S. Ct. 2551 (2015).

249. Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

250. *Johnson*, 135 S. Ct. at 2557, 2560.

251. *Welch*, 136 S. Ct. at 1263. Mr. Welch also filed a pro se petition for a writ of certiorari, providing the necessary exception to my expectation that it is more difficult for second-tier appellants to obtain further review from Kafkaesque decisions. *Id.*

252. *Welch v. United States*, No. 14-15733-C (11th Cir. June 9, 2015) (order denying certificate of appealability).

253. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Eleventh Circuit's decision operated as a merits determination, given the showing required for relief. *See id.* (setting standard for obtaining a certificate of appealability).

254. *Welch*, 136 S. Ct. at 1264.

bility.<sup>255</sup> In a seven-to-one decision, however, the Supreme Court held not only that the Eleventh Circuit should have granted Mr. Welch a certificate of appealability but also that he may have been entitled to an amended sentence because he had argued correctly that *Johnson* should apply retroactively.<sup>256</sup>

The point should be plain: independent reason-giving, even in appeals that appear to be losers, may well avoid the errors inattention sometimes produces. So even an instrumentalist may hesitate to ascribe to the view that unpublished decisions need no reasons at all—if for no reason other than that such decisions may be essentially unreviewable by the Supreme Court, and some errors may go undiscovered as a result of abandoning reason-giving (if we consider *Welch* to be the exception that proves the rule).<sup>257</sup> If courts insulate their reasons from public or judicial scrutiny, no one—not lower courts, not judges on the panel, not the Supreme Court—can fault the decision’s reasoning or detect its error.

So, let’s assume that even the most instrumental among us would agree that at least some unpublished decisions need reasons; the difficulty, then, would be deciding which decisions deserve reasons and which do not. That’s a very difficult question to answer in the abstract. Perhaps, instead, we should consider what kind of time investment we might be asking courts to make if they were to offer reasons in nearly all unpublished decisions. If we are balancing the efficiency benefits with the risk of error, perhaps we should know what the efficiency benefits really are before we relieve courts of any reason-giving expectation in a significant number of decisions.

The instrumentalist’s concern with reason-giving is only persuasive, in my view, if the instrumentalist’s central presumption holds true: that reason-giving in unpublished decisions takes significant *judicial* time, thereby taking judicial time away from other, more complex appeals.<sup>258</sup>

But that presumption is likely only true in a limited sense, and it stretches credulity in the main. I will first explain the circumstances in which I would agree that facially under-reasoned unpublished decisions may save significant time. Then, I will debunk the time-saving fallacy more broadly. Although I do not take an instrumental view of procedure, I suggest that instrumentalists may overvalue time-saving, while undervaluing public disclosure of the reasons for a particular appellate decision.

255. See *Welch*, No. 14-15733 (order denying certificate of appealability).

256. *Welch*, 136 S. Ct. at 1268 (remanding case to determine whether Mr. Welch was entitled to relief or whether, instead, he qualified for a sentencing enhancement under another provision of the Armed Career Criminal Act).

257. And *Welch* surely is the exception, not the rule, because the Supreme Court is not usually an error-correcting court. See SUP. CT. R. 10.

258. It is possible that these decisions actually free up judicial time to do other things entirely, i.e., that judges are, in fact, leisure-seeking. For purposes of this Article, however, I will assume, that the administration of judicial resources has been arranged to maximize resources available for the most difficult or “important” cases—an assumption that animates much of the judicial writing on unpublished decisions.

First, I agree that some unpublished decisions save *significant* judicial time. I suspect, however, that time-saving is greatest in the circumstances that produce the *avoidant decision*—that is, in particularly complex or difficult appeals in which judges agree on outcome but not on reasoning. If the value to be maximized under our unpublication regime is efficiency, then the avoidant decision makes good sense. To be sure, preparing for oral argument requires a significant investment of judicial time.<sup>259</sup> But a summary adjudication offers judges an efficiency boon when they are certain about an outcome but less certain about the reasons for getting there. For many judges, the opinion-writing process itself requires the most effort and the greatest investment of resources.<sup>260</sup>

But now, let's debunk the time-saving fallacy of the unpublished decision. The kind of time-saving the avoidant decision offers is the exception, not the norm. Most unpublished decisions are only time intensive in the aggregate. If, as courts press, they use unpublished decisions only for routine, second-tier appeals involving common appellate issues,<sup>261</sup> it should take little effort to explain the reasons for the court's decision. If the case involves complex or unsettled issues, then by the court's own rules, the appeal should be bumped to the first track for a deeper dive. But where the law is settled and the application of the law to the facts is not subject to disagreement, the giving of reasons should be straightforward and easy to do.

Even more importantly, *reason-giving should already have been done by a staff attorney*. In every circuit, staff attorneys draft memoranda recommending the disposition of many of the appeals that result in unpublished decisions.<sup>262</sup> Surely, those memoranda say more than "See the district court's

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259. Remember that the avoidant decision comes from a first-tier appeal—that is, an appeal that has full appellate process in all other respects but happens to result in a perfunctory decision after oral argument. See *supra* Section III.C; see also Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247, 252 (2003) ("Each judge thoroughly prepares for oral argument and usually arrives at the sitting with questions about each case. When those questions are answered at oral argument, the correct ruling often becomes clear to the judges."). Judge Wilson's description of the appellate process in the Eleventh Circuit suggests that the Eleventh Circuit uses the perfunctory post-argument decision to provide swift justice when the outcome is clear. *Id.* at 252–53. He does not suggest that the court issues these decisions to avoid certain questions post-argument, as seems to have occurred in *Henry v. City of Mt. Dora*, see *supra* notes 201–206 and accompanying text.

260. For an extreme illustration, consider Kozinski's description of his opinion-writing process: "My clerks and I normally go through 20–30 drafts of an opinion; 50 or 60 drafts is not uncommon as I polish and revise, shift footnotes and add rhetorical flourishes over the course of weeks, sometimes months." Alex Kozinski, Essay, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1711 n.9 (1991).

261. See *supra* text accompanying notes 182–184.

262. See, e.g., POSNER, *supra* note 21, at 88–116 (reprinting staff attorney memoranda); Levy, *supra* note 14, at 344–54 (describing staff attorneys' work).

decision.”<sup>263</sup> The point is: the reasons already exist somewhere within the court’s private files; the only question for the judges assigned to the case is whether to disclose those reasons to the litigants and whether to subject those reasons to scrutiny.

I will concede, for the sake of argument, that reason-giving in *all* second-tier appeals, in the aggregate, may take more judicial time.<sup>264</sup> It will, at the very least, add to the time judges spend reviewing the substance of the unpublished decision. How can that possibly be a bad thing, given that the decision has persuasive value and affects someone’s life? If our courts of appeals were still laboring under ever-increasing caseloads or were moving slower year-over-year, the cost of additional review before terminating an appeal might weigh against a reason-giving expectation for second-tier appeals. But that is not the case.<sup>265</sup> Nor do litigants care particularly about judicial delay.<sup>266</sup> For the reasons discussed, decisional quality likely has a far more significant impact on litigants’ perception of procedural fairness than any delay in waiting for that decision.<sup>267</sup>

If time costs are not enough to defeat a reason-giving expectation, then let’s turn to the next potential objection: a reason-giving norm may unwittingly foster insincerity.<sup>268</sup> Those who distrust the sincerity of judicial decisionmakers may be especially concerned about a reason-giving expectation, as it may only exacerbate that distrust. Even for those of us who view judicial decisionmakers more benevolently, the “psychology of motivated reasoning”<sup>269</sup> suggests that requiring reasoned explanations might “encourage

263. Controversially, Judge Posner gave us a window into these memoranda by publishing several in his self-published book; indeed, they do more. See POSNER, *supra* note 21, at 87–96.

264. *But see* Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN ST. L. REV. 243, 272–73 (2013) (finding no correlation between increased bench presence—the amount of time a judge spends presiding over adjudication of issues in open court, as a rough measure of procedural fairness—and average case disposition times).

265. See *supra* text accompanying notes 116–118, 135–137 (discussing caseload statistics and median times for resolution).

266. See Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, 65 DEPAUL L. REV. 323, 351 (2016) (“For decades, however, procedural justice studies have suggested that cost and delay do not play a significant role in litigants’ opinions of procedural fairness.” (citing E. ALLAN LIND ET AL., RAND INST. FOR CIVIL JUSTICE, R-3708-ICJ, THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 55–56 (1989) (“Delay appears not to play a substantial role in determining whether tort procedures are seen as fair and whether the litigant leaves the court satisfied.”))).

267. I imagine that the quality of the decision might color one’s perception of the time taken for a court to resolve an appeal; litigants might well feel differently about a long wait for a fully reasoned result than a short wait for a Kafkaesque result.

268. Cohen, *supra* note 162, at 518–22.

269. *Id.* at 520; see *id.* at 519 n.204 (“We often search for a convincing rationale for the decisions that we make, whether for inter-personal purposes, so that we can explain to others the reasons for our decision, or for intra-personal motives, so that we may feel confident of



judges to think about their reasons for the decision in a strategic way before deciding the outcome” and “may work as an incentive for [judges] to fabricate post hoc constructions intended to justify their intuitions.”<sup>270</sup> Put simply, judges may not give the *actual reasons* for a particular decision; if we require judges to explain themselves, they may do so insincerely.<sup>271</sup>

If courts weren’t free to “avoid” the issue, the appeals that create avoidant decisions might be ripe for post hoc rationalizing of the sort Cohen warns may lead to insincere results.<sup>272</sup> Where there is little precedent to guide the decisionmaker, her decisionmaking process may be less logical and more intuitive than we might expect or desire. This risk seems greatest in cases with novel questions or unusual circumstances, but it is also present in contentious or divisive cases. Again, this suggests a limited role for avoidant decisions. But I struggle to see how routine appeals would be fertile ground for insincere results.

Finally, let’s turn to the institutional objection to reason-giving. Reason-giving may force undesirable—indeed, counterproductive—agreement among decisionmakers, especially on multimember courts. Cass Sunstein and Frederick Schauer have separately identified two interconnected institutional costs of an inflexible reason-giving norm. First, Sunstein has argued that incompletely theorized agreements on particular outcomes are necessary and, indeed, valuable.<sup>273</sup> Judges more easily agree “on relatively narrow or low-level explanations” for their decisions, according to Sunstein, and, when they do, “[t]hey need not agree on fundamental principle.”<sup>274</sup> Armed with only this limited agreement, judges might well say less, not more, to decide a case.<sup>275</sup>

Similarly, Schauer contends that reason-giving can bind judges in undesirable ways, because “to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.”<sup>276</sup> Giving a reason thus commits the reason-giver (more or less) to that generality (actually, a rule), too, and to applying that generality again in a case that also falls within it. Likewise, “when we justify a rule or principle itself,” we invoke greater levels of generality, thus “put[ting] the class of instances encompassed by it within a wider class of instances encompassed by a more

having made the ‘right’ choice.” (quoting Eldar Shafir et al., *Reason-Based Choice*, 49 COGNITION 11, 33 (1993)).

270. *Id.* at 520–21.

271. *But see* Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 1005 (2008) (arguing that judges must publicly state reasons for their decisions so that “parties to a case, and all others whose interests might be affected by its outcome [can] know why the law has been applied in one way rather than another”).

272. *See supra* note 269.

273. Sunstein, *supra* note 187, at 1735.

274. *Id.* at 1736.

275. *Id.* (“[Judges] do not offer larger or more abstract explanations than are necessary to decide the case.”).

276. Schauer, *supra* note 162, at 641 (emphasis omitted).

general principle.”<sup>277</sup> Reason-giving ultimately forces the reason-giver “to transcend the very particularity of that case.”<sup>278</sup> A judge who says little more than “affirmed” or “we find no error” has issued, instead, a *highly* particularized decision.<sup>279</sup> That kind of particularized decision may avoid the thoughtless or unfortunate commitment to a reason, a rule, or a generality over which the reason-giver is less sure.<sup>280</sup>

In our context, however, neither of these reasons not to give reasons should hold any particular sway. We’re thinking about decisions that are nonprecedential; they have no binding effect on lower courts or other panels. We are less worried about the kinds of agreement costs that Schauer and Sunstein identify; the publication decision itself mitigates much of that concern. Indeed, even the publishable decision does not bind, thus suggesting it may have an institutional role where judges find it difficult to reach agreement on a precedential outcome.

To the extent we find institutional worries about reason-giving in unpublished decisions, however, those concerns are likely most significant in cases presenting unusual factual scenarios or particularly difficult or novel questions. By definition, Kafkaesque decisions are not born in these contexts, but avoidant decisions always are. In some exceptional cases, judges rightly may be hesitant to give reasons in particularly novel or complex cases, for fear (as Schauer has suggested)<sup>281</sup> that they may be bound to more general rules over which they have less certainty, even if they are bound only in some loose sense because the decision has, at most, only persuasive value. Forcing agreement over more fundamental principles—even in unpublished decisions—may sow disharmony in the court and (especially) uncertainty in the circuit’s law.

Although I can find room for some avoidant decisions in an unpublication scheme, I do not mean to suggest that courts *should* be in the business of avoiding complex issues—only that doing so may sometimes be defensible in light of the institutional costs of an inflexible reason-giving requirement. In difficult cases, however, the accuracy-enhancing effects of reason-giving are likely great.<sup>282</sup> Courts, therefore, must be careful in exercising their in-

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277. *Id.*

278. *Id.*

279. *Id.* at 640 (explaining that the “extreme of nongenerality is ‘specificity’ or ‘particularity’” and that “generality and particularity mark opposite directions on the same scale”); see also Sunstein, *supra* note 187, at 1754 (“With full particularity, the judgment is not merely incompletely theorized; it is not theorized at all.”).

280. See Schauer, *supra* note 162, at 656 (“Having given a reason, the reason-giver has, by virtue of an existing social practice, committed herself to deciding those cases within the scope of the reason in accordance with the reason.”).

281. See *id.* at 654–56 (describing commitment costs).

282. See *supra* note 245 and accompanying text (discussing the “just won’t write” phenomenon).

herent discretion to avoid issues.<sup>283</sup> Withholding reasons in a complex case may be understandable, but even where the decision is itself legally correct, the withholding may not be justifiable. Courts generally should know the difference between the complex one-off and the recurring issue or the high-profile case that calls for public reasons, even if courts may not be able to predict with perfect foresight when a lawmaking decision is needed and when an unpublished decision would suffice.<sup>284</sup> And if the issue is, indeed, recurring, surely the court will have an opportunity to address it again—and fix its mistaken failure to issue a reasoned (and, likely, lawmaking) decision when the issue first arose.

Even if unpublished decisions generally raise fewer of the kinds of institutional concerns Cohen has identified, it may be that courts are reluctant to issue even minimally reasoned decisions in many unpublished decisions for fear of creating more “junk” law.<sup>285</sup> Because unpublished decisions issued after 2006 are citable,<sup>286</sup> an unpublished decision that says enough about the case and the basis for the decision may be persuasive to lower courts and future appellate panels. To avoid any inadvertent lawmaking effects for lightly considered appeals, courts may use Kafkaesque and avoidant decisions as the functional equivalent of the no-citation rule. By saying next to nothing, courts effectively make their decisions uncitable.<sup>287</sup>

In doing so, however, the courts also deprive everyone—litigants, the public, other courts—of important information about how and why the appeal was resolved as it was. Failing to explain why a particular recurring issue or argument is wrong wastes a valuable signaling opportunity. If courts were to show repeat players (like prisoners) that the arguments they advance have been tried unsuccessfully many times before—a fact that cannot be gleaned from the face of the Kafkaesque decision itself—perhaps the volume of pro se appeals might begin to recede. Although a reduction in pro se appeals is not a goal I urge courts to pursue, judges may feel differently—and see the

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283. See Sunstein, *supra* note 187, at 1751 (“If judges on a panel have actually agreed on a general theory, and if they are truly committed to it, they should say so (even if, for reasons I have suggested, they should usually be reluctant to commit). Judges and the general community will learn much more if they are able to discuss the true motivating grounds for outcomes.”).

284. See Reynolds & Richman, *supra* note 42, at 1191–94 (arguing that judges are not able to predict when decisions should be precedential or not).

285. Chief Judge Howard Markey of the U.S. Court of Appeals for the Federal Circuit once described unpublished decisions as “junk.” Chief Judge Howard T. Markey, Remarks at the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), in 128 F.R.D. 409, 414 (1989).

286. FED. R. APP. P. 32.1.

287. Kafkaesque decisions that incorporate the reasoning of a lower court may be citable by reference to the lower court decision. See, e.g., *supra* note 224 and accompanying text (discussing the *Perry* decision). But the Kafkaesque decision’s facial inscrutability may render it useless to many; anyone searching through a commercial database of court of appeals decisions for a particular fact pattern or legal proposition would not find a decision like the *Perry* case (unless the lower court decision was appended to the court of appeals decision).

possibility of such reduction as a good reason to devote more time to pro se appeals.

Similarly, judges may see the Kafkaesque decision as the best solution to a nuisance: meritless appeals from frequent filers, including, especially, prisoners. I question the effectiveness of Kafkaesque decisions to deter nuisance filings, given what we know of their procedural justice effects and the reasons why losing appellants appeal.<sup>288</sup> And, to the extent the unpublished decision itself was meant to be a deterrent to such filings, the rise of pro se litigation suggests that it has not been effective. Regardless, courts have other tools to combat truly frivolous filings, including “three strikes” laws to restrict prisoner filings.<sup>289</sup> Although I’m not advocating for these tools, they are direct and transparent. If courts believe an appeal is truly frivolous, they should say so; otherwise, how is the pro se litigant to know?

Put simply, the reasons not to give reasons are unconvincing in the context of Kafkaesque decisions. Time-saving, worries about insincerity, and institutional concerns are slight and surely outweighed by the benefit of reason-giving to a decision’s recipient. If reason-giving does not take up significant resources or impose other systemic costs, courts should offer reasons for their decisions whenever doing so might offer some benefit—and especially when withholding reasons might inflict individual and institutional harm.

### B. *The Argument for a Minimum Reason-Giving Requirement*

To maximize the procedural justice experience of unpublished decisions, I urge courts to issue unpublished decisions that at least do the following: independently (1) identify the issues on appeal; (2) explain the relevant law; and (3) apply that law to key facts. Some decisions may call for more, but few should issue with less—unless the case implicates the institutional concerns that create avoidant decisions, which may have a limited role to play in an unpublication scheme (without undermining the litigant’s procedural justice experience).

The reason-giving expectation I propose can be accomplished succinctly, as the Eleventh Circuit example illustrates.<sup>290</sup> The decision will likely borrow heavily from, if not rest entirely on, the work of the staff attorney who reviewed the appeal and prepared a memorandum recommending a disposition. This alternative may underscore just how abysmal the Kafkaesque deci-

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288. See *supra* notes 172–174 and accompanying text (discussing study on reasons why individuals appeal, knowing that chances of success are remote).

289. See 28 U.S.C. § 1915(g) (2012) (requiring prisoners to pay court filing fees up front if they have three “strikes,” i.e., dismissals based on frivolousness, maliciousness, and even failure to state a claim); FED. R. APP. P. 38 (sanctions for frivolous appeals).

290. See *supra* note 199 and accompanying text (reproducing *Edgerton* decision). My reason-giving recommendation is also not particularly new. In 1975, the Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman Hruska, made a similar recommendation. See *supra* note 198.

sion is: can a simplistic analysis that may be nothing more than a cut-and-paste job from a staff attorney memo *really* be preferable? Admittedly, I am proposing only modest, incremental improvement: courts should do away with Kafkaesque decisions in favor of memo decisions in every appeal that does not go to oral argument.

The memo decision has superior procedural justice effects for at least two reasons. First, Tyler's work underscores that it is the *perception* of participation that matters most for experiences of procedural justice. What matters is that a court *appears* to have considered the litigant's arguments, not that those arguments have had any actual effect on the decision. Identification of the issues raised provides some contextual clue that the briefs have been read and understood. Even where courts continue to reason through incorporation, it is possible that merely identifying the arguments raised on appeal might have positive procedural justice effects. To that end, where the litigant has simply rehashed her trial court brief, the court should say so. Perhaps in these circumstances something less than the Eleventh Circuit's treatment of Ms. Edgerton's appeal is sufficiently responsive, but the court should explain why it has failed to engage with the appellate arguments.

Second, independent reasoning (even if taken verbatim from a staff attorney memo, which may well be the only *independent* work done in an appeal) is likely more responsive to the arguments made on appeal than the district court's decision will be. Responsive reasoning not only validates the appellant's voice, but it also provides an opportunity for the court to demonstrate its independence from the district court and to be accountable for its own decision. The appearance of independent review may—and I stress *may*—provide some “cushion” to tolerate and legitimate a bad result.<sup>291</sup>

Memo decisions may be preferable only because pro se and other second-tier litigants are likely unaware of certain features of appellate process. They may not know that the memo decision likely involved the same amount of judicial time and scrutiny as the Kafkaesque decision. They may not know that staff attorneys have primary responsibility (if not ultimate authority) for the resolution of their appeals, no matter how detailed the result. Indeed, were these facts widely known, the memo decision's procedural justice effects might be marginal at best. Research on the subjective experience of second-tier appellants would help us better understand—and not just extrapolate from other descriptive models—the procedural justice effects of reason-giving in this context.

Finally, some pro se litigants may not be able to decipher a fully reasoned published, publishable, or even a memo decision without the benefit of a lawyer's guidance—a feeling familiar to many law students. Many (if not most) pro se litigants will not have had access to the same educational opportunities as the readers and writers of law review articles. That fact, how-

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291. See TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 36, at 107 (noting that “fair procedures can act as a cushion of support when authorities are delivering unfavorable outcomes” and that the cushion may be “fairly robust”).

ever, should not change our reason-giving expectation to any significant degree, though it may affect *how* courts articulate those reasons. The pro se litigant surely can tell the difference between the Kafkaesque decision and the memo decision; she knows the back of the hand when she sees it. Posner’s recent work on reason-giving in pro se appeals<sup>292</sup> goes further than I will (for now) to urge courts to write decisions that actually *educate* pro se litigants.<sup>293</sup> His judge-as-teacher model has much to commend it, and future work should consider more deeply the role of (and any limits on) appellate court activism in pro se appeals. For now, though, courts can improve their output significantly by eliminating Kafkaesque decisions entirely, in favor of memo decisions of varying degrees (that is, some may look more like the Third Circuit’s decision and some more like the Eleventh Circuit’s).

#### CONCLUSION

Our federal courts of appeals face an enormous workload. The pressures of time make it impossible for any of us—whether we are judges, practicing lawyers, or academics—to do our best work all of the time. In a world of fixed resources, the way the federal courts of appeals have decided to manage their dockets may strike many as the right balance.<sup>294</sup> But the question of resource allocation is distinct from considerations of the quality of judicial output in unpublished decisions. And by any measure, the Kafkaesque decision should have no place in our judicial system.

I am mindful, however, that it is easy for an academic to criticize the judiciary—even an academic who has served as a law clerk to a judge on one of our nation’s busiest courts. It may be better to hear the same message from a fellow judge, the late Judge Patricia Wald: “Terse orders and memoranda may be the only possible judicial response to a large number of cases in an overcrowded system, but we must be careful that our decisions do not deteriorate into standardized forms.”<sup>295</sup>

I am not urging judges to spend more time on unpublished decisions—though I suspect doing so might reduce the risk of error and greatly improve those decisions and their procedural justice effects. I do, however, urge courts to make public the reasons they already have for ruling how they rule: give litigants the reasons contained in the staff attorney’s (or law clerk’s)

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292. See *supra* note 21 and accompanying text (discussing Posner’s work on pro se appeals in federal courts of appeals).

293. See POSNER, *supra* note 21, at 29 (suggesting that courts should “[p]rovide brief statements of the reason(s) for denying an appeal, in simple language intelligible to pro se’s”); *id.* at 46–47 (recommending staff attorney explore other avenues of relief available to pro se litigant, which court might include in its decision).

294. See Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 406 (2013) (concluding that current case-management practices comport fairly well with an idealized system that maximizes error correction and lawmaking).

295. Wald, *supra* note 29, at 779.

memo where doing so does not implicate the institutional concerns that undergird the avoidant decision.<sup>296</sup> Reason-giving is an important—and usually the *only*—procedural justice experience in the appellate process for second-tier appeals.

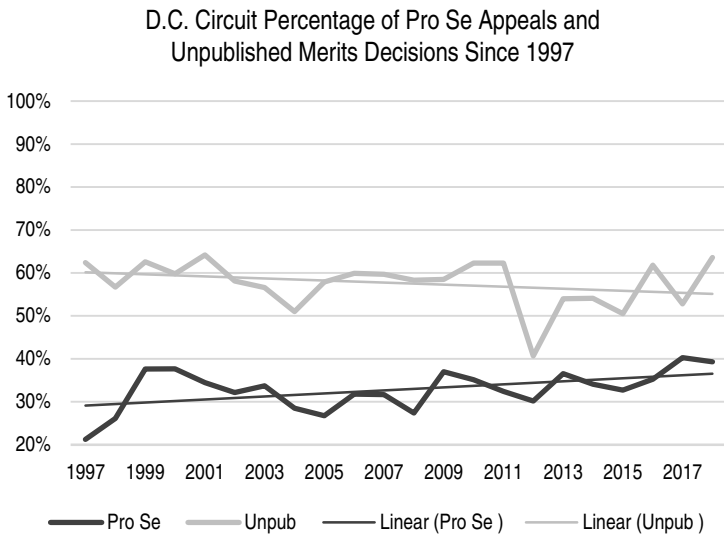
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296. Based on my experience as a law clerk on the Eleventh Circuit and based on what Posner has revealed in his work, *Reforming the Judiciary*, some courts already follow this practice in many cases. See POSNER, *supra* note 21, at 16–17 (discussing work of staff attorney's in drafting unpublished decisions); *id.* at 88–97 (example of staff attorney work product). Posner notes that, at least in the view of the Seventh Circuit's staff attorneys' office, the Seventh Circuit issues relatively lengthy and reasoned unpublished decisions compared to other courts. See *id.* at 18.

APPENDIX A:  
UNPUBLISHED DECISIONS AND PRO SE APPEALS<sup>297</sup>

The figures in Appendix A show two trends by circuit: the volume of pro se appeals commenced (as measured against the entire volume of appellate litigation) and the volume of unpublished merits decisions issued (as measured against all merits decisions). In each geographic circuit other than the D.C. Circuit (see Figure A-1), the volume of both unpublished decisions and the percentage of pro se appellate litigation has increased since 1997.

FIGURE A-1




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297. All data have been drawn from JUDICIAL BUSINESS tbl.B-12 (1997–2017) and JUDICIAL BUSINESS tbl.B-9 (1997–2017).



FIGURE A-2

First Circuit Percentage of Pro Se Appeals and Unpublished Merits Decisions Since 1997

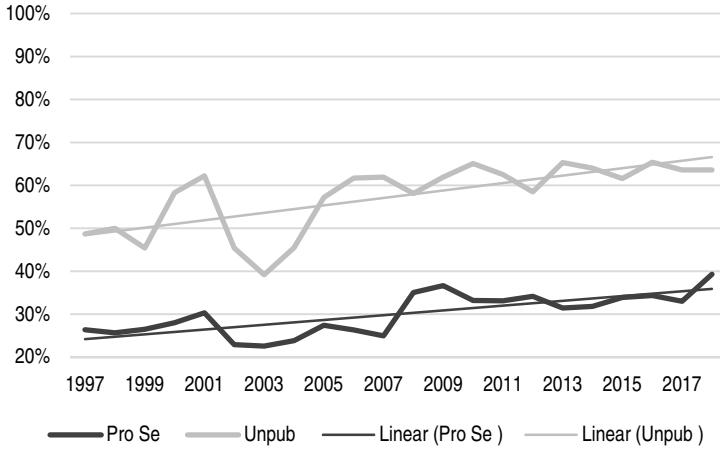


FIGURE A-3

Second Circuit Percentage of Pro Se Appeals and Unpublished Merits Decisions Since 1997

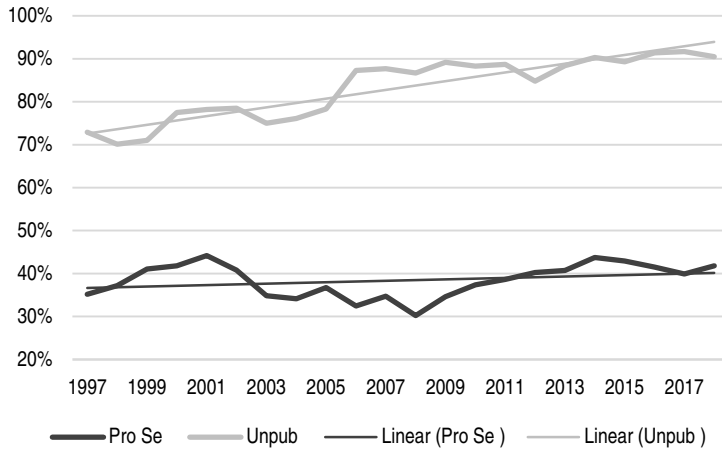


FIGURE A-4

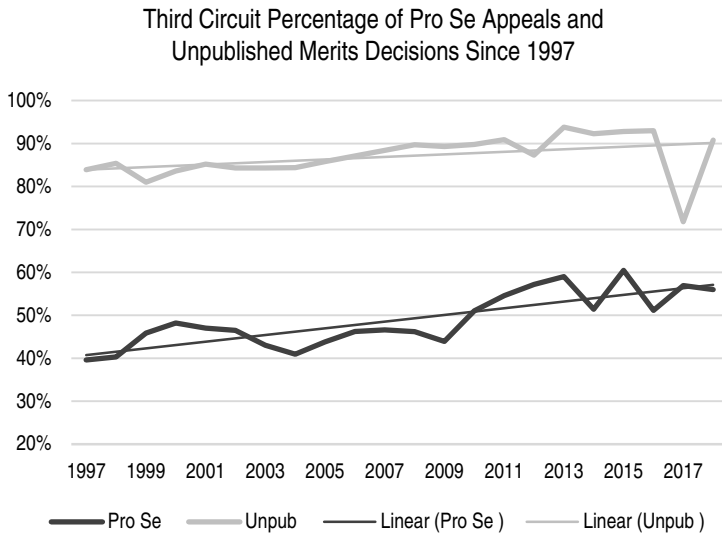


FIGURE A-5

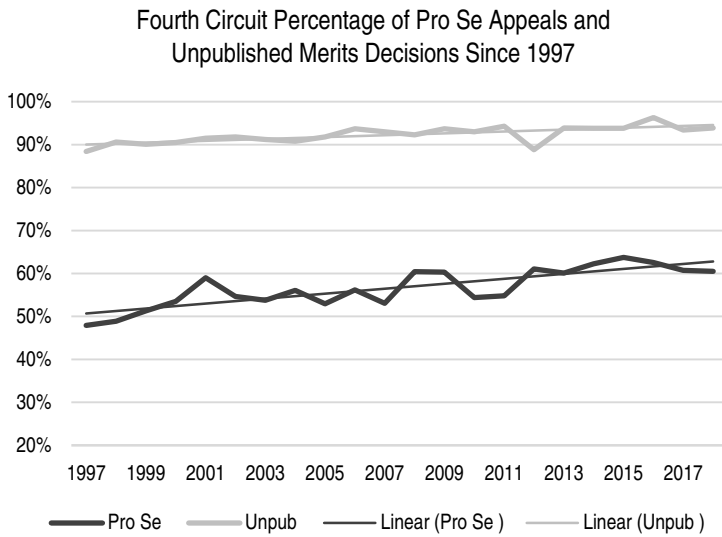


FIGURE A-6

Fifth Circuit Percentage of Pro Se Appeals and Unpublished Merits Decisions Since 1997

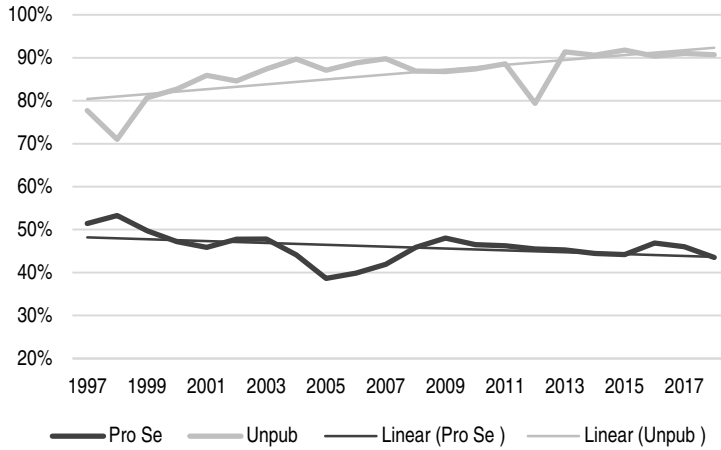


FIGURE A-7

Sixth Circuit Percentage of Pro Se Appeals and Unpublished Merits Decisions Since 1997

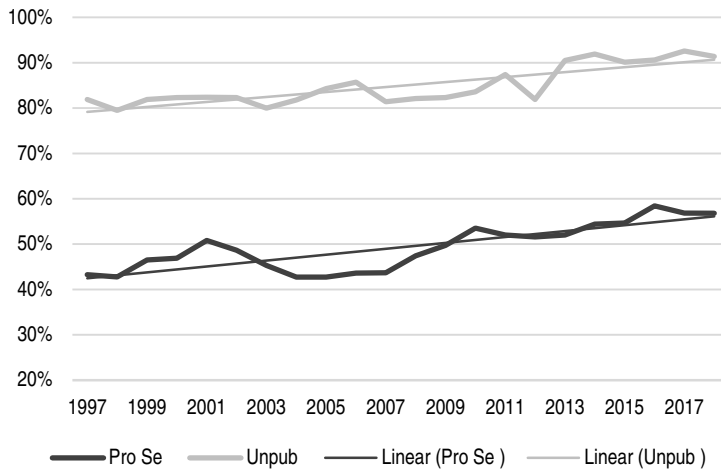


FIGURE A-8

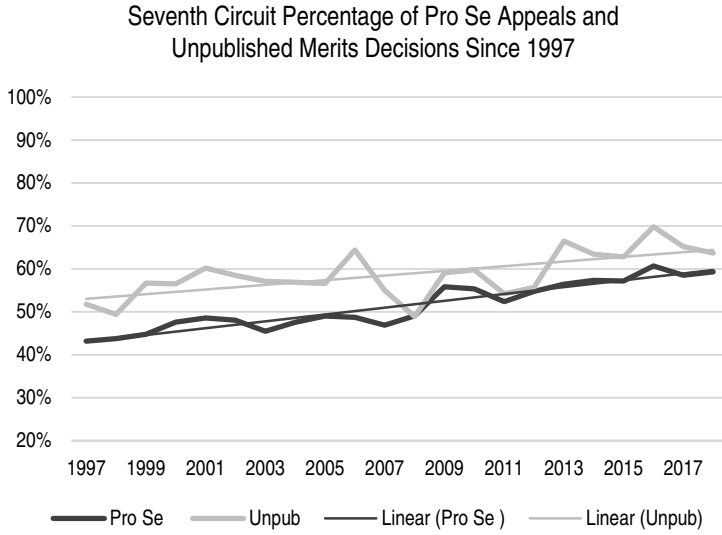


FIGURE A-9

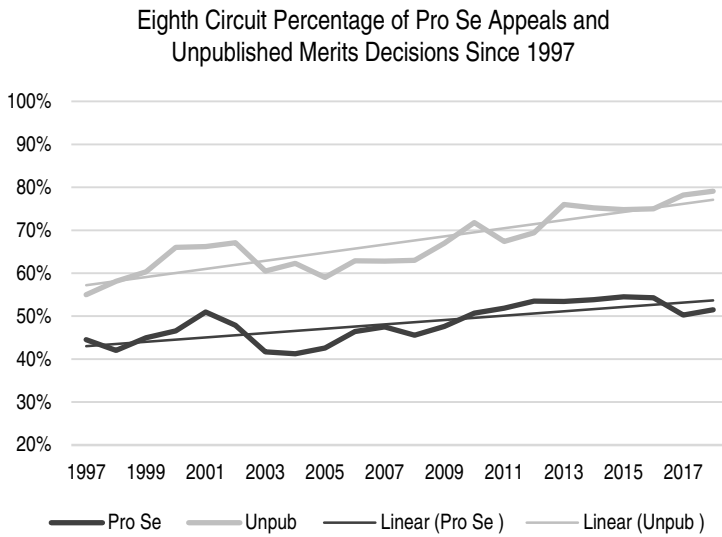


FIGURE A-10

Ninth Circuit Percentage of Pro Se Appeals and Unpublished Merits Decisions Since 1997

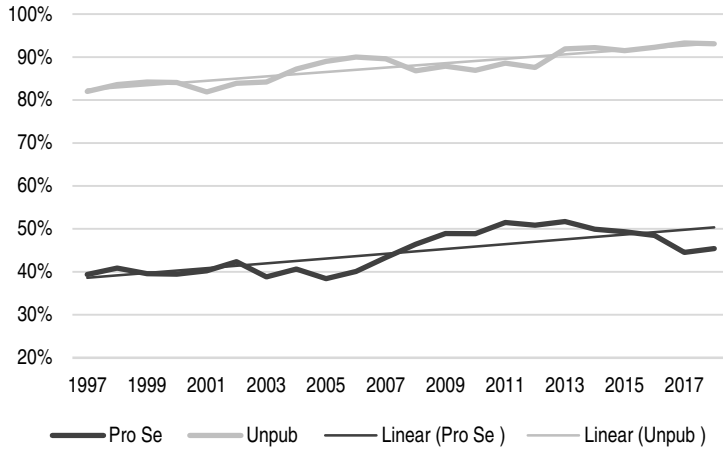


FIGURE A-11

Tenth Circuit Percentage of Pro Se Appeals and Unpublished Merits Decisions Since 1997

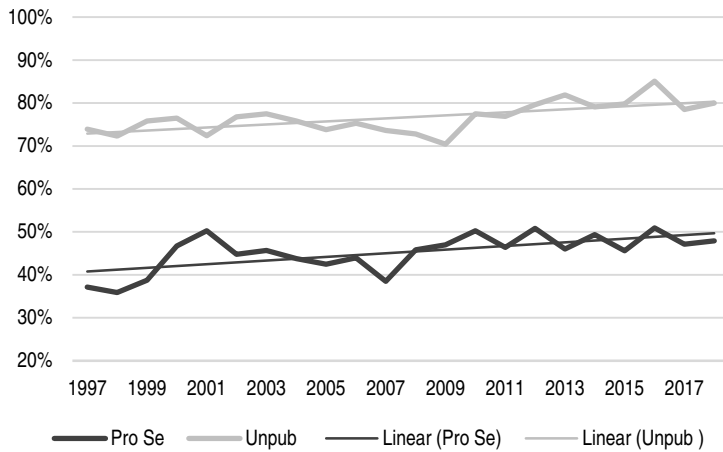
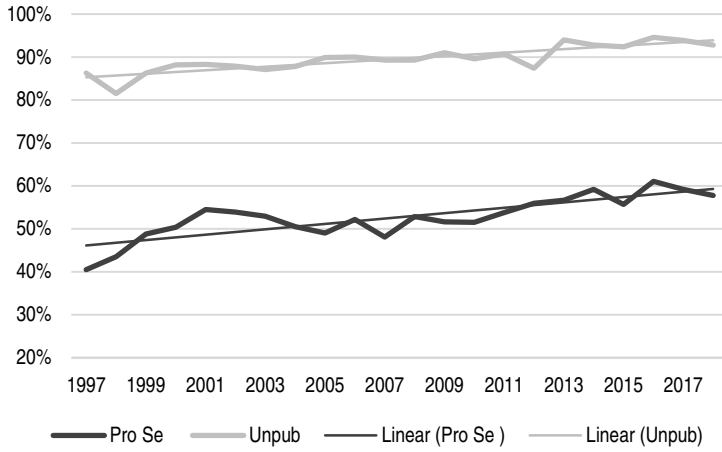


FIGURE A-12

**Eleventh Circuit Percentage of Pro Se Appeals and Unpublished Merits Decisions Since 1997**

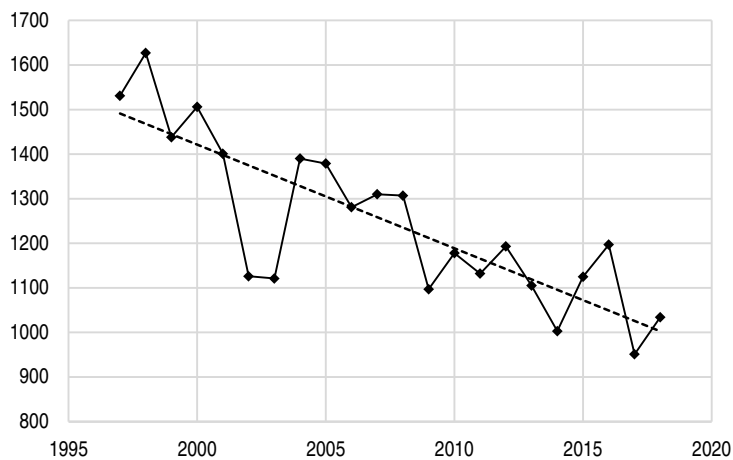


APPENDIX B:  
APPEALS COMMENCED OVER TIME BY CIRCUIT<sup>298</sup>

The figures below capture the overall downward trend in appeals filed annually in each of the geographic U.S. courts of appeals since 1997.

FIGURE B-1

D.C. Circuit Appeals Commenced  
Annually Since 1997



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298. JUDICIAL BUSINESS tbl.B (1997–2017).

FIGURE B-2

First Circuit Appeals Commenced  
Annually Since 1997

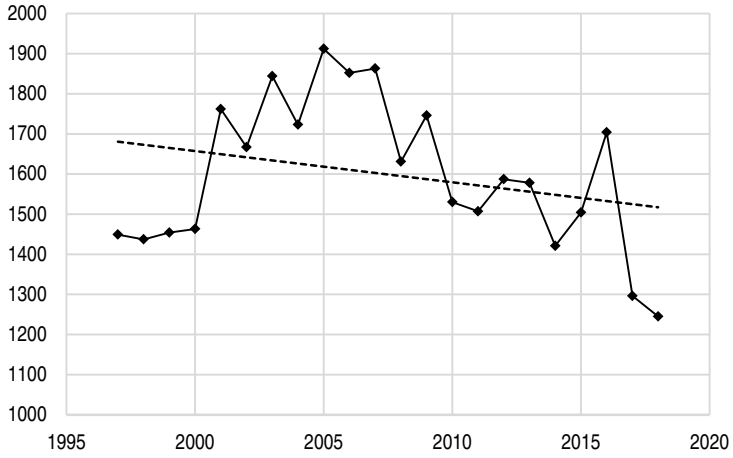


FIGURE B-3

Second Circuit Appeals Commenced  
Annually Since 1997

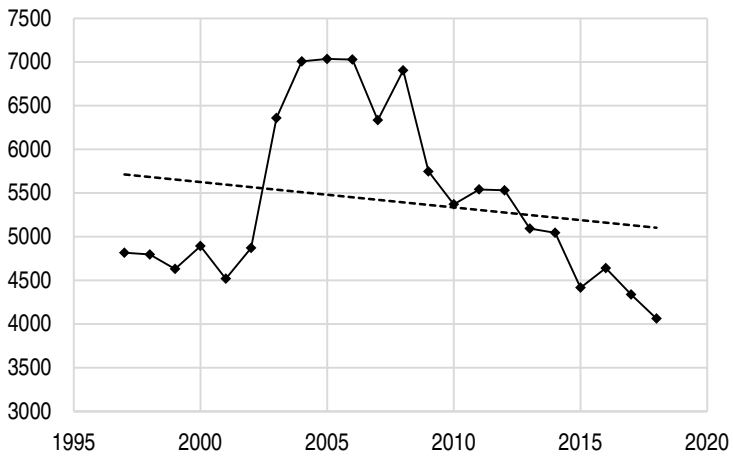




FIGURE B-4

Third Circuit Appeals Commenced  
Annually Since 1997

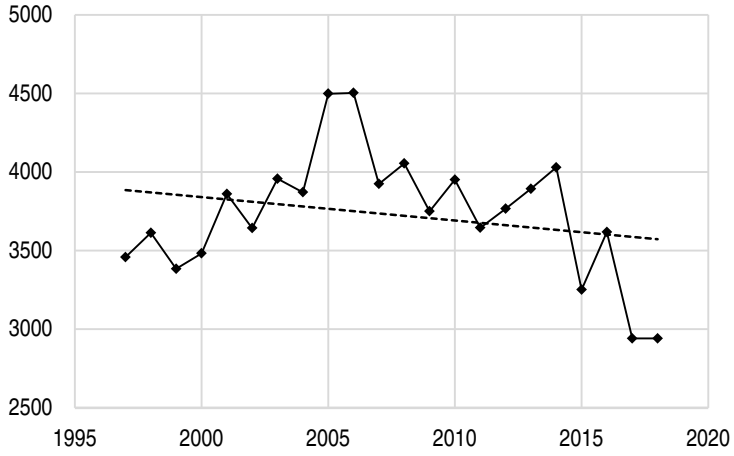


FIGURE B-5

Fourth Circuit Appeals Commenced  
Annually Since 1997

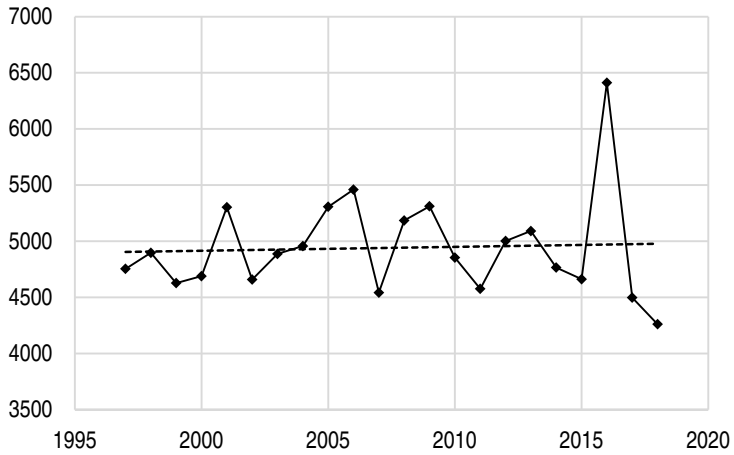


FIGURE B-6

Fourth Circuit Appeals Commenced  
Annually Since 1997 (Without 2016 Data)

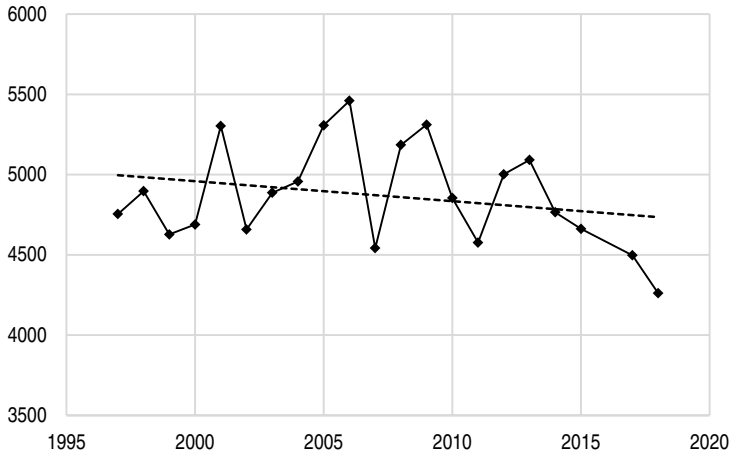


FIGURE B-7

Fifth Circuit Appeals Commenced  
Annually Since 1997

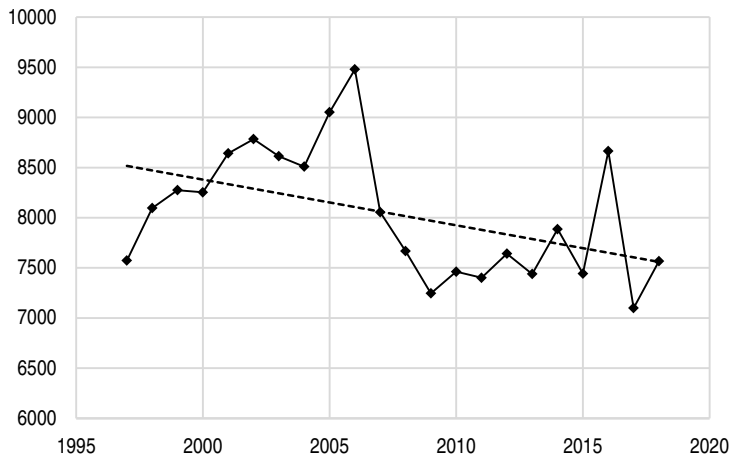


FIGURE B-8

Sixth Circuit Appeals Commenced  
Annually Since 1997

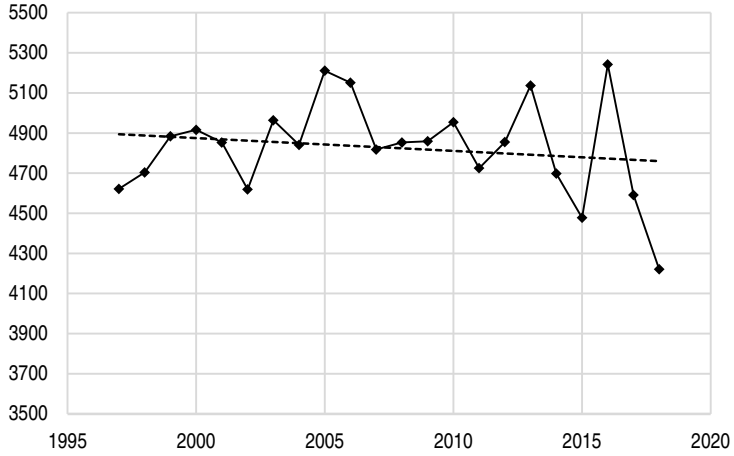


FIGURE B-9

Seventh Circuit Appeals Commenced  
Annually Since 1997

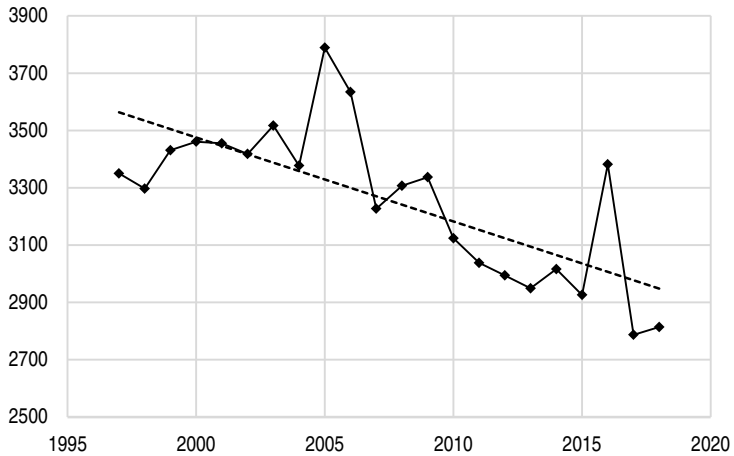


FIGURE B-10

Eighth Circuit Appeals Commenced  
Annually Since 1997

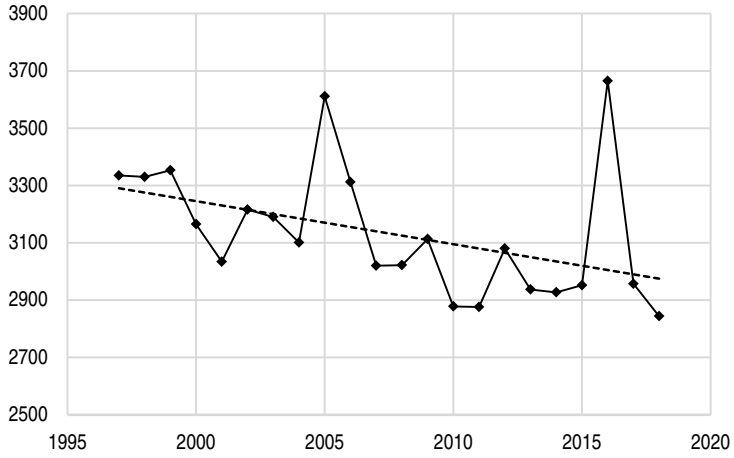


FIGURE B-11

Ninth Circuit Appeals Commenced  
Annually Since 1997

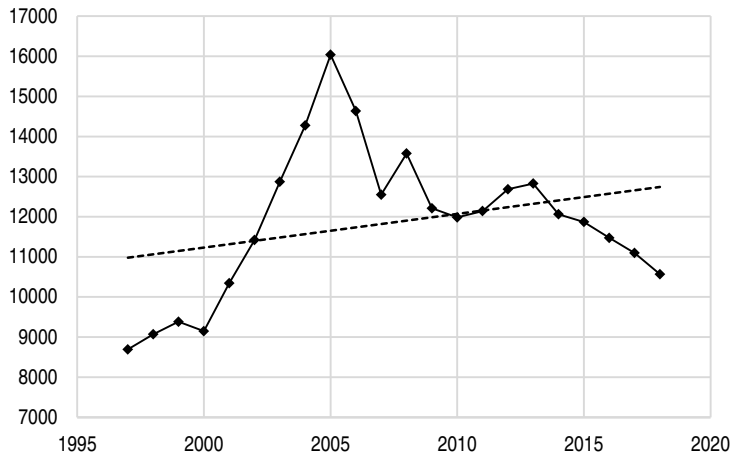


FIGURE B-12

Tenth Circuit Appeals Commenced  
Annually Since 1997

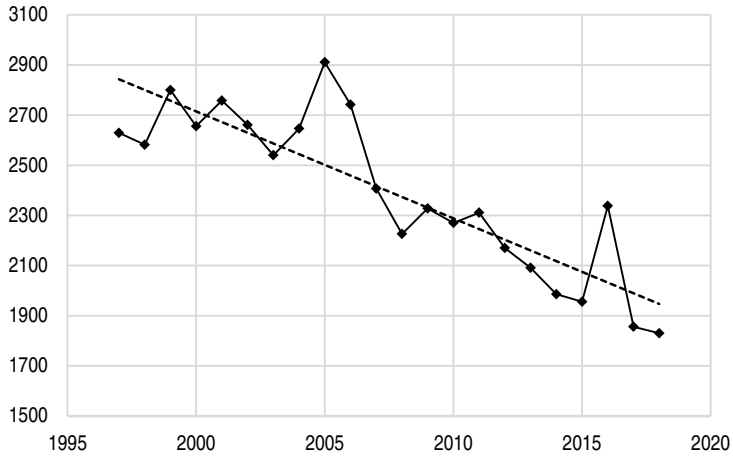


FIGURE B-13

Eleventh Circuit Appeals Commenced  
Annually Since 1997

