DISTORTED DIGITAL DATABASES AND THE CONSTRUCTION OF LEGAL KNOWLEDGE

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"The ability to study a court's opinions is accordingly critical to developing a sophisticated understanding of what law is."[1]

ABSTRACT

This article examines whether the sporadic publication of decisions in family law cases, which is customary in most common-law jurisdictions, even in the digital era, serves the interests of the public, the legal profession, or the development of knowledge in family law. The paper includes a theoretical overview of the debate surrounding the status of published versus unpublished decisions within the context of the construction of legal knowledge, a summary of studies examining the differences between digital databases and actual court rulings, and the particular policies and practices of the publication of rulings in family law in a number of

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[1] 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, 783 (1995).

common law jurisdictions. The empirical research in this study is based on a content analysis of a sample of 1,373 decisions from the family court archives in Israel and 1,145 decisions from five databases over the same seven-year period. We found that in general, not only was a very small percentage of decisions regarding family law published in the commercial databases, but the image of family courts that is reflected in the databases is distorted on several dimensions: Courts are depicted as more confrontational (adversarial) than they actually are; family disputes in the databases address more complicated issues than actual family court litigation; published decisions are longer and more complex than actual court decisions; decisions are more beneficial to women in the databases than they are in reality; there are a majority of male judges in database decisions, despite the fact that in practice family court judges are mostly female; and judicial work in the periphery is under-represented. This study contributes to understanding the dynamics of the publication of rulings and the pitfalls of the partial accessibility of legal decisions in a particularly challenging and constantly evolving area of law. If the distorted version of family litigation and case law that appears in the databases constitutes the knowledge that professionals have about family law, one can only speculate about the effect of this biased view on future practice and judicial decisions in this area.

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I. INTRODUCTION

In 2015, the British Columbia Supreme Court of Canada issued a judgment that affirmed the open court principle and the publication of judgments even in high-conflict family court cases.[2] The Court rejected the father's request to have the reasons for the judgment sealed, claiming that "[i]t is an unfortunate reality litigants face when, unable to privately resolve their highly personal disputes, there is a trial of the proceeding, which is in the public domain."[3] However, in order to protect the children's best interests, the Court added that the reasons for the judgment would be anonymized as far as possible.[4] Despite this judgment that unequivocally held the open court to be an 'overriding principle' which applies in family law matters just as it does in non-family civil matters, there is still a substantial gap between the availability of decisions in family law and other legal matters.

Should there be an obligation to publish decisions in family court cases? Does the sporadic publication of decisions in these cases, which is customary in most common-law jurisdictions, even in the digital era,[5] serve the interests of the public, the legal profession, or the development of knowledge in family law? This is the issue that is at the heart of this Paper. Based on original data from Israel comparing published and unpublished family law cases, we conclude that the lack of systematic and comprehensive publication of family court cases leads to a distorted perception of the litigation and even more so of caselaw in this area.

Until the digital era, commercial or formal-state entities in common law countries took upon themselves the responsibility of

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[2] M. v. M., 2015 CanLII 1297 (Can. B.C. S.C.).

[3] *Id*. ¶ 10.

[4] For a discussion of the difficulties involved in anonymizing cases in family and the importance of publication despite these problems, see Sujoy Chatterjee, *Balancing Privacy and the Open Court Principle of Family Law: Does De-Identifying Case Law Protect Anonymity?*, 23 DALHOUSIE J. LEGAL STUD. 91, 92 (2014).

[5] *See generally* Julia Brophy & Ceridwen Roberts, *'Openness and transparency' in family courts: what the experience of other countries tells us about reform in England and Wales*, FAMILY POLICY BRIEFING 5 (May 2009), https://www.nuffieldfoundation.org/wp-content/uploads/2019/12/Family_Policy_Briefing_5.pdf [https://perma.cc/57BH-4MR3] (discussing the approach to family law case publication and the challenges faced in England, Wales, Canada, Australia, New Zealand, and Scotland).

publishing selected judicial decisions, usually delivered by appellate courts.[6] These decisions represented only a small portion of the cases discussed in the courts. Substantial rulings, even in appeals, remained invisible to both judges and lawyers. [7] Furthermore, published rulings enjoyed a special status in many countries, since only they could be used as precedents, even if other decisions that were not published were accessible to the parties.[8]

With the development of digital technology, increasing numbers of rulings were made available online, independent of their

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[6] RICHARD SUSSKIND, THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY 21 (1996); Dragich, *supra* note 1, at 758.

[7] Stephen L. Wasby, *Publication (or Not) of Appellate Rulings: An Evaluation of Guidelines*, 2 SETON HALL CIR. REV. 41, 42 (2005); Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 975 (2008); Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 517 (2016).

[8] Wasby, *supra* note 7, at 43; Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 69 (2004). In England, a collection of instructions limits the right of lawyers to cite decisions that have not been published and gives the judges the authority to declare the precedential value of the ruling. In the United States of America, federal appellate courts are "free to issue unpublished opinions and to decide their precedential value, but are prohibited from imposing any restrictions on the citation of unpublished opinions." Lee Faircloth Peoples, *Controlling the Common Law: A Comparative Analysis of No-Citation Rules and Publication Practices in England and the United States*, 17 IND. INT'L & COMP. L. REV. 307, 308 (2007). However, the precedential value of the non-published opinions that now may be cited in decisions is still unclear. Robert A. Mead, *Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed by Health Care Providers*, 37 WM. MITCHELL L. REV. 206, 251 (2010); Charles J. Stiegler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 LOY. L. REV. 535, 543 (2013). In Canada, although detailed decisions are required in complex cases, and while summary decisions are allowed for simple or non-controversial cases, no attempt was made to prohibit the citation of certain categories of decisions as precedents. Jonathan de Vries, *Legal Research, Legal Reasoning and Precedent in Canada in the Digital Age*, 48 ADVOC. Q. 1, 17 (2018) (Can.). "While courts would sometimes suggest that some decisions, usually short oral decisions or handwritten endorsements, might have limited precedential value, courts never formally designated their decisions as being authorized or unauthorized for future citation and the general rule remained that all decisions had equal capacity for future precedential value." *Id.* However, decisions are sometimes cited that have not been published and thus are not easily available. For example, in Ontario, all decisions are assigned a neutral citation, but this does not mean they have been published in any format; and "in British Columbia, even if an oral decision is transcribed, the judge or master involved has the final say over whether it is added to the website," and thus may not be available. Susannah Tredwell, *Unreported Decisions: A New Challenge*, SLAW (Jan. 14, 2014), http://www.slaw.ca/2014/01/14/unreported-decisions-a-new-challenge/ [https://perma.cc/A3M6-6EFZ].

publication in print form. This led to debates about the status of decisions published only online compared to those that were published in print.[9] Despite the appearance of many rulings in computerized databases, the distinction was often maintained between print rulings, which were considered "published" rulings, and those that only appeared in databases, and were considered "unpublished" rulings with all the implications stemming from this differentiation. Many of the debates and empirical studies that examined the process of publishing judicial decisions challenged the distinction between the status of "unpublished" and "published" rulings in the digital era.[10] Other studies compared the different attributes of published versus unpublished decisions in order to expose the inherent difficulties of relying only on published rulings.[11]

Based on these writings, mainly by researchers in the U.S. and Canada, our study examines whether databases reliably reflect the legal reality on a subject that is of special interest, namely family law.

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[9] *See, e.g.*, Peoples, *supra* note 8, at 321; William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1724 (2005); 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, 705 (2006); Diane S. Sykes, *Citation to Unpublished Orders under New FRAP Rule 32.1 and Circuit Rule 32.1: Early Experience in the Seventh Circuit*, 32 S. ILL. U. L.J. 579, 579 (2008).

[10] *See, e.g.*, Wasby, *supra* note 7, at 46; Lauren S. Wood, *Out of Cite, Out of Mind: Navigating the Labyrinth that is State Appellate Courts' Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561, 562 (2016); Donald R. Songer et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 964 (1989).

[11] Some of these studies examined the differences between cases designated as unpublished and those that were published in official sources while others examined differences between those available in databases with those actually decided by the courts. *See* Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133, 1135-37 (1990); Evan J. Ringquist & Craig E. Emmert, *Judicial Policymaking in Published and Unpublished Decisions: The Case of Environmental Civil Litigation*, 52 POL'Y RES. Q. 7, 9 (1999); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 69, 75 (2001); Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 109 (2007); David S. Law, *Judicial Ideology and the Decision to Publish: Voting and Publication Patterns in Ninth Circuit Asylum Cases*, 89 JUDICATURE 212, 214 (2006); Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL JUD. STUD. 213, 215-16 (2009); John Szmer et al., *The Efficiency of Federal Appellate Decisions: An Examination of Published and Unpublished Opinions*, 33 JUST. SYS. J. 318, 320 (2012); Keith Carlson et al., *The Problem of Data Bias in the Pool of Published U.S. Appellate Court Opinions*, 17 J. EMPIRICAL JUD. STUD. 224, 225-26 (2020).

In Israel, as in many other countries,[12] the default rule in family court decisions is non-publication, and explicit court approval is required for their publication. We compare the attributes of the family court decisions that appear in the online databases with a random sample of rulings from family court archives. It should be noted that since our study, the Israel Courts Administrator has denied all subsequent requests by researchers to gain access to files and records of proceedings held behind closed doors, including all family court proceedings.[13]

We found that, in general, not only was a very small percentage of decisions regarding family law published in databases, but the image of family courts that is reflected in the databases is distorted on several dimensions: Courts are depicted as more confrontational (adversarial) than they actually are; family disputes in the databases address more complicated issues than actual family court litigation; published decisions are longer and more complex than actual court decisions; decisions are more beneficial to women in the databases than they are in reality; there are a majority of male judges in database decisions, despite the fact that in practice family court judges are mostly female; and two urban areas are over-represented, accompanied by an under-representation of the legal work conducted in the periphery, including the complete absence of several courts from the periphery.

This Article first describes the theoretical and practical aspects of the creation of legal knowledge through publication of common law rulings, focusing on the policy and practices of the publication of family law decisions in several common law countries, including

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12 *See* Marc van Opijnen et al., *Online Publication of Court Decisions in the EU. Report of the Policy Group of the Project*, 17 LEGAL INFO. MGMT. 136 (2017) (discussing the anonymization of published court documents); James Mumby, *Transparency in the Family Courts, Publication of Judgements: Practice Guidance*, COURTS & TRIBUNALS JUDICIARY, para. 9 (Jan. 16 2014), https://www.judiciary.uk/wp-content/uploads/2014/01/transparency-in-the-family-courts-jan-2014-1.pdf [https://perma.cc/F7TE-DC49]; Julie Doughty, Alice Twaite & Paul Magrath, *Transparency Through Publication of Family Court Judgments: An Evaluation of the Responses to, and Effects of, Judicial Guidance on Publishing Family Court Judgments Involving Children and Young People*, CARDIFF UNIV. (2017), https://orca.cardiff.ac.uk/99141/1/Transparency%20through%20publication%20of%20family%20court%20judgments%20March%202017.pdf [https://perma.cc/7M3R-K7LE]; Christina L. Boyd et al., *Mapping the Iceberg: The Impact of Data Sources on the Study of District Courts*, 17 J. EMPIRICAL LEGAL STUD. 466, 474-77 (2020).

13 *See infra* text accompanying note 101.

Israel (Part II). It then offers a description of the methodology and samples used in this study to compare court decisions in databases to those in family court archives (Part III), followed by a presentation of the findings of the study (Part IV). Finally, it discusses the implications of the findings on the development of legal knowledge in family law (Part V).

II. THE POWER OF THE (UNPUBLISHED) WORD

a. Creating Legal Knowledge

Legal knowledge, like all knowledge, is a social product, and is created, transmitted and preserved in social situations through social institutions.[14] Moreover, there is almost always an element of power in the control of knowledge,[15] and thus the role of the gatekeepers who generate and manage knowledge carries great weight—in the legal profession as well as in other areas.[16] In fact, the term "profession" is usually described in terms of the control and monopoly of a particular body of knowledge.[17] In common law countries, the knowledge that legal professionals control is comprised of formal legal sources, including rulings and legislation,

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[14] PETER BERGER & THOMAS LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 49-61 (1966).

[15] Susan B. Boyd, *Backlash and the Construction of Legal Knowledge: The Case of Child Custody Law*, 20 WINDSOR YEARBOOK OF ACCESS TO JUSTICE, 141-42 (2001) (exemplifying the attitude to the power foundation in controlling knowledge in the legal context); *see* Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 250 (John G. Richardson ed., 1986) (giving a general discussion of knowledge as affording power as part of cultural wealth); MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977, at 59 (Colin Gordon ed., 1988) (relating specifically to the connection between knowledge, power and social legitimacy).

[16] ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 1-3 (1988); Richard L. Abel, *The Rise of Professionalism*, 6 BRIT. J.L. & SOC'Y 82, 82 (1979). *See generally* MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977) (analyzing the historical development of the professions in the context of liberal capitalism, and how they function as a form of ideological control, including in the legal profession).

[17] ABBOTT, *supra* note 16, at 102; Herbert M. Kritzer, *The Professions are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & SOC'Y REV. 713, 716-17 (1999).

as well as informal knowledge systems.[18] Rulings afford an essential component in what is considered to be legal knowledge and provide the basis for the accumulation of legal precedents, which are the core of common law jurisprudence. Dragich and Martin noted that access to this knowledge is essential: A judge cannot consider applying rulings as precedents unless she and the lawyers have an effective way of knowing of their existence.[19] Precedent depends, therefore, on the circulation of knowledge within the system and, more precisely, on the system of storing and retrieving information available to lawyers.[20]

Although common law systems rely significantly on precedents and on previous rulings, and legal decisions are an essential source of law, most legal decisions are not published and, accordingly, are available to lawyers only on a limited basis in the U.S., England, and Canada.[21] Whether the decision to publish the rulings rests with the

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[18] SUSSKIND, *supra* note 6, at 27-34, 273-77; Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 766-72 (2003).

[19] Dragich, *supra* note 1, at 800-02; Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 8 (2008).

[20] *See* Levin, *supra* note 7, at 977-86 (relaying the importance of rulings that are not precedential in accumulating legal knowledge that is essential for the work of lawyers).

[21] Peoples, *supra* note 8, at 315–17; Dragich, *supra* note 1, at 760-65; Burton M. Atkins, *Communication of Appellate Decisions: A Multivariate Model for Understanding the Selection of Cases for Publication*, 24 L. & SOC'Y REV. 1171, 1171-72 (1990); Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 L. LIBR. J. 21, 21-22 (1991). Despite the fact that in the U.S. decisions are not published by public authorities, some have been made accessible through other means, such as professional publications and, now, in digital databases. However, the status of unpublished decisions and the possibility of using these decisions as precedents is still unclear and inconsistent. Since 2007, when the Supreme Court amended the Federal Rules of Appellate Procedure, courts cannot prohibit or restrict the citation of federal judicial opinions that have been designated as "unpublished." Yet the unpublished opinions are inconsistently available in the standard research databases, and consumers have little guidance about the extent to which unpublished decisions will be given weight by judges. Michael Kagan et al., *Invisible Adjudication in the U.S. Court of Appeals*, 106 GEO. L.J. 683, 684-85 (2018); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 200-205 (2001); Wasby, *supra* note 7, at 8; Charles J. Steigler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 LOY. L. REV. 535, 542-43 (2013); Patricia J. Schlitz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1430-31 (2005). For further discussion of these topics, see

court (as in the U.S.)[22] or with commercial entities (as in England, Canada and Israel),[23] this restriction to the access and availability of legal knowledge has important implications.[24] Dragich claims that non-publication inhibits the development of the legal body of knowledge, impedes the ability of lawyers and judges to perform their daily tasks, and threatens the legitimacy of the federal courts.[25] Susskind has noted, in the context of British law before the arrival of digital databases, that "in the highest court of the land (the House of Lords) there are no formal means of judges notifying one another of their decisions, which may well be binding. A Court of Appeals

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generally the symposium on *Have We Ceased to Be A Common Law Country*, 62 WASH. & LEE L. REV. 1411 (2005); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions,* 62 WASH. & LEE L. REV. 1667 (2005); Wood, *supra* note 10. In England one may cite decisions that were not published, and these are even likely to have binding force. Susskind, *supra* note 6, at 21. In Canada, during the print era, there was no compulsion to publish decisions and no dominant publisher, such as West in the U.S. Various publishers of law reports in different regions published decisions based on their own criteria, often after a delay of 4-6 months after release of the judgment, and after 18 months after release of Supreme Court decisions. Unpublished decisions were available through the Court offices, but it was very difficult to access them because there was rarely an index that could assist in locating the decisions. There are no restrictions on the citation of unpublished decisions, except that they should be accessible, which was a problem in the era of printed decisions and still remains difficult for some tribunals. Theresa Roth, *Law Reporting in Canada*, 3 CAN. L. LIBR. 204, 204-209 (1977-1978). According to University of Manitoba Law Librarian Mathew Renaud, the Court records (audio only) all decisions. It is then up to the Court to publish or not publish the decisions. The judge does not play a part in deciding to publish the decision.

[22] *See* Dragich, *supra* note 1, at 760-62. However, Robel claims that legal auxiliary officers are the ones who make these decisions. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 960 (1989). In Canada, the editors of the various law reports decided which decisions to publish in the print era, although the availability of free online databases (especially CanLII) has vastly expanded the number of decisions which can be easily accessed. However, the transfer of decisions to the CanLII depends on the judge or the court officer, so that there are still gaps in the decisions available online.

[23] Peoples, *supra* note 8, at 313–15. *Contra* Atkins, *supra note* 21, at 1176-79 (maintaining that judges use "hints" to influence the decisions of the commercial actors). In the U.K. since 2002, there is a now a free public web service "BaliII" which is legally constituted in the UK as a company limited by guarantee and as a charitable trust which provides both previously unreported (published) and reported judgments from a wide variety of courts. BAILLI – THE FIRST 20 YEARS, www.bailii.org/bailii/timeline/#More1999 [https://perma.cc/CSQ4-KRP2].

[24] Levin, *supra* note 7, at 989-94.

[25] Dragich, *supra* note 1, at 760.

judge, for example, has no official mechanism for learning of the findings in a neighboring courtroom."[26]

Furthermore, the litigants must be capable of assessing the formal and informal standards of law and policy, and "take into account not only what reported precedents provide but also the empirical pattern associated with how courts respond to disputes."[27] Levin maintains that relying on the same small proportion of federal-regional court decisions that are published has led to a basic misunderstanding of the federal court rulings in the U.S.[28] The impression regarding the work of the court is likely to be very different if we also examine the decisions that are not published.[29]

Since both lawyers and professionals tend to base their perceptions of the legal system mainly on published rulings, they are liable to draw incorrect conclusions regarding the character of the decisions and the litigants in the field. Thus, for example, Siegelman and Donohue found that not only were the published rulings in cases of employment discrimination longer and more complex than those not published, but the plaintiffs appearing in the published rulings also had a higher income and worked at more prestigious professions than in the unpublished ones.[30] In addition, there was a difference in the outcome of the decisions, with an

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[26] SUSSKIND, *supra* note 6, at 21 (referring to the state of affairs before the appearance of digital databases).

[27] Atkins, *supra* note 21, at 1172-73; *see also* Martin, *supra* note 19, at 8; Robel, *supra* note 22, at 940; Mead, *supra* note 8, at 251.

[28] Levin, *supra* note 7, at 977.

[29] Siegelman & Donahue, *supra* note 11, at 1135-37 (discussing the context of employment discrimination cases); Keele, *supra* note 11, at 215-16 (examining variations in published and unpublished cases against the U.S. Forest Authority); Lizotte, *supra* note 11, at 108 (evaluating the distorted view created by only examining published opinions in the federal district court summary judgment context); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 502-03 (1989) (discussing these differences in the context of litigation in constitutional law at the U.S. federal appellate level).

[30] Siegelman & Donahue, *supra* note 11, at 1150-56. Songer, however, found no differences in complexity and importance between the decisions that were published and those that were not in civil law. His indices for complexity were the rate of the reversal of lower court decisions (on the assumption that reversing the result indicates that the case was not simply mechanical or procedural) and whether there was disagreement between the judges. Donald R. Songer, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206, 209 (1988). Similar findings were discovered in an additional study by Songer et. al., *supra* note 10, at 984.

average dollar award to plaintiffs being four times higher in published compared to unpublished decisions.[31]

Both Lizotte and Wasby found significant differences in the representation of different judicial districts in the computerized databases.[32] In addition, Lizotte found that the databases misrepresented the relationship between the number of rulings awarded in favor of the plaintiffs and the number of those awarded in favor of the defendants.[33] A comparison of three databases—Westlaw, Lexis-Nexis and PACER and docket sheets—also revealed substantial differences among these sources on many variables, including the success rates of litigants and whether the party of the appointing president affects judicial behavior. The authors concluded that "utilizing docket sheets, now available electronically, to gather data will often be required to draw accurate conclusions about the nature of district court litigation and the behavior of district court judges."[34]

It may be suggested that the formal standards for publishing a decision in most jurisdictions are based on perceptions of the importance of the case and its precedential character.[35] It is not surprising, therefore, that published decisions are different from "routine" decisions.[36] However, there are several problems with this claim. First, the criteria for determining the precedential importance of the decision are not completely clear and unequivocal: There is considerable variation in the tendency of judges and courts to publish decisions, or even to make them available on digital databases.[37] Thus there are cases that seem to meet the criteria for

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[31] Other researchers also found differences in the results between rulings that were published and those that were not. *See, e.g.*, Hannon, *supra* note 21, at 217-18 (finding that the number of victories of the National Labor Relations Board in rulings that were not published were 27 times higher than the number of losses, while in rulings that were published the number of victories was only three times higher); Merritt & Brudney, *supra* note 11, at 76-77 (recognizing published opinions are more often decisions delivered by majority opinion, and not unanimously).

[32] Lizotte, *supra* note 11, at 109; Wasby, *supra* note 7, at 43; *see also, generally*, Jolly A. Emrey & Stephen Wasby, *State Dominance of a Circuit: An Exploration*, 32 S. ILL. U. L.J. 545 (2008) (discussing how some states dominate the agenda and precedent that exist in a given federal circuit).

[33] Lizotte, *supra* note 11, at 108. Lizotte also found that bending the ruling to the benefit of the plaintiffs was even more prominent in printed publications.

[34] Boyd et al., *supra* note 12, at 466.

[35] Atkins, *supra* note 21, at 1172-74.

[36] Eisenberg & Schwab, *supra* note29, at 517.

[37] Songer et al., *supra* note 10, at 984; Wood, *supra* note 10, at 562.

publication and nevertheless are not published, and vice versa.[38] McCuskey refers to submerged precedents— reasoned opinions that are buried in court dockets and are not available even on commercial databases.[39] The inconsistent approach of judges in the U.S. regarding whether or not to publish a ruling not only undermines the rule of law,[40] but also conceals it since most cases are not appealed.[41] Moreover, publication inconsistencies may arise due to factors other than differing views on the precedential merit of decisions. Susskind, for example, maintains that "[t]he decision whether or not to report a case is often commercially inspired rather than through any passion for coherent development in common law."[42] Mead presents more dubious reasons for non-publication.[43] He claims that because only one of the twelve cases in which a defendant was successful in an appeal in a health care decision was published, "a cynic could contend that that the courts of appeal, consciously or unconsciously, shields the health care industry from reversal in the supreme court by choosing not to publish decisions in which the industry wins."[44] Similarly, Nielson and Walker suggest strategic and ideological reasons for judges deciding not to publish qualified immunity cases that allow for significant judicial discretion in order to hide opinions that flout Supreme Court precedent and make them less liable to be reviewed.[45] Thus non-

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[38] Merritt & Brudney, *supra* note 11, at 74-75; Dragich, *supra* note 1, at 788. *Contra* Wasby, *supra* note 8, at 123 (finding that only in a few cases was there a problem with the court not publishing a particular ruling).

[39] McCuskey, *supra* note 7, at 516.

[40] Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of* Hart v. Massanari, 62 WASH. & LEE L. REV. 1553, 1555 (2005); Wood, *supra* note 10, at 562; McCuskey, *supra* note 7, at 517. It should be noted that this inconsistency may exist in other jurisdictions, but has been researched in the U.S.

[41] *See, e.g.*, Hannon, *supra* note 21, at 199.

[42] SUSSKIND, *supra* note 6, at 21; *see also* Merritt & Brudney, *supra* note 11, at 85 (analyzing how judges apply the standards to publish in very different ways, even in the same instance, and that a standard, such as the judge's studies in leading schools, also created differentiation between the decisions that were published and those that were not).

[43] Mead, *supra* note 8, at 266.

[44] *Id.* at 264.

[45] Aaron L Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 94 (2016). "Qualified immunity is a judicially created doctrine that shields government officials from being held personally liable for constitutional

publication not only affects the development of legal knowledge, but also disrupts the ability of significant actors, such as the Bar Association and academia, to supervise litigation and judges' decision-making process.[46] As Kagan, Gill, and Marouf claim:

> [w]hen courts decide not to publish a decision, they effectively ensure that the decision is less likely to be subject to public scrutiny. . . . [especially] if the decision is not included in significant legal databases . . . .The most invisible decisions may be those for which transparency is most important to the maintenance of confidence in the judiciary.[47]

Another implication of the large proportion of decisions that are not published is the considerable disparity in knowledge available to the various consumers of the court services.[48] This is the "body of 'secret law'"[49]—the "invisible judgements" that afford unfair advantages to repeat players that are equipped with resources and

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violations—like the right to be free from excessive police force—for money damages under federal law so long as the officials did not violate 'clearly established' law." Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do With Police Reform?*, LAWFARE (June 6, 2020), www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform#:~:text=Qualified%20immunity%20is%20a%20judicially,violate%20%E2%80%9Cclearly%20established%E2%80%9D%20law [https://perma.cc/5GV4-GB9Z].

[46] Circuit Judge Patricia Wald states that the ability to decide not to publish "allows for deviousness and abuse. I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent." Vladeck & Gulati, *supra* note 21, at 1684. *See also* Robel, *supra* note 22, at 943-46; Morgan Hazelton et al., *Sound the Alarm? Judicial Decisions Regarding Publication and Dissent*, 44 AMERICAN POLITICS RESEARCH 649, 653 (2016) (documenting empirical support for ideological and strategic motives for publication); Kagan et al., *supra* note 21, at 700 (maintaining that transparency guards against arbitrariness in judicial decisions).

[47] Kagan et al., *supra* note 21, at 718.

[48] Robel, *supra* note 22, at 940; Merritt & Brudney, *supra* note 11, at 73; Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1437 (2004); McCuskey, *supra* note 7, at 517.

[49] Dragich, *supra* note 1, at 785; Merritt & Brudney, *supra* note 11, at 73.

internal information enabling them to make use of these decisions.[50] Despite the online availability of most Supreme Court decisions and many decisions from the lower courts, researchers are just starting to assess the positive and negative impacts of the accessibility of an increasing number of legal decisions,[51] as well as non-judicial sources found in the various digital databases.[52] Solomon, for example, found that a new arrangement for recognizing only decisions published online as binding (and not those published in printed format) compromised a large group of lawyers in Texas.[53] About a third of the Texas lawyers lacked access to paid digital databases such as Westlaw or Lexis, and therefore were unable to access civil rulings that were not available elsewhere. Similarly, Boyeskie noted the strategic advantages of the government and large legal firms, which can allow themselves full online access, including to rulings that were not published, and thus attain an advantage over smaller firms and private lawyers.[54] Other

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[50] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95, 96-103 (1974) (describing the advantages of return actors (i.e., those who make repeated use of the judicial process) compared to one-time players in everything pertaining to litigation and stating the return players frequently are the "haves" while the one-time players are the "have nots"). Research indicates that bias in selective publication affords an advantage to repeat players. Dragich, *supra* note 1, at 785; Atkins, *supra* note 21, at 1194; Pether, *supra* note 40, at 1592; William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 22 N.Y. L. SCH. J. INT'L & COMP. L. 59, 60 (2003); Jason J. Boyeskie, *A Matter of Opinion: Federal Rule of Appellate Procedure 32.1 and Citation to Unpublished Opinions*, 60 ARK. L. REV. 955, 969 (2008); Wood, *supra* note 10, at 581 (noting that "a disproportionate amount of published opinions appears to involve wealthy clients represented by prominent attorneys").

[51] Mills, *supra* note 50; Peoples, *supra* note 8.

[52] Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 29 (1994); Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 560 (1997). *See generally* Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971–1999*, 75 IND. L.J. 1009, 1014-15 (2000) (maintaining that the development of computerized databases has raised the number of citations of legal journals that are not leading journals). Another implication of the digital era that was examined recently is the use of blogs by law firms in order to increase the number of links to them and to improve their placement in search engines. *See* Adrian Dayton, *Which Law Firm Owns the Most Digital Real Estate?*, NAT'L L.J. (2010), www.jdsupra.com/legalnews/which-law-firm-owns-the-most-digital-rea-16074/ [https://perma.cc/MJ2E-V5RH].

[53] Andrew T. Solomon, *Practitioners Beware: Under Amended Trap 47, "Unpublished" Memorandum Opinions in Civil Cases are Binding and Research on Westlaw and Lexis is a Necessity*, 40 ST. MARY'S L.J. 693, 697 (2009).

[54] Boyeskie, *supra* note 50.

researchers have shown that lawyers who appear on behalf of the State were able to use decisions that were not published and were not available to the opposing party.[55] This was particularly problematic in criminal cases, with prosecutors enjoying more leeway compared to the defense lawyers in citing unpublished decisions.

b. Digital Publication and the Creation of Legal Knowledge

i. The Open Court Principle

The invisibility of a large proportion of decisions also goes against the need for and claim to transparency in the legal system. Indeed, Jeremy Bentham's quote, *"Where there is no publicity there is no justice,"* [56] has appeared in many discussions on courts' publication policy.[57] Judicial transparency takes many forms, including access to court proceedings and records. Former Chief Justice of Canada Beverley McLachlin has stated that "[o]penness signifies that the public and the press have free access to the courts of justice and are entitled to attend and observe any hearing. It signifies that court records and documents are available for public examination".[58] Canadian jurisprudence has generally adhered to the open court principle,[59] stressing the benefits of providing open access to all court decisions and records (including documents filed in court offices), in addition to complying with the rights of freedom

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[55] *E.g.*, Robel, *supra* note 22; Mead, *supra* note 8; WOOD, *supra* note 10.

[56] JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM VOL. 9, 493 (London, Simpkin, Marshall, & Co. 1843).

[57] JUDGES TECH. ADVISORY COMM., CANADIAN JUD. COUNCIL, OPEN COURTS, ELECTRONIC ACCESS TO COURT RECORDS, AND PRIVACY (2003) https://cjc-ccm.ca/cmslib/general/news_pub_techissues_OpenCourts_20030904_en.pdf [https://perma.cc/727W-CXNY].

[58] Beverley McLachlin, *Courts, Transparency and Public Confidence – To the Better Administration of Justice*, 8 DEAKIN L. REV. 1, 2 (2003).

[59] Jane Bailey & Jacquelyn Burkell, *Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information*, 48 OTTAWA L. REV. 143, 143 (2017); Nicolas Vermeys, *Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-examine Our Fundamental Values*, *in* ACCESS TO JUSTICE 123, 125-26 (Karim Benyekhlef et al. eds., Ottawa Univ. Press 2016).

of information and the public's right to know. The open court policy ensures the fair administration of justice and enhances the public's positive perception of, and confidence in, the judiciary;[60] encourages judges to act fairly, consistently and impartially, allowing the public to "judge the judge;"[61] fosters the integrity of the judicial process; allows interested parties to make informed decisions about whether to intervene or become involved as a friend of the court; and can encourage judges to decide cases expeditiously.[62] In Canada, the availability of decisions on a free online database has vastly improved access to these decisions and is the major source of case law. [63] The Canadian Legal Information Institute (hereinafter "CanLII"), provides a very large national compilation of legal materials, comprehensively covering Canada's federal system. CanLII's databases now include decisions of Canadian superior courts and a broad range of administrative tribunals (more than 120 databases), with historical scope typically stretching back to around 2000, but sometimes considerably earlier (to 1985 for Supreme Court decisions).[64] However, in Canada too there are still decisions, even of appellate courts, which are not readily available. For example, in British Columbia, even if an oral decision is transcribed, the judge or master involved has the final word regarding its inclusion in the CanLII website. If consent is not given, the decision is not made available.[65]

In the United States, while access to decisions is problematic regarding appellate courts, it is even more difficult to gain access to lower court opinions. Although in most jurisdictions only Supreme

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[60] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-72 (1980)

[61] Sharon Rodrick, *Open Justice, the Media and Avenues of Access to Documents on the Court Record*, 29 U.N.S.W. L.J. 90, 93-95 (2006); Pether, *supra* note 48.

[62] *Study from the Directorate General for Internal Policies on the "National Practices with Regard to the Accessibility of Court Documents*," 2013 PE 474.406 6, https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474406/IPOL-JURI_ET(2013)474406_EN.pdf [https://perma.cc/AL5H-XAA5].

[63] WestlawNext Canada and LexisNexusQuicklaw are the two main paid-for case providers in Canada. Westlaw Estates and Trusts maintains it has unpublished decisions since 1986, while FamilySource on Westlaw maintains it has a comprehensive collection of unreported and reported decisions.

[64] Graham Greenleaf, *The Global Development of Free Access to Legal Information*, 1 EUR. J. L. & TECH. (2010) ejlt.org/index.php/ejlt/article/view/17 [https://perma.cc/V746-D4PN].

[65] Susannah Tredwell, *Unreported Decisions: A New Challenge,* SLAW (Jan 14. 2014).www.slaw.ca/2014/01/14/unreported-decisions-a-new-challenge/ [https://perma.cc/9D77-ELET].

Court decisions have precedential value, it is well recognized that most legal work is conducted in the lower courts, where judges have the opportunity to make the initial decision on substantive issues.[66] Savchak and Bowie have suggested a bottom-up direction of jurisprudential evolution, in which intermediate court judges play an integral role in the development of precedent and law.[67] They found that judges in state supreme courts often adopt the language and arguments of lower appellate court opinions. Therefore, in a certain sense, judges on the lower courts play a more significant role in shaping the law than do their colleagues in the appeals courts, "yet they often operate free from appellate oversight and public scrutiny."[68] Moreover, the decision-making process in the appeals courts is shaped, at least partially, by what the judges in the appeal know about the case as it is applied in the lower courts. Thus, the legal process in the appeals courts is also biased and provides us with a distorted picture of the case itself. [69] In other words, the lack of information regarding the work of the lower courts will necessarily affect the decisions of appeals courts that are at the center of academic legal research and will inevitably create a biased image of judicial decision-making.

ii. Publishing Cases in Family Law

If publication is problematic in the lower courts, it is even more so with family law. Despite the advantages of the open court policy and the importance of access to decisions for the development of legal knowledge, family law has often been considered the exception to demands for transparency and availability, and subject to special considerations.[70] In the 2005 *Model Policy for Access to Court Records in Canada,* the Judicial Council's Judges Technology Advisory Committee (hereinafter "JTAC") recommended that in cases "where there may be harm to minor children or innocent third parties," protection of children and the right to privacy overcomes

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66 Levin, *supra* note 7.

67 Elisha Carol Savchak & Jennifer Barnes Bowie, *A Bottom-up Account of State Supreme Court Opinion Writing*, 37 JUST. SYS. J. 94, 114 (2016).

68 Levin, *supra* note 7, at 977.

69 *Id.* at 978.

70 Doughty et al., *supra* note 12, at 7.

the open court principle.[71] At the same time, the 2003 Discussion Paper of JTAC ,which formed the basis for the Model Policy, acknowledged that "[t]here is inconsistency in the availability of reasons for decisions in family law cases."[72] Inconsistency and discrepancy between jurisdictions seems to be an accurate description of the situation beyond Canada as well. A 2009 study by the Open Society Justice Initiative, which surveyed sixteen countries, concluded that "[a] prevalent shortcoming among countries surveyed is inconsistency among a system's courts in policies for providing documents."[73]

These inconsistencies exist despite clear international standards. Article 14 to the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), states that:

> . . . [t]he press and the public may be excluded from all or part of a trial . . . when the interest of the private lives of the parties so requires . . . ; but *any judgment rendered* in a criminal case or *in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children*.[74]

While this international standard is quite clear in preferring privacy considerations and the protection of children from exposing their families' disputes, legal systems across the globe still vary widely in their policies on judicial transparency and accessibility to judicial information.[75] In this study, which focused on family courts in Israel, we aim not only to somewhat fill the void in information regarding the work of the lower courts, but also to provide ways of evaluating the extent to which published decisions actually reflect

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[71] JUDGES' TECH. ADVISORY COMM., CANADIAN JUD. COUNCIL, USE OF PERSONAL INFORMATION IN JUDGMENTS AND RECOMMENDED PROTOCOL, ¶ 31 (Mar. 2005), cjc-ccm.ca/sites/default/files/documents/2019/news_pub_techissues_UseProtocol_2005_en.pdf [https://perma.cc/5LUB-FPRN].

[72] JUDGES TECH. ADVISORY COMM., CANADIAN JUD. COUNCIL, *supra* note 57, at 9.

[73] Open Society Justice Initiative, *Report on Access to Judicial Information* 37 (March 2009).

[74] International Covenant on Civil and Political Rights art. 14(1), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (noting that Canada and Israel are both parties to the ICCPR) (emphasis added).

[75] Yaron Unger, *Publication of Family Law Decisions: A Theoretical Background and Comparative Overview*, THE KNESSET (ISRAELI PARLIAMENT) LEGAL DEPARTMENT (2014) (in Hebrew).

the rulings of family courts. Our premise is that, all in all, the power to direct the flow of information and to construct the content of legal knowledge is closely connected to the publication (or non-publication) of legal decisions.[76]

c. Gendering Publication of Legal Decisions

Is the control of legal knowledge also connected to gender? Until recently, female judges in many countries were excluded from higher instances due to a gender-dependent appointment process that stifled their promotion prospects.[77] Through informal social networks (e.g., the "old boys' network" of male judges),[78] useful information was conveyed that strengthened the power of male judges and often weakened the power and the authority of female judges.[79] The one domain that nevertheless might be expected to

[76] Elizabeth A. Tillman & Rachel K. Hinkle, *Of Whites and Men: How Gender and Race Impact Authorship of Published and Unpublished Opinions in the US Courts of Appeals*, RSCH. & POL., Jan-Mar. 2018, at 1, 2 ("Published opinions constitute binding precedent for all future cases in that circuit while unpublished opinions have little impact beyond the litigants.").

[77] Dermot Feenan, *Judicial Appointments in Ireland in Comparative Perspective*, 1 STUD. INST. J. 37, 37-38 (2008); Dermot Feenan, *Editorial Introduction: Women and Judging*, 17 FEMINIST LEGAL STUD. 1, 2-8 (2009); Eyal Katvan, *No More Parsley to Beautify the Salad: The Entry of Women to Judicial Positions and the Attorney's Office in the Land of Israel and the State of Israel*, 32 IYUNEI MISHPAT 69, 70-73 (2010); DAME HAZEL GENN, DIRECTORATE OF JUD. OFFIS. FOR ENG. AND WALES, THE ATTRACTIVENESS OF SENIOR JUDICIAL APPOINTMENTS TO HIGHLY QUALIFIED PRACTITIONERS: REPORT TO THE JUDICIAL EXECUTIVE BOARD 3-4, 8 (2008), https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/the_attractiveness_of_senior_judicial_appointment_research_report.pdf [https://perma.cc/CH9B-Z9N9]; Rebecca D. Gill & Christian Jensen, *Where are the Women? Legal Traditions and Descriptive Representation on the European Court of Justice,* POLS., GROUPS, & IDENTITIES (2018), www.tandfonline.com/doi/full/10.1080/21565503.2018.1442726 [https://perma.cc/AV7C-5R3M]; Melody E. Valdini & Christopher Shortell, *Women's Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices,* 69 POL. RSCH. Q., 865, 865 (2016).

[78] Informal "social networks" describe more extensive networks than those entering the social networking framework which is parallel to the concept of an "old boys' network", which refers to the way in which the social elites maintain their strength through social and business connections. *See* LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 179 (2001) (finding that the lawyers involved in divorce cases in Maine and New Hampshire did not include women in the social network, and that this had implications for the work of female lawyers).

[79] Genn, *supra* note 77, at 21-23; Feenan (2009), *supra* note 77, at 3.

provide a supportive social network or advantage to female judges is that of family law, which is usually considered particularly suitable for women in the legal profession.[80] Whether or not that is the case, there is still a question of whether and how the voice of the woman judge is manifested in rulings accessible to the public. Although there have been studies about the relationship between judges' gender and the outcome of cases,[81] including the connection between the gender of professional participants, litigants, and the results of the case,[82] very few studies have examined the connection

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[80] ULRIKE SCHULTZ & GISELA SHAW, WOMEN IN THE WORLD'S LEGAL PROFESSIONS 33-45 (2003). *But see* Katvan, *supra* note 77, at 71 (regarding distancing from female identification, as mentioned). In fact, a proposal to appoint a woman judge for matters of family law was rejected in Israel already in 1948. Katvan, *supra* note 77.

[81] Some studies have found that the judge's gender does not influence the outcome of cases. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking,* 85 S. CAL. L. REV. 313, 339 (2012); Rosemary Hunter, *More than Just a Different Face? Judicial Diversity and Decision-Making,* 68 CURRENT LEGAL PROBS. 119, 126 (2015). For a review of studies that found little difference, and an explanation of why this is so, whereas others have found that women judges are more sympathetic to women plaintiffs, especially in cases involving women's issues such as sexual discrimination, domestic violence, and family law, see James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes: An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L.J. 315, 319-20 (2007); Katherine Felix Scheurer, *Gender and the U.S. Supreme Court: An Analysis of Voting Behavior in Gender-Based Claims and Civil-Rights and Economic-Activity Cases,* 33 JUST. SYS. J. 294, 311-13 (2012); Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race,* 69 POL. RSCH. Q. 788, 793-96 (2016); Susan W. Johnson, *Family Matters: Justice Gender and Female Litigant Success in Family Law Cases in the Supreme Court of Canada*, 38 JUST. SYS. J. 332, 343-45 (2017); Susan Haire & Laura P. Moyer, *Gender, Law, and Judging*, OXFORD RSCH. ENCYCLOPEDIAS (Apr. 26, 2019), https://doi.org/10.1093/acrefore/9780190228637.013.106 [https://perma.cc/QJX4-WTMJ]; *see also* Katherine Felix Scheurer, *Gender and Voting Decisions in the U.S. Court of Appeals: Testing Critical Mass Theory*, 35 J. WOMEN, POL., & POL'Y 31, 43-49 (2014) (suggesting that female federal appellate court judges are more likely to take on a "different voice" after they reach a critical mass on a given bench).

[82] In Israel, the interaction between women judges, plaintiffs, and defendants was shown to affect the results in criminal law. BOGOCH & DON-YICHYE, GENDER AND LAW: DISCRIMINATION AGAINST WOMEN IN COURTS IN ISRAEL 103-04 (1999); *see also* Ruth Halperin-Kaddari, *First Among Equals: Chief Justice Dorit Beinish as Israel's First Female Chief Justice*, in ESSAYS IN HONOR OF CHIEF-JUSTICE DORIT BEINISCH (FESTSCHRIFT) (Keren Azulay et. al. eds., 2018) 47 (Hebrew). Regarding other countries, see generally Brenda Kruse, *Women of the Highest Court: Does Gender Bias or Personal Life Experiences Influence Their Opinions?*, 36 U. TOL. L. REV. 995 (2005) (demonstrating how the gender and life experiences of female U.S. Supreme Court

between gender and the citation of decisions, and even fewer have studied gender in relation to the authorship of published versus unpublished decisions.[83] Tilman and Hinkle found that gender and race were related to the decision to appoint judges to write published opinions. They suggest that "judges from historically disadvantaged groups have fewer opportunities to shape policy and they shoulder a disproportionately large share of the routine chore of resolving individual case."[84]

In this study we hope to contribute to the debate on the place of female judges in this domain by examining the extent to which decisions delivered by women judges are included and cited in legal databases, and by comparing the presence of men and women judges in the databases and in actual court cases. Moreover, we compare the effect of judges' genders on the outcome of cases reported in the databases and those from the court archives and the relationship between the gender of the participants and the outcome in each corpus. We suggest that if the databases do indeed underestimate the role of female judges and present an image of decision-making that is different from reality, this would be an indication of bias in the creation of judicial knowledge in family law.

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justices influenced their opinions in matters of employment discrimination); Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923 (2005) (showing that female justices on U.S. state high courts are more likely to support the female litigant in divorce cases than are male justices); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (exploring the role of female judges in the decisions of U.S. federal appellate courts in Title VII sexual harassment and sex discrimination cases). Johnson has shown that in family law, female justices on the Supreme Court of Canada tend to support female litigants more often than their male colleagues, although it was conditioned on party affiliation of the judge. *See* Johnson, *supra* note 81, at 334-35.

83 Merritt & Brudney, *supra* note 11, at 85-110; Stephen J. Choi et al., *Judging Women,* 8 J. EMPIRICAL LEGAL STUD. 504, 509 (2011) (exploring the role of gender on citations); Shane A. Gleason et al., *Walking on Broken Glass: Justice Gender in State Supreme Court Citations, in* OPEN JUDICIAL POLITICS, (2d ed. 2020), https://open.oregonstate.education/open-judicial-politics/chapter/walking-on-broken-glass/ [https://perma.cc/775Q-NE34] (examining citations). *See* Tillman & Hinkle, *supra* note 76, at 2 (studying the authorship of published and unpublished decisions). It should be noted that both Merritt and Brudney and Choi et al. found gender to be insignificant in citations. While Choi et al. examined citations to state high court judges in published opinions, Gleason et al. examined horizontal citations in State Supreme Courts (i.e., coming from outside the state in which these citations were considered binding precedents), and found that women judges were more likely to be cited than men.

84 Tillman & Hinkle, *supra* note 76, at 1 (quoting abstract).

d. Publication of Legal Decisions in Israel

Publishing legal decisions is not mandatory in Israel. In fact, a recent decision by the High Court of Justice refused to obligate the State to enact legislation that would create a database of all legislation and judicial decisions in Israel.[85] For many years, the Israel Bar Association, in collaboration with the Supreme Court, published compilations of judicial decisions. This was part and parcel of the legal community's outlook on transparency following the British Mandate. In 1948, in the introduction to the first volume of decisions published by the Bar Association, Justice Zmora, the President of the Supreme Court, described the British Mandate as a period in which legal decisions were treated as "secret *cabalistic* texts."[86] The editors of this first volume of decisions explained that the opinions were selected for publication if they entailed an element of precedence and if they were significant. These considerations shaped the future volumes of decisions published in print format.

The Supreme Court began to digitalize its decisions in the 1980s.[87] A few years later, the Bar Association and commercial companies began to produce CDs that included these decisions, as well as selected opinions from other courts. Today, the main source of knowledge about caselaw is in digital format, through online computerized databases. The Courts Administration also operates a computerized database on the Court website. While it purports to publish all decisions of all courts (except for family courts) on its internet site, a superficial comparison of several court decisions on the site and in Court Administration Archives indicates that not all

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[85] *See* HCJ 856/17 Fosterlov v. Knesset & Ministry of Justice, Nevo Legal Database (Feb. 13, 2018) (Isr.). The Court held that it did not obligate the Parliament to enact legislation. In addition, the Court noted that the Supreme Court had a new, user-friendly online database.

[86] Moshe Zmora, in a letter to the members of the PSAKIM editorial board (of the Supreme Court and District courts in Israel) dated Feb. 12, 1948, regarding the development of publishing rulings during the Mandate. *See* Eyal Katvan et al., *"Kosher" Judgements in a Pigskin: The British Mandate Law Reports as an Historical Source*, ZMANIM (in Hebrew) (forthcoming 2022) (on file with University of Pennsylvania Journal of International Law).

[87] *See* E.I. Cuomo, *Non-Publication of Judicial Decisions, in* ISRAELI REPORTS OF THE XII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 427 (S. Goldstein ed., The Harry Sacher Institute for Legislative Research and Comparative Law 1986).

are published.[88] When it comes to family courts, neither the Courts Administration nor the commercial databases publish the decisions of the family courts on a permanent basis.

i. Family Courts in Israel

Family courts in Israel have jurisdiction over all family matters except for marriage and divorce, over which Rabbinical courts have exclusive jurisdiction for Jewish couples. In addition, family courts and rabbinical courts have parallel jurisdiction over all other family matters.[89] With its establishment according to the Family Court Law in 1995, the family court became the main legal forum for divorcing couples. In 2003, some 100,000 files were handled by this instance, and the number has grown annually with litigants preferring to turn to the family court rather than to the rabbinical court.[90] The establishment of family courts led to structuring the process of litigation in family matters as a system of three instances (family court, district court, and the Supreme Court) instead of two instances as in the past (the district court and the Supreme Court). Appeals to the Supreme Court now necessitate an additional step of requesting the right to appeal. Supreme Court appeals in family matters are quite rare, and so are appeals from family to district

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[88] Although the former Director of Courts, Justice Dan Arbel, claimed that all decisions are published automatically on the site of the Court Administration without a selection process (in a telephone interview dated June 9, 2004), a random search in the site reveals that of the 6,399 cases closed in the district court in Eilat in 2003, only 290 were published.

[89] RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 233-235 (2004).

[90] Jurisdiction over matters related to divorce can be acquired either through turning to the rabbinical court or to the family court—the first petitioner obtains the jurisdiction in the forum where the claim was first submitted. ARIEL ROSEN-ZVI, ISRAELI FAMILY LAW: THE SACRED AND THE SECULAR 48-49 (1990). In the beginning, it was accepted that men wish to acquire the jurisdiction of the rabbinical court, although it now seems that both parties prefer the family court. Bryna Bogoch & Ruth Halperin-Kaddari, *Divorce Israeli Style: Professional Perceptions of Gender and Power in Mediated and Lawyer-Negotiated Divorces*, 28 L. & POL'Y 137, 139-42 (2006); RUTH HALPERIN-KADDARI & INBAL KARO, WOMEN AND FAMILY IN ISRAEL: STATISTICAL BI-ANNUAL REPORT 63-70, 143 (2005).

courts.[91] It should be noted that fewer than five judges in district courts throughout Israel are recognized (without an official designation) as family court appeals judges. In view of the normative significance and importance of Supreme Court and district court decisions, the consequence of the limited number of appellate opinions has been to diminish the creation of legal precedents and the minimal development of family law in the common law of Israel.[92]

ii. Publishing Family Court Decisions in Israel

In contrast to the practice of publishing judgments of other courts, most of the decisions delivered in the family courts are not published.[93] The simple reason for this is that unlike most other legal procedures, proceedings in family courts are held *in camera* to protect the litigants' privacy. Hence, the default is non-publication of family court judgments unless the court specifically approves publication.[94] Thus, family court judges sometimes add a clause of "publication" to decisions they consider suitable for publication, while providing instructions regarding the deletion of the names of the parties and so on. This deletion obviously involves time and money and generates a further incentive for the non-publication of family court rulings. However, in fact, it seems that the default of non-publication is not necessarily followed. Our study found that

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[91] Data regarding the family court and the Tel Aviv District Court show that appeals occur in less than 1% of the family files that are closed annually in 2001, 2002, and 2003. In 2018 the appeals rate in overall family matters was 2.3%. TIKHNUN V'TAKTZIVIM, MAHLEKET KALKALAH V'STATISTIKA, DOAH SHNATI 2018 HANHALET BATEI HAMISHPAT AGAF PITUAH [DIVISION OF DEVELOPMENT, PLANNING, AND BUDGETS, DEPARTMENT OF ECONOMICS AND STATISTICS, 2018 ANNUAL REPORT OF THE COURT ADMINISTRATION] 20 (2018), www.gov.il/BlobFolder/reports/statistics_annual_2018/he/2018.pdf [https://perma.cc/F6GL-SC3B].

[92] *See* RUTH HALPERIN-KADDARI, *Moral Considerations in Family Law and a Feminist Reading of Family Courts Decisions in Israel*, *in* IYYUNIM B'MISHPAT, MIGDAR, U'FEMINIZIM [STUD. IN L., GENDER AND FEMINISM] 651, 652 (Dafna Barak-Erez et al. eds., 2007).

[93] Ruth Halperin-Kaddari & Adi Blutner, *The Hidden Law,* 20 LAW. 112, 113 (2013).

[94] See para. 68(e) of the Court Law (combined version), 1984 and para. 2 of the Labor Court regulations (study of files) 2003, that allows disclosure of court files only if they have been approved for publication.

databases seem to publish decisions which they select according to their own criteria, unless explicitly restricted by the judges, and even in these cases, the publication ban is not always obeyed.[95]

Until 2007, judges and lawyers representing the parties would decide on the publication of decisions. They adopted similar methods of disseminating the information: circulation among colleagues and release to one or more of the databases that publish judgments. Since 2007, the Courts' Director decided that family court judges must submit their decisions for publication through a court spokesperson only, ostensibly putting an end to the judge's choice of database. Still, even in this new situation the decision to publish (or not to publish) a decision relies on the initiative of judges or lawyers, and they are likely to have a personal or professional interest in publishing (or not publishing) a particular decision.[96] Moreover, lawyers (as distinct from judges) can still choose the forum in which to submit their decisions for publication. These new processes of disseminating decisions and making them available to legal professionals are likely to have important implications on the future development of family law in Israel.[97]

Aside from two printed volumes of around 100 family court rulings (from 2000-2001) published only once by a commercial press in conjunction with the Court Administration, family court rulings are now published exclusively in digital databases. The number of decisions published ranged from 385 to 790 in the various databases during the years at the time in which the main empirical part of the study was conducted (1996-2003),[98] and remains low even two decades later.

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[95] Only 53% of the decisions included in the databases mentioned the conditions according to which their publication was approved, or in which there was specific approval for publication. Moreover, in four cases in the databases, publication was specifically banned.

[96] Some claim that judges decide to publish decisions of a particular ideological direction and prevent the publication of other types of decisions. For examples, see Law, *supra* note 11, at 219; Keele, *supra* note 11, at 234.

[97] *See* Halperin-Kaddari, *supra* note 92, at 662.

[98] This is the aggregate number of all the databases together. Some of the decisions appear in only one of them, some in more than one, and some in all of them. In preparing our databases research records, we unified all the available decisions into one file in which each decision appeared only once, as explained below.

Figure 1: Family courts decisions published in three online databases, 2004-2019

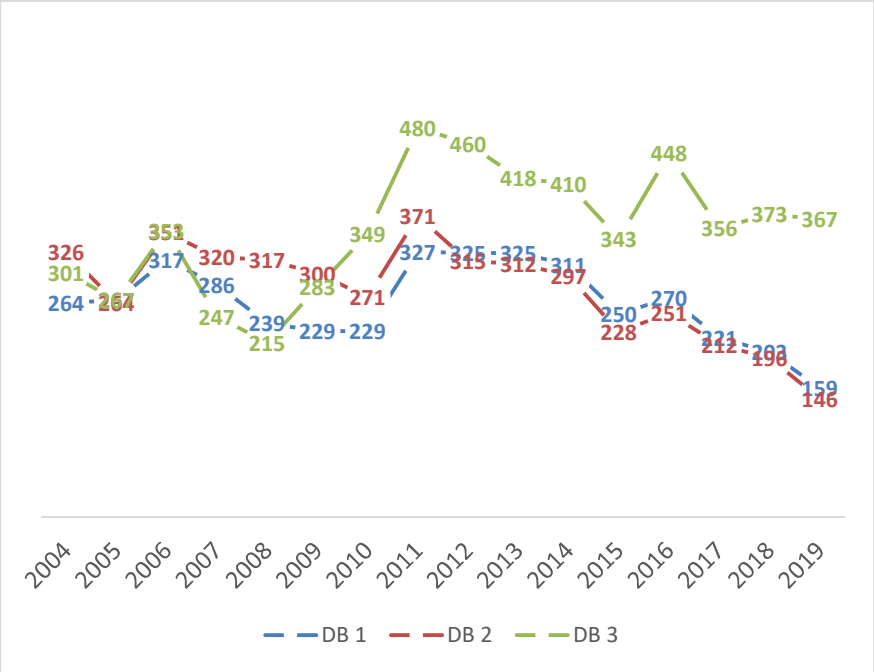

Figure 1 indicates that over the 16 years between 2004 and 2019, the highest number of family court opinions published in one year in any of the databases was 480. Moreover, it also shows that during this period, the number of decisions published has declined in two databases to its lowest point ever, and even substantially declined in the database that published the most family court decisions. A different picture entirely emerges when we examine the figures and trends that actually occurred in family courts. The number of files that were finalized and closed in family courts each year increased from 51,740 in 2004 to 88,160 in 2018.[99] Thus not only is a small segment of the work volume of family courts represented in the

[99] Ma'arekhet Batei Hamishpat B'Yisrael Doah Hatzi Shnati [Court Administration of Israel Semi-Annual Report] 5 (2012), https://www.gov.il/BlobFolder/reports/statistics_second_half2011/he/7-12_2011.pdf [https://perma.cc/5YMS-DLQE].

databases, but the trend over time in the courts is the opposite of what is reflected in the databases. Hence our findings of the gap between the published and unpublished opinions which are reported in this study, at the only time that it was possible to research family court archives, remain just as relevant today.

iii. Attempts to Change the Publication Policy

The inadequacy of the accessibility of family court decisions has not escaped the policymakers and the legislator. The first bill to change the default rule and make publication of family court decisions mandatory (after removing all personal and confidential information) was tabled in 2010. A judicial committee to look into these issues was formed and a policy paper was issued by the legal research department of the Knesset (Israeli Parliament) in 2014.[100] Another bill was tabled in 2014 and was repeatedly tabled in all the subsequent parliaments for the last six years. Notwithstanding the fact that this bill has had bi-partisan support, it never passed the stage of the first reading due to the government's reluctance to assume the costly administrative procedures involved in the elimination of personal information. Within the inherent tension between the personal right to privacy and the public right to know, it appears that the Israeli legislature has chosen the former.

As previously mentioned, ours was the last study to receive permission to examine actual family court records and to have access to archived files. Since then, the courts administration adopted a policy that precludes any such possibility for *in camera* proceedings, holding that the statutory provision that mandates the closed doors prohibits any disclosure of the proceedings, including for academic research.[101] This restrictive interpretation led two family law scholars to appeal to the High Court of Justice against the Courts Administrator in December 2019, asking the Court to direct

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[100] Unger, *supra* note 75. This policy paper relied heavily on initial findings from our study. Bryna Bogoch et al., *Hapsakim Hasmuyim Min Ha'ayin: Hashpa'atam shel Hama'agarim Hamimuhashvim Al Yetzirat Guf Hayeda Hamishpati B'Dinei Hamishpaha B'Yisrael [The Hidden Text of Law: The Digital Databases' Effect on the Creation of Knowledge base in Israeli Family Law]*, 34 IUNEI MISHPAT 603, 604-07 (2011).

[101] Opinion of the Legal Advisor to the Courts Administration, Circular No. 26632918 (Dec. 9, 2018) (on file with the authors).

the latter to allow access to family courts files for research purposes.[102]

e. The Research Hypotheses

Against this background, our study sought to examine the generation of legal knowledge in family courts through an analysis of decisions in computerized databases and court files. [103] Underlying the research were several specific hypotheses:

1. In line with studies conducted outside Israel, [104] we hypothesized that courts in central Israel would be over-represented in the databases, and courts in the periphery would be under-represented compared to both groups in actual court data.

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[102] HCJ 8001/19 Triger and Shakargy v. Courts Administrator, Nevo Legal Database (Nov. 30, 2020) (Isr.). The appellants were represented by the Rackman Center for the Advancement of the Status of Women at Bar-Ilan University, which also initiated the 2014 and all subsequent bills on this matter. The appeal was eventually withdrawn on the advice of the High Court, after the Court Administrator committed to instruct all family court judges about the importance of publication, and to consider the petitions' specific research requests. Regrettably, neither of these two commitments have been fulfilled.

[103] A few comprehensive and systematic studies conducted in Israel regarding judicial decisions should be noted, such as studies by Yoram Shachar & Meron Gross, *Kabalatan Udhiyatan Shel Pniyot L'Beit HaMishpat HaElyon: Netuhim Kamuti'im [The Acceptance and the Rejection of Applications to the Supreme Court – Quantitative Analyses]*, 13 MECHKAREY MISHPAT (Bar-Ilan L. Stud.) 329 (1996); Yoran Shachar et al., *Nohagei HaHistamkhut Shel Beit HaMishpat HaElyon – Nituhim Kamuti'im [Citation Practices of Israel's Supreme Court – Quantitative Analyse]*, 27 MISHPATIM (HEBREW U. L. REV.) 119, 119 (1996); Yoram Shachar et al., *The Hundred Leading Precedents in the Supreme Court Rulings, 7* MISHPAT VMEMSHAL (HAIFA U. L. REV.) 243 (2004). A report on further research in which Meron Gross analyzes rulings by the Supreme Court between 1995-2004 was recently published. Ido Baum, *Who are the Supreme Court Judges Most Biased in Their Rulings in Favor of the State?*, THE MARKER (July 6, 2010), https://www.themarker.com/law/1.556478 [https://perma.cc/2SUA-89YU]. Some of the variables examined in our study are similar to those examined by Shachar's team including the length of the ruling.

[104] Lizotte, *supra* note 11, at 134; Emrey & Wasby *supra* note32, at 548.

2. Consistent with studies in countries outside of Israel,[105] rulings in the databases will be longer and more complex than the rulings in family courts.

3. In line with research showing that women are excluded from social and professional networks and from the authorship of published opinions,[106] we hypothesized that more rulings published in the databases would be written by male judges rather than by female judges, despite the numerical advantage of women judges in family courts.

4. Rulings published in computerized databases will be biased towards plaintiffs,[107] unlike rulings in the family courts files.

5. In line with studies showing that female judges favor female plaintiffs, female plaintiffs will be more successful than male plaintiffs in cases appearing before female judges, especially in the databases.[108]

The basic assumption is, as noted, that judicial opinions are a key component in the development of the law. Thus, we argue that the need for full and inclusive availability of judicial opinions is not only a practical issue but is part and parcel of the way legal doctrine takes shape. Opinions available to the legal profession and the public at large should reflect the entire range of judicial opinions, including all the players participating in that process regardless of religious, geographical, and gender differences. Thus, full transparency of judicial work—even in the area of family law, which has publication

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105 *See* Siegelman & Donahue, *supra note* 11, at 1156. Brian T. Damman, *Guess My Weight: What Degree of Disparity is Currently Recognized between Published and Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority For All?*, 59 DRAKE L. REV. 887, 913 (2011) cites research claiming that "[u]npublished decisions traditionally consist of an inferior quality of writing, detail, and reasoning, requiring less time and resources from judges and their clerks." However, other scholars claim that there is no real difference between unpublished and published decisions, and that unpublished opinions often contain reasoning in greater length, depth, and intricacy than do their visible counterparts. McCuskey, *supra* note 7, at 516. We have based our hypotheses about the sample of courts and database opinions on the first school.

106 Mather, *supra* note 78, at 179; Tillman & Hinkle, *supra* note 76, at 4.

107 Hannon, *supra* note 21, at 217-18.

108 Johnson, *supra* note 81, at 343-44.

restrictions—is necessary for the organic growth of legal doctrine and the authentic expression of the judicial reality.

III. METHODOLOGY

a. Sample

i. The Sample of Family Court Files

In order to construct the sample of family court decisions, we requested a list from the Court Administration specifying all the decisions delivered in each of the family courts (from 1996-2003).[109] The Court Administration's Statistics Department compiled the list for us, and from it we selected the decisions identified as rulings, in contrast with the "other decisions" which are mostly short procedural or technical decisions. However, a preliminary examination of the files revealed that a considerable portion of the decisions identified as rulings were, in fact, procedural decisions, frequently one-line decisions that were not useful to our analysis. Accordingly, we added another criterion and chose those decisions marked as opinions in which at least one hearing took place. A total of 17,590 files were found that met these criteria, of which 1,509 were chosen according to the relative proportion of opinions handed down in each family court annually. The files were sampled by choosing each tenth decision from the list of files of the various courts. If the particular file on the list was missing, the following one was chosen. Because of additional procedural obstacles, our entire sample comprised 1,373 files.[110]

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[109] When we began our research, 2003 was the last full year in databases. Attempts to update this study have been frustrated by the restrictive policy adopted by the Courts Administration. Nevertheless, the coding schedule we used is available for future use in Israel and in other jurisdictions as well.

[110] Not included in the sample were 21 files that followed the missing file numbers in our sample but were decided in 2004 or later. This relationship between the sample (1,373 files) and the population (17,590 files) is certainly acceptable in social science. For example, in Reagan's study of unpublished appellate decisions in all the federal court of appeals in the United States in 2002, the sample included

In order to examine the court files, we applied for permission from the Courts Administrator at that time, Justice (ret.) Dan Arbel. After receiving his general permission to examine 1,500 family court files, we asked to obtain further permission to examine specific files from each of the Magistrate Courts that are responsible for the Family Courts. Unfortunately, not all the courts agreed to our request.[111] The actual analysis of the files was conducted in the courts themselves, after the secretariat of each court extracted the decisions of the required files from the archives. The researchers on the team signed confidentiality agreements to ensure the anonymity of the parties in the court files.

ii. The Sample of Family Court Decisions in Computerized Databases

Each ruling in each of the five computerized databases identified as a family law opinion was included in the analysis. In all, we retrieved 3,309 Family Court decisions across all the five databases, ranging from 385 files in one database to 790 files in another. We unified these decisions into one file in which each decision appeared only once. The unified sample of the databases contained 1,145 separate decisions that were coded according to the same parameters that were used to code the court archive files.

b. Parameters for Coding

Many family court cases are characterized by multiple secondary files that are added to the primary file based on the original petition. Thus, each opinion was coded according to the type of file (whether a main or secondary file, whether a claim or a

50 appeals in each circuit, while the full appeals population varied between 1,105 in the District of Columbia Circuit and 12,365 in the Ninth Circuit. ROBERT TIMOTHY REAGAN ET AL., FEDERAL JUDICIAL CENTER, CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS 22 (2005), www.uscourts.gov/sites/default/files/citatio3_1.pdf [https://perma.cc/45VJ-QU5J].

111 Eventually we were prevented from analyzing 60 files in the Rishon LeZion Court and 47 files in the Ashdod Court. In addition, due to travel costs, we substituted three files from the Beer Sheva Court for 3 files from the Eilat Court, and 14 files from the Haifa Court for 14 files from the Haifa Bay Area Court.

counter claim),[112] the judgment venue, the year in which the decision was handed down, the topic of the dispute, various attributes of the stakeholders (judges, lawyers if applicable, plaintiffs, defendants) including their gender, and decision attributes (such as the outcome—the claim was accepted in its entirety, was partially rejected, a compromise was reached, other—citations to legislation and rulings, reference to the refusal by the parties to cooperate with the formal Jewish divorce process and family violence). All these included very detailed categories in order to limit the discretion of those coding the data, and thus increase reliability. The data were entered using Access software designed specifically for this research. Furthermore, to ensure reliability, 50 files were coded by two coders. Hardly any differences were found in coding the data; the slight differences were discussed and corrected accordingly. Moreover, the research coordinator randomly examined additional files to ensure that coding adhered to the researchers' instructions. A separate database included more detailed data regarding the judges, including their ages and the length of their tenure in family courts. This auxiliary database was designed to interface with the main database and with the data from the various files.

IV. FINDINGS: BIASED REPORTING IN THE DIGITAL DATABASES

The comparison between the computerized databases and the family court archives will be presented according to the five hypotheses presented above: venue; the judge's gender; length of the decision; result of the claim; the relationship between the results and the gender of the participating players. As we will see, the portrayal of family court cases in the databases is different from that found in the family courts themselves.

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[112] For example, the primary file could deal with a petition for divorce and child support, with secondary files added for petitions for property division. Each file entails a separate ruling. These multiple secondary files pose special problems when analyzing family court rulings.

a. Venue

As mentioned above, many researchers in the U.S. found that certain states and/or districts control "lawmaking" because they dominate the corpus of published decisions, whether in print format or in the computerized databases.[113] We hypothesized that central Israel would dominate the opinions in the databases compared to the actual Courts.

Our findings regarding the Family Courts in Israel confirm those found elsewhere: the information in the legal databases only partially reflects the decisions made in court. Primarily, the databases totally ignore five family courts, all in Israel's periphery: Eilat, the Haifa Bay area (which we were unable to include in our sample), Kiryat Shmona, Nazareth, and Tiberias.[114] While courts in Eilat, the Haifa Bay area, and Kiryat Shmona indeed deal with a relatively small number of cases, the courts in Nazareth and Tiberias combined accounted for 10% of all the family court decisions in Israel (see Table 1). Many of the files dealt with by the Nazareth court pertain to Arab couples, and therefore are of less interest to most lawyers who deal with family law, due to the close connection between the religious law and family law in Israel. Nevertheless, the fact that these courts are missing in the computerized databases demonstrates that a considerable number of cases have no influence on the development of family law in Israel.

Moreover, the Ramat Gan Court (situated close to Tel Aviv, central Israel) sets the tone in the database sample. Although in practice the Ramat Gan family court is responsible for less than half of all family court decisions, it accounts for two-thirds of family court decisions found in the legal databases. On the other hand, in all the databases the Beer Sheva Court's representation in the databases was lower than its actual share in family court decisions. Here too, the explanation may lie in the fact that this court serves the

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113 *See* Emrey & Wasby *supra* note 32, at 568 (stating that "those districts higher proportion of published opinions than of unpublished dispositions, further solidify their dominant place in making the law of the circuit"); Kagan et. al., *supra* note 21, at 698-99 (finding differences in the availability of immigration decisions in Lexis and Westlaw for each of the 11 Federal Court Circuits).

114 It should be noted that since our study, additional family courts have been opened in Petah Tikva and Kiryat Gat.

Bedouin population in near-by settlements, which are of less interest to the majority of Jewish lawyers in family law.

Table 1: Location of Cases in Family Law Court Sample and in Databases (percent)

	Family Court	Databases
	N=1373	N=1145
Ashdod	--	.1
Beer Sheba	6.6	1.0
Hadera	.2	.1
Haifa	16.8	14.3
Jerusalem	19.7	18.3
Kiryat Shmona	2.0	--
Nazareth	7.2	--
Ramat Gan	44.6	66
Rishon Letsion	.6	.2
Tiberias	2.4	--
Total	100%	100%

b. Length of Decisions

As we hypothesized on the basis of previous studies, we expected to find that the rulings in the databases would be longer and more complex than those of the family courts. Indeed, the decisions in the computerized databases were on average twice as long as the decisions in the court (7.7 pages on average in the databases, compared to 3.89 in court). It may be that judges send rulings to the databases that they view as more complicated and/or rulings that involve some legal innovation. The databases may also

choose to publish more complex cases whose news value is greater. [115] Table 2 (below) shows that decision length in the databases has increased over the years by almost three pages—from 6.22 pages on average in 1998 to 9.16 pages in 2003. The increase in decision length in the sample of court decisions was similar—from 3.16 in 1996 to 4.96 in 2003. This suggests that judges are affected by the length of decisions in the databases, motivating them to write longer rulings.

Table 2: Decision Length in Databases and Court Sample, 1996-2003

	Databases			**Sample of court decisions**		
Year of decision	Average no. of pages	N	SD	Average no. of pages	N	SD
1996	6.89	19	2.233	3.16	33	4.151
1997	6.41	34	5.153	3.58	85	4.218
1998	6.22	102	3.863	3.38	144	4.358
1999	6.28	123	3.545	3.28	181	5.253
2000	7.59	187	5.030	3.65	144	4.683
2001	8.21	167	5.722	4.14	145	4.781
2002	7.59	196	5.116	4.29	156	5.000
2003	9.16	258	5.959	4.96	161	4.871
Total	7.73	1,086	5.216	3.89	1,049	4.803

Significance (anova) for the databases – p = .000, df = 7, F = 6.180; for courts: df = 7, F = 1.993, p = .04

[115] In the United States, no uniform criteria for publishing were found for databases and rulings with very similar attributes that were published in one place but not in another, even in the same district. Merritt & Brudney, *supra* note 11, at 74-75.

c. Complexity of Decisions

One measure of the complexity of legal decisions is the number and type of citations they mention, such that more complicated decisions are characterized by references to a greater number of sources, including not only opinions from the Supreme Court and family courts, but also from local and foreign academic sources. We coded the number of citations in each decision according to the type of source, counting each quoted source only once.[116] The results are presented in Table 3 (below).

Table 3: Number of Citations in Databases and in Family Courts

Type of sources cited	Databases (1145 opinions)	Sample of Family Courts (1373 opinions)
Israeli Supreme Court Decisions	2043	448
Rabbinical Court	14	4
Israeli Academic Articles	94	23
Israeli Books	332	83
Foreign Legal Books and Articles	19	--
Foreign Decisions	69	--
Jewish Law, Decisions	87	--

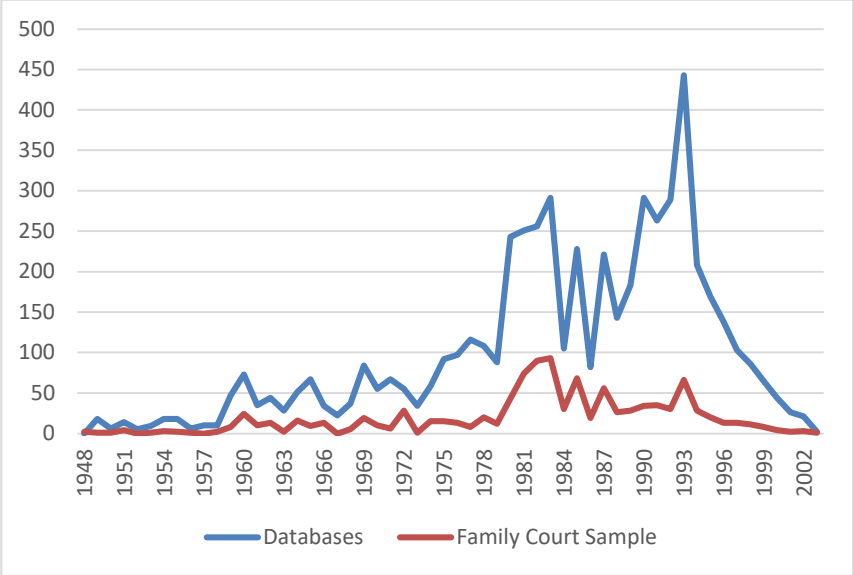
[116] A specific source could be referred to several times in a decision. We counted only the first reference to the source in the decision.

Table 3 indicates that, as predicted, the decisions selected for publication in the databases are more complex on average than those in family court archives, with more than four times as many citations in the databases than in the family court archives. The archives had a higher number of opinions without citations to any sources. In both samples, there are many more citations to the Israeli Supreme Court than any other source (about six times as many), indicating the importance of the Supreme Court as an authoritative and persuasive source in family law decisions. Moreover, in the court sample, there were no references to foreign books and decisions, while in the databases, there were almost 90 decisions that referred to foreign sources. Interestingly, the greatest difference between the two samples was in reference to Jewish law decisions, with more than eight times as many citations in the databases than in the court sample. Still, there were relatively few citations to Jewish law in both samples (87 in the databases compared to 10 in the court sample). Thus, the databases present a more sophisticated picture of decision-making in the family courts than do those in the routine family court cases sampled.

d. Citations to Supreme Court Decisions Over Time

We also sought to determine whether there was a difference between the two samples in the frequency of references to the Supreme Court over time, i.e., was there a point in time when the databases began diverging from the family court sample? Unlike the citations presented in Table 3 above, here we counted each citation to a Supreme Court decision over the entire time period. Results are presented in Figure 2 below.

Figure 2: Total citations to Supreme Court decisions in the family courts sample and the databases, by year of cited Supreme Court decision



There was very little difference between the two sources in the early years, for two reasons. First, not many Supreme Court decisions were available for citations. Second, computerized databases did not begin publishing decisions that did not appear in the edited printed versions until 1985. Nevertheless, current databases include early decisions that did not appear in print, and citations to Supreme Court decisions from the sixties began increasingly appearing in family law decisions. Although the pattern of increase and decrease in the number of Supreme Court citations in the databases more or less matches that of the family law decisions, in practice,[117] the highest number of Supreme Court citations in the family law sample is 100 to the Supreme Court decisions of 1982, whereas the highest number of citations in the databases is 450, to decisions in 1993. Thus, on this measure too, the

[117] Note that the year refers to the year of the cited Supreme Court decision, not the year the decision was handed down in the courts or databases. As the reader will recall, family law courts only appeared in 1995.

databases do not truly reflect the fluctuations in family law citations, and present a more complex type of decision-making than is the norm for family law opinions.

e. Type of Cases

Another difference found in the literature between published and unpublished decisions was the topic of the decision. Although there were some basic similarities between the types of cases reported in the databases and those that were heard in the family courts, there were some interesting differences as well (see Table 4). The three most common case types were: housing and maintenance, financial matters (i.e. distribution of marital property), and child custody. However, whereas in the court sample, the largest proportion of the cases dealt with housing and maintenance (43%), in the databases, this type comprised only 29%, and financial matters were most frequent (38%). Child custody cases comprised the same proportion in both sources. Nonetheless, within the category of custody cases, there were only three Hague Convention cases (i.e. child abduction) in the courtroom sample (two of which were counter claims of one couple), whereas there were 26 such cases in the databases.

Table 4: Topic of Dispute in Databases and Court Sample

Topic of Dispute	Databases	Court Sample
Housing and Maintenance	29%	43%
Finance and Property	38%	23%
Child Custody	10%	10%
Marital Age	4%	10%
Domestic Violence	1%	3%
Ratification of Matrimonial Property Agreement	3%	5%
Inheritance	6%	1%
Other	9%	5%
Total	100.0	100%
Total N	1145	1329

Another two differences are the proportion of inheritance cases and domestic violence cases in the two sources. Notably, inheritance cases that are connected to divorce proceedings appear more frequently in the databases (only 1% in the courts, compared to 6% in the databases). Moreover, although the proportion of domestic violence cases is small in both data sources, it is higher in the courts than in the databases (1% compared to 3%).

f. Case Outcomes

Not only do the databases and court archives differ in the types of cases, but also in the outcome of the proceedings.[118]

[118] *See also supra* text accompanying note 31 (highlighting the differences in the outcome between published and unpublished studies).

Table 5: The Outcomes of the Cases in the Databases and in the Sample of Court Decisions

Results	Databases		Sample of court decisions	
	N	%	N	%
Rejected	417	37%	227	18%
Partially accepted	190	17%	178	14%
Accepted	498	44%	410	32%
Other results	21	2%	416	36%
Total	1,126	100%	1,276	100%

As Table 5 indicates, the main difference between databases and the sample of family court decisions is that over a third of the claims in the databases were rejected, compared to less than one fifth in the court sample. Moreover, the outcomes in the databases are more clear-cut with fewer "other" results, such as compromises, mediation, and so on. While a third of the decisions in the courtroom sample were "other" decisions, only 2% of the decisions that were published in the databases resulted in "other" outcomes. This is even more surprising as the court sample included only files in which there had been at least one hearing, and thus in which there was at least some intervention by the judge. Hence, the databases present a distorted picture of the results of family court proceedings by exaggerating the adversarial character of the court litigation and by understating the role of the court in finding non-confrontational solutions.

g. Imposition of Court Costs

Another aspect of the outcome of cases which reveals the discrepancy between the databases and the courts is the extent to which court costs were imposed on the parties, and the amounts

charged. As Table 6 shows, in the courts, costs were imposed on only about 5% of the plaintiffs and on less than 10% of the respondents. However, in the databases, about one third of the respondents and one fifth of the plaintiffs were charged court costs. Moreover, although more costs were imposed on the respondents than on the plaintiffs in both sources, the costs imposed on the plaintiffs were about ten times higher in the databases (2,426 NIS which was about $600 at the time) than in courts (247 NIS), and five times higher than those of the courts for respondents (3,251 compared to 564 NIS). Because these means include all cases, including those in which no court costs were imposed, we conducted a more stringent comparison, examining average costs for only those cases in which costs were imposed on the parties. The discrepancy between the sources was still statistically significant: average costs in databases were almost twice as high as in courts, with 11,377 NIS for plaintiffs in the databases and 5,942 NIS in the courts, and 10,737 NIS for respondents in the databases, compared to 5,955 NIS in the courts. Here, there was little difference between the plaintiffs and respondents, with the respondents being charged slightly higher costs than the plaintiffs. It is interesting that the highest cost charged plaintiffs in the databases was 101,855 NIS (including lawyer's fee and court charges), which was substantially greater than the highest sum charged the respondents (75,000 NIS). However, in the court sample the situation was reversed, with maximum costs for the plaintiff lower than the highest costs for the respondent (50,000 compared to 70,000 NIS).

These results indicate that not only do the databases present a distorted view of the costs imposed on plaintiffs and respondents, but they also present the plaintiffs as more liable for sanctions in the form of court costs than respondents. Because the databases are the main source of caselaw for legal professionals, it may be that the higher level of court costs in the databases influence the future imposition of costs.

Table 6: Mean Court Costs in the Databases and Courts

	Databases			Court sample		
% files that incurred costs	N=1144			N= 1376		
Plaintiffs *	21.3%			4.2%		
Respondents **	31 5.%			9.5 %		
Mean Costs, Entire Sample	Mean	N	Std. Deviation	Mean	N	Std. Deviation
Plaintiffs	2426	1140	7329.639	246.90	1372	7329.63
Respondents	.3251	982	7710.91	564.27	1372	3207.85
Mean costs in those cases in which costs were imposed						
Plaintiffs ***	11377.07	244	12242.34	5942.98	57	7739.915
Respondents ****	10737.23	362	10904.26	5955.18	130	8775.657

*t=-7.148, df=2510, p<.001** t= -11.582, df =2352, p<.0001
t =-3.203, df 299, p<.005* t=-4.503, df 490, p<.001

h. Gender of Judges and Publication in Databases

In accordance with our hypotheses, our results show that just as databases do not reflect the distribution of the decisions of the various courts, they also distort the contribution of female judges.

In general, of the forty-six different judges who appeared in the sample of court files, only thirty-three appeared in the databases. In other words, the rulings of thirteen judges were not accessible for the perusal of either lawyers or litigants and could not contribute in any way to the development of legal knowledge and policy in family law.

The inaccessibility of decisions of about 30% of the family court judges is not gender neutral. There is a clear disparity between the proportion of published decisions written by female judges and their proportion in the court sample. The number of decisions delivered by female judges in practice, in the court sample, is higher

than those delivered by male judges, and accounts for a little more than half the decisions. However, in the databases the number of decisions by male judges is one and a half times higher than the number of decisions by female judges (59% compared to 41% of the decisions).

Another indication of the minimization of women's role in family law decision-making is the comparison between the average number of opinions written by male and female judges. Whereas 33.8 decisions were written on average by each female judge who appeared in the court sample, only 29.25 decisions appeared for each woman judge in the databases. For male judges the reverse is true: Their average number of decisions in the court sample was 26.28, compared to 39.5 decisions for each male judge in the databases. The role of women judges in family law is thus symbolically minimized, and a large number of their decisions are erased from the public sphere.

The belittling of the role of women judges became even more apparent when we looked at the decisions that are available in all five databases. Of 134 decisions that appeared in all five databases (the "most popular" decisions), 75% were written by male judges. These decisions, appearing in the largest number of databases, account for 15% of the decisions delivered by male judges, but only 7% of the decisions delivered by female judges. Hence, not only do the databases disproportionately represent the decisions of male judges but the opinions of male judges appear more frequently in all the databases compared to those of female judges.

The misrepresentation of cases in computerized databases is not confined to Israel. Tilman and Hinkle found that white male judges were more likely to be assigned to write published decisions than were women or non-white judges, and they were less likely to author unpublished opinions.[119] The databases in our sample show a similar preference for male-authored opinions. Lizotte, who found discrepancies between summary judgments in Westlaw, Lexis and court dockets, suggests that local norms develop regarding publishing rulings, and that judges and editors of the databases are sensitive to these norms.[120] Thus, certain judges may be well-known due to the publication of their rulings, and accordingly they also deliver many more of their rulings to the databases. The databases

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119 Tillman & Hinkle, *supra* note 76, at 4-6.

120 Lizotte, *supra* note 11, at 143.

are also more willing to publish the rulings of these well-known judges. Women judges may not be attuned to the importance of circulating their rulings, and accordingly there is also less readiness by the databases to accept their decisions. In other words, a type of circular process is created, and thus the inequality in publication is perpetuated.

Table 7: Frequency and Mean Number of Decisions in the Databases and in the Sample of Court Decisions by the Gender of Judges

Source	Gender of Judge	N	%	Mean
Databases	Male judges	677	59%	39.5
	Female judges	468	41%	29.3
	Total	1,145	100%	
Family Courts	Male judges	657	48%	26.8
	Female judges	710	52%	33.8
	Total	1,367	100%	

i. Gender, Outcome, and Publication

The connection between the gender of the participants, whether professionals or litigants, and the results of the case has been examined both in Israel and abroad.[121] However, our question in this context was whether the databases presented a different image of the interaction between the gender of the participants and the results than what actually occurred in the courts. To examine this, we first constructed a numerical index of the results of the case, so that a claim that was rejected was scored -1, a claim in which the result was "other" was scored 0, a claim that was partially accepted was scored

[121] *See supra* text accompanying note 82.

1, and a claim that was fully accepted was scored 2.[122] Thus a higher score means a better outcome for the litigant. Table 8 (below) presents the findings regarding the result of the case according to the gender of the judge and the gender of the plaintiffs separately for the databases and the court sample.

In general, we found that while both male and female judges favored female plaintiffs in family cases in both sources, the advantage of women was significantly exaggerated in databases. Thus, for example, while the average outcome score for female plaintiffs in cases with male judges was .64 in the courts, it was .91 in the databases. Similarly, before female judges, female plaintiffs had a score of .71 in courts but 1.02 in databases. Male plaintiffs, on the other hand, fared better in the courts (.49) than in the databases (.28) when judged by men, with no difference between the two sources before female judges. Thus, the positive outcomes for female plaintiffs, and their advantage before female judges is overstated in the databases, while men are presented as less successful than they really are before male judges. Thus, the experience of women in family courts is presented in the databases in a more positive light than it is in reality. We can only speculate whether movements such as those that aim to protect the rights of men in divorce processes are not motivated partially by the false image projected from these databases.

[122] Johnson used a dichotomous score in analyzing results, such that a judgment favoring a woman litigant was scored 1 and one that was against the woman litigant was 0.

Table 8: Mean Outcome and Gender of Judges and Plaintiffs in Databases and Court Sample

		Databases			Court Sample		
Judges' gender	**Gender of Parties**	**Mean**	**N**	**Std. Deviation**	**Mean**	**N**	**Std. Deviation**
	Plaintiffs*						
Male	Male	.28	285	1.392	.49	230	1.221
	Female	.91	364	1.258	.64	385	1.027
Female	Male	.35	178	1.431	.34	166	1.158
	Female	1.02	279	1.251	.71	479	1.091

*Differences between male and female plaintiffs and respondents significant p=.000 in both databases and court samples.

V. CONCLUSION

This study joins a body of cutting-edge research that examines whether published rulings that are virtually the only ones accessible to professionals and academics, and thus essentially control the law building narrative, faithfully reflect the reality of law-making in court. The basic assumption in this area of research is that the development of legal doctrine in common law countries depends on the accessibility of rulings for the various actors in the field: judges, lawyers, practitioners, academics, and the public at large. Accessible rulings are the basis for the development, expansion and application of the law. Our main objective in this study was to explore the implications of the digital revolution on the generation of a body of legal knowledge in the area of family law. This area of law is particularly complicated and sensitive in Israel, where proceedings are conducted behind closed doors and the default is the non-publication of legal decisions. We hypothesized that in a legal area in which most decisions are not published, the accessible judicial decisions would significantly differ from the judicial reality in courts. This asymmetry is likely to have unique implications for the practice of law and the development of legal doctrine.

We found that, in general, the image of the family courts reflected from the databases is distorted on a number of parameters: judicial work in the periphery is under-represented; decisions are longer and more complex in the databases, and include more citations to Supreme Court decisions and academic literature; databases emphasize financial and property disputes, whereas the most common types of court cases are housing and child custody; cases in the databases are adversarial and understate the role of the court in finding consensual solutions; imposition of court costs is more common, and the court costs are much higher, especially for plaintiffs. Moreover, there are significant gender implications in the differences between the sources: not only are about 30% of the judges that appear in the court files absent from databases, but a higher proportion of those absent are female. Thus, the role of female judges is minimized by the exclusion of their decisions to the extent that most published decisions are written by male judges despite the fact that women form the majority of family court judges. The databases also present a more favorable picture of the success of female plaintiffs, especially in cases with female judges, while male plaintiffs are presented as less successful than they are in reality. These results are compounded if we take into account the prominence of the cases: Thus, for example, female judges were even more under-represented in the subgroup of cases appearing in all databases.

The fact that the publishers of these rulings are commercial businesses functioning to make a profit undoubtedly affects the selective publication. Although the databases serve academic researchers, students, and, of course, lawyers from around the country, one may still assume that there are certain objectives and areas that arouse greater interest than others among the users of these computerized databases, and that this fact affects the choice of which rulings to publish. Thus, for example, it may well be that the editors of databases are convinced that lawyers, who apparently are the majority of the users of these databases, are more interested in cases that conclude with an unequivocal result than those that conclude with a compromise and are interested in the financial aspects of cases. The difference we found between the attributes of cases that are published compared to the reality of the courtroom may result from the imputed preferences of database users. Although database editors may claim that they do not choose what to publish, and that they publish every ruling they receive, some of

the distortions found in our study seem to derive from the databases' commercial nature.

At present, despite the digital revolution which made many previously unpublished legal decisions available, there is no country in the world in which all court decisions are published and accessible to all. This is particularly true in family law, where the questions of privacy versus transparency are even more acute than in other fields. Moreover, a major part of the body of law in this area is generated by lower courts, whose work has often been ignored by researchers who were more interested in appellate and higher courts. Our study contributes to understanding the pitfalls of the partial accessibility of legal decisions in a particularly challenging and constantly evolving area of law, which is relevant to jurisdictions beyond Israel. When publication is driven by commercial or even partially commercial interests, and dependent on the voluntary submission of the judges, the result is a severely distorted depiction of family litigation and case law. We have shown that on many parameters the databases reflect a distorted image of family law, including that it is acrimonious, favors women litigants, and is controlled by male judges. If this is the knowledge that the professionals have about family law, one can only speculate about the effect of this biased view on future practice and judicial decisions in this area.