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MAKING THE LAW: UNPUBLICATION IN THE DISTRICT COURTS

HILLEL Y. LEVIN*

I. INTRODUCTION

The conventional story of civil law in the district courts is one of accessibility, transparency and accountability: people have a dispute; they hire lawyers; the lawyers come to court and present evidence and argument; the trial judge and jury resolve the conflict; and an unsatisfied party may appeal.

It is probably the case that this story was always fictional, but over the past quarter-century it has been deconstructed and demolished. Today, it is an utter fantasy. We cannot even legitimately claim that our system demonstrates an aspiration to the ideals of accessibility, transparency and accountability. Managerial judges; special masters; magistrate judges; the push and rush to settle; sealed settlement agreements; sealed files

* Assistant Professor at the University of Georgia School of Law. I wish to thank Judith Resnik, Norman Spaulding, Bill Eskridge, Kate Stith, Penelope Pether, Dick Craswell, Bob Weisberg, Robin Feldman, Carl Tobias, Jeannie Merino, Brooke Coleman, John Greenman, Stephen Lee, Nirej Sekhon, William Reynolds, David Hoffman, Paul Heald, Jason Solomon, Peter Appel, Usha Rodrigues, Robert Bartlett, Christian Turner, and Harlan Cohen, and all of the many people who were generous with their time, for their support, guidance and feedback. In addition, Stanford Law School student Jacek Pruski provided first class research assistance, for which I am deeply grateful.

1. See, e.g., Lawrence M. Friedman, The Day Before Trials Vanished, 1 J. Empirical Legal Stud. 689, 689 (2004) (arguing that, contrary to conventional wisdom, "the trial was never the norm, never the modal way of resolving issues and solving problems in the legal system").

2. See, e.g., Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982). In this path-breaking article, Resnik argued that the rise of managerial judging has given judges unreviewable powers to affect the impact of civil cases.

3. See, e.g., Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?, 53 U. Chi. L. Rev. 394 (1986) (suggesting that increased use of special masters has attendant risks including that adjudication becomes too removed from public scrutiny and oversight).


5. See, e.g., Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073 (1984). Fiss was the first to argue that private settlement undermines the public role of courts and should not be celebrated. See id. at 1075 ("I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets."); see also David Luban, Settlements and the Erosion of the Public Realm, 83 Geo. L.J. 2619, 2619-20 (1995).

6. See, e.g., Laurie Kratky Dore, Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements, 55 S.C. L. Rev. 791 (2004);
and secret dockets;\textsuperscript{7} summary judgment;\textsuperscript{8} the regular use of staff attorneys and law clerks to screen and dispose of cases;\textsuperscript{9} two-track appeals featuring decisions without comment and non-precedential opinions\textsuperscript{10}—this is the real story of our federal courts, where the needs of efficiency and docket control seem to trump all else.\textsuperscript{11} Legal scholarship has not looked particularly kindly at the introduction of these efficiency and docket control innovations, and scholars have argued that the costs of these “efficiency reforms” outstrip whatever savings they have achieved.\textsuperscript{12} In any case, what


7. See United States v. Ochoa-Vasquez, 428 F.3d 1015, 1024-31 (11th Cir. 2005) (analyzing whether secret docketing in drug trafficking conspiracy prosecution to protect confidential informants and cooperative defendants violated defendant’s First Amendment right to access criminal proceedings); Dave Altimari, Lawmakers Seek End to Secret Court Files, HARTFORD COURANT, Mar. 11, 2003, at A1; see also Joseph F. Anderson, Jr., Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy, 55 S.C. L. REV. 711 (2004); David S. Sanson, The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform, 53 DUKE L.J. 807 (2003).

8. See, e.g., Arthur R. Miller, The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982 (2003) (maintaining that increased use of summary judgment due to impulse of docket control has fundamentally altered roles of courts’ trial procedures); see also Gillian K. Hadfield, Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases, 1 J. EMPIRICAL LEGAL STUD. 705 (2004). Hadfield’s empirical evidence suggests that the “vanishing trial” is due, in large measure, to non-trial adjudication including the increased use of summary judgment. This finding is at odds with the conventional view, which maintains that private settlement is largely to blame for the decrease in the percentage of cases that go to trial.

9. See Penelope Pether, Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law, 39 ARIZ. ST. L.J. 1 (2007) (depicting how appellate court staff attorneys and judicial clerks exercise enormous degree of Article III power, treat “haves” and “have-nots” unequally, impoverish law and are effectively unreviewable).


11. See Rex R. Perschbacher & Debra Lyn Bassett, The End of Law, 84 B.U. L. REV. 1 (2004) (discussing consequences of law privatization in all its manifestations); see also Miller, supra note 8, at 982-1016 (describing how supposed “litigation explosion” has been used by critics of system of civil adjudication to remake courts through procedural and substantive reforms).

12. For a discussion of the criticisms of these efficiency and docket control measures, see supra notes 2-11 and accompanying text. Of course, this is not to suggest that these practices and innovations are without their defenders in the academy. For example, Derek Bok has long championed the use of settlement. See Derek Bok, A Flawed System, HARV. MAG., May-June 1983, at 38. And it is not difficult to find defenders of summary judgment. See, e.g., Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 YALE L.J. 27, 44-45 (2003) (noting that use of summary judgment to manage judicial caseload has not generated much criticism). With respect to the debate over unpublication of appellate judicial opinions, see Elizabeth M. Horton, Selective Publication and the Authority of Precedent in the United States Courts of Appeals, 42 UCLA L. REV. 1691 (1995); Boyce F. Martin, Jr., In Defense of Unpublished Opinions, OHIO ST. L.J. 177 (1999); Robert J. Marti-
all of this demonstrates is that our commitments to transparency and accountability are more apparent than they are real.

In recent years, one particular area of focus for legal scholars concerned about the increasing privatization and opacity of courts has been the issue of systematic unpublication of judicial opinions by the appellate courts. And not just scholars. Indeed, this is one of the few court process issues in my memory that has engaged all elements of the legal profession. Judges have issued dueling opinions on the constitutionality of the


14. Alex Kozinski & Stephen Reinhardt, Please Don’t Cite This!: Why We Don’t Allow Citation to Unpublished Dispositions, Cal. L. Rev., June 2000, at 43 (“Few procedural rules have generated as much controversy as the rule prohibiting citation of [unpublished opinions].”).
practice and traded polemics on its appropriateness. Practitioners—whose voices often seem lost (or at least muted) on issues like this—are in the thick of the debate. No longer merely academic, this debate has even spawned a change in the rules of appellate procedure (one that amusingly pulled off the difficult feat of being both highly controversial and relatively minor).

Unfortunately, amid all of the talk about unpublication by appellate courts and the larger issues of accessibility, accountability and transparency that it raises, unpublication in the district courts—more than 95% of opinions go unpublished—has escaped the notice and consternation of scholars. I say “unfortunately” because this practice seems to raise at least as many, and likely more, problems as the unpublication practices in the appellate courts.

In this Article, I address the issue of unpublication in the district courts from a normative perspective for the first time. I draw from the rich parallel literature regarding appellate court publication practices, but


17. See Kozinski & Reinhardt, supra note 14, at 44 (“At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules and Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that [unpublished opinions] be citable.”).


20. See generally id.; William M. Richman, Much Ado About the Tip of the Iceberg, 62 WASH. & LEE L. REV. 1723 (2005); see also Pether, supra note 9, at 8-9. Pether wrote that:

[the rule change is modest, because while it means that circuit courts can no longer forbid lawyers to cite back to them decisions they have made but designated 'not for publication,' nor sanction them if they do, the prospective ban on citation bans does nothing to solve the major problems of institutionalized unpublication: it will not dismantle the U.S. courts' binary system of 'precedential' and 'unprecedential' judicial opinions, with the various problems this system produces, nor will it address the logical problem of designating opinions precedential or non-precedential in advance.

Id.


22. See Martineau, supra note 13, at 130 (noting that no one has objected to practice of unpublication by trial courts).
argue that unpublication in the district court context raises an even broader set of concerns. My argument rests on two fundamental points. First, district courts play a unique institutional role in our system of adjudication, one that gives district judges exceptional power to make and shape the law. Indeed, from the perspective of a realist, district judges have even greater control over the law than do their appellate counterparts, yet they often operate free from appellate oversight and public scrutiny. Second, in contrast to the appellate context, where even "unpublished" opinions are usually available for public review, in the district court context, “unpublished” opinions almost disappear. Thus, the law in the district courts—the central location of lawmaking in our system—is rendered opaque, and our district judges unaccountable.

My argument proceeds as follows. In Part II, I begin by exploring the institutional role of the district courts and arguing that district judges, in a legal realist sense, make the law. In Part III, I define my terms “unpublished” and “opinions” for the district context, and provide an overview of the publication process in the district courts. Next, in Parts IV and V, the heart of this Article, I examine the troubling implications of the practice—what I term the “transparency” and “accountability” problems, respectively—and then argue that the justifications for unpublication are overstated, unconvincing and anachronistic. Finally, in Part VI, I argue that existing technology allows us to move beyond this problem and briefly explore how, from a practical standpoint, current practices could be reformed.

II. Why District Courts—and their Opinions—Matter

Our understanding of the federal courts stands in inverse proportion to the importance of each court. That is, we know a great deal about the Supreme Court, which does the least; somewhat less about appellate courts, which do somewhat more; and still less about district courts, which do the most. I initially assert these points—that district courts are both the most important and the least understood—bluntly and without the ornamentation of citation because they ought to be obvious and uncontroversial. Nevertheless, because contemporary legal scholarship and legal education do not reflect this view, it deserves elaboration.

In the 2006 term, the Supreme Court issued sixty-eight opinions. In the 2006 calendar year, 66,618 appeals were filed in the federal appellate

23. See infra notes 27-46 and accompanying text.
24. See infra notes 47-76 and accompanying text.
25. See infra notes 77-143 and accompanying text.
26. See infra notes 144-145 and accompanying text.
Meanwhile, 244,068 civil cases were filed in federal district courts in 2006. In other words, district court judges deal with many more cases, by a large margin, than other federal judges.

But these numbers only begin to tell the story, because the relative power that district judges exercise in the judicial hierarchy becomes clearer when we consider their role qualitatively. District judges have much greater discretion and power over litigants and cases than do appellate judges or Supreme Court justices. By the time a case gets to the Supreme Court, it has been honed to its finest points of law and the issues are fairly narrow and clear. Even the intermediate appellate courts—though they may see a larger slice of a case than the Supreme Court does because litigants generally have a first appeal as of right—review only distinct points of law at the end of a case. By contrast, district judges take part in shaping a case and building it from the bottom up. They sit with a case from its very outset, managing it, watching it and helping it to unfold; they engage with the attorneys and litigants, and intervene through any number of mechanisms at various stages of the case. Such intervening mechanisms include interlocutory and procedural decision-making that is, legally or functionally, unreviewable. Over time, increased caseloads, increased discretion, increased use of summary judgment, alternative dispute mechanisms and other case management tools have magnified the role of the district judge to an even greater degree. And, of course, unlike appellate judges, district judges sit by themselves, without the (at least theoretically) moderating influence and oversight offered by appellate panels. As Ringquist and Emmert put it, "[d]istrict court judges, more than their appellate court brethren, engage in the nuts and

30. This is true not only collectively, but also individually. In 2006, the average district court judge saw 495 new cases added to the judge's docket, and terminated 517 cases. See U.S. Courts, Judicial Caseload Profile Report, http://www.uscourts.gov/cgi-bin/cmsd2006.pl (last visited Feb. 17, 2008).
31. See Resnik, supra note 2, at 377 ("[j]udges are playing a critical role in shaping litigation and influencing results.").
32. Id. at 403-14.
33. Id. at 426 ("[A judge's decisions may be] made privately, informally, off the record, and beyond the reach of appellate review.").
34. See generally id.; Hadfield, supra note 8; Miller, supra note 8; Judith Resnik, Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. EMPiRICAL LEGAL STUD. 783 (2004); Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution, 1 J. EMPiRICAL LEGAL STUD. 843 (2004).
35. See Martineau, supra note 13, at 129 (defending unpublished opinions by appellate courts on grounds that institutional constraint of sitting on panel protects against irresponsible behavior by judges).
bolts of policymaking from formation through implementation...[and have been] thrust...into more prominent policymaking roles.”

The sheer volume of cases that district judges see and the power and discretion they have over those cases demands that judges be subjected to the greatest scrutiny, for, as one district judge strikingly put it, “[t]he people of this district either get justice here with me or they don’t get it at all...Here at the trial court—that’s where the action is.”

Together, this can only mean that district courts—more than appellate courts and more than the Supreme Court—make the law. This is true both from a practical and theoretical standpoint. Practically speaking, many legal standards are, by design, indeterminate, and precedent does not constrain them. Thus, district judges must do interpretive work, but the distinctions among “making,” “interpreting” and “applying” law often disintegrate. In these areas of the law, practicing lawyers look to district cases to fill out the doctrine. Similarly, judges have substantial fact-finding authority, and in finding facts, the judges shape the case and make the law.

More theoretically, from a legal realist perspective, “law” can only be defined by what it does and how it operates. Thus, every time a district judge rules, that judge makes law. This view of the law is not, by any stretch, uniquely my own. Llewellyn captured it when he wrote that, “[w]hat these officials”—everyone from judges to lawyers to police officers—“do about disputes is, to my mind, the law itself.” As a result, to determine what the law is, “[y]ou will have to take what [judges] say and compare it with what they do,” ultimately placing action over pronouncement. This being so, among the federal courts, the district courts make the most law because they do more. This view animates the move towards empiricism that legal scholarship is currently experiencing, what Miles and Sunstein call the “new legal realism.”


37. C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts 1 (1996) (quoting Judge Henry N. Graven). Rowland & Carp provided another revealing quote, this one from C.J. Wyzanski, a district judge who refused “promotion” to the appellate court:

The district court gives more scope to a judge’s initiative and discretion. The district judge so often has the last word. Even where he does not, heed is given to his estimates of credibility, his determination of the facts, his discretion in framing or denying relief upon the facts he found.

Id. at 5.


39. Id. at 14.

saying that this view of the law is not new and I am not breaking ground here.

Yet.

I continue to wonder whether this view has really sunk in. Legal education and scholarship continue to place considerably more emphasis on what the Supreme Court and appellate courts do than on the trial courts' actions.41 (And never mind administrative agencies, legislators, local governments, police officers and all of the other law makers. At best, they get one law school course or a seminar devoted to them.)

On the teaching side, our casebooks are long on Supreme Court and appellate court opinions and short on district court opinions. Even Civil Procedure—the course that concerns itself most with district courts—is primarily taught through a formalist lens: legislatures and higher courts tell us the important rules and if we study them closely, we know what to do and what the procedural rules are. On the scholarship side, the new legal realists and the law and society movement have made inroads here, but a single Supreme Court ruling will generate more law review articles, more blog posts, more classroom discussions, more seminars, more conferences, more symposia, more interest than will an ordinary, or even extraordinary, district court opinion.

To a degree, there may be good reason to focus on the higher courts. A single decision by the United States Supreme Court affects many more people than any decision by a district court. By the same token, a Supreme Court decision probably does far more to shape public discourse than any decision by a district court. (Would anyone seriously suggest that the public debate on abortion would look as it does had the Supreme Court denied the Roe v. Wade petition for certiorari?) In other words, individual Supreme Court decisions are both more interesting and more important, in some measures, than individual district court opinions, and scholars who wish to analyze and move the law understandably focus on the interesting and important cases.42 Likewise, with respect to legal education, the focus on appellate and Supreme Court opinions may carry pedagogical benefits, serving as a way to teach students how case law develops and how to reason and argue from opinions.43 But with all of that said, we have not focused enough on district courts, the makers of the law.

41. See, e.g., Theodore Eisenberg & Stewart J. Schwab, What Shapes Perceptions of the Federal Court System?, 56 U. CHI. L. REV. 501, 503 (1989) ("Many, even most, nonjudicial observers of the system know only what they read in published opinions. Most law students, law professors, and non-litigator lawyers fit into this category . . . . [M]ost law school casebook teaching is based on the supposition, that published appellate opinions convey the most accurate view of what the law is.").

42. It probably goes without saying, though I shall say it anyway, that appellate court decisions lie somewhere in between district court cases and Supreme Court cases in terms of both their interest and their importance.

43. See generally Edmund M. Morgan, The Case Method, 4 J. LEGAL EDUC. 379 (1952); see also Anthony Chase, The Birth of the Modern Law School, 23 AM. J. LEGAL
There are practical reasons that academics focus on the higher courts. Law professors are more likely to have clerked at higher courts than they are to have clerked at district courts, and their worldviews and scholarly agendas may be shaped by their experiences. Additionally, the keys to the kingdom in the legal academy are held, to a large degree, by students, specifically those students who edit law reviews. Perhaps this impacts the kinds of scholarship in which academics engage, for better and worse, and orients legal writing towards the higher courts, for student editors are likely to be most familiar with legal discourse that addresses appellate and Supreme Court cases. And, of course, students are oriented this way because appellate opinions are the textual meat of legal education in the United States.

But what probably accounts most of all for the undue focus on higher courts in legal scholarship, apart from the fact that the legal academy is not as realist as it imagines itself to be, is a different practical consideration entirely: studying the district courts in a systematic way is difficult—more difficult than studying federal appellate courts and far more difficult than studying the Supreme Court.

It is difficult to study district courts for all of the same reasons that it is important to study them: there are more of them than other federal judges; they handle a lot more cases than other federal judges do; and they do a lot more in those cases than other federal judges do in their cases. It is easy enough to find and analyze all of the Supreme Court cases that address abortion, or monopolies, or free speech rights, or creditors, or equal protection, or negligence, or federalism, or the right to counsel. It is less easy, though still possible, to do so with appellate court cases; but to even attempt to do so with district court cases is a monumental and daunting task, both from a research standpoint (how do you get all of

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Hist. 329, 342 (1979) (discussing how case method teaches students to “think like lawyers”).


46. See id. at 3 (“Given the importance of article placement in tenure and promotion decisions and in reaching the intended audience, claims that law reviews use the wrong criteria or (worse) no criteria at all in selecting articles cause understandable angst among authors. Professor Carl Tobias’s assessment, for example, that ‘most editors possess strong predilections and act on them compulsively when making publication offers’ should strike fear into the heart of every author, especially because, despite the efforts of some commentators to illuminate those predilections based on what the journals publish, the article selection process is largely a black box.’”).
those cases?) and from an analysis standpoint (what do you do with them once you have found them?). And this is simply a predictable and inherent consequence of the number of district judges, the size of the dockets and the nature of judicial work in the district courts.

Which brings us to unpublished district court opinions. The greatest obstacle to studying district courts is nothing inherent to the district courts. Rather, it is the modern system of institutionalized unpublication that makes it nearly impossible to study the district courts. If we accept that the law is what judges do, then we cannot evaluate the legal system by reference to only published decisions because they may not reflect what goes on in the majority of cases. Thus, the trouble with studying only published opinions is much the same as the problem with studying only Supreme Court opinions, or only appellate court opinions: they give us a skewed view of the law itself.

III. OPINION PUBLICATION AND UNPUBLICATION IN THE DISTRICT COURTS

I begin my practical discussion of unpublication by defining the terms “opinion” and “unpublished” in the district court context and providing a brief procedural background. One reason for doing so is obvious: these are the key terms and processes and I do well to define them at the outset.

But there is also another reason to begin this way. For those who are familiar with the debate over unpublication in the appellate courts, these words and processes have fairly well-defined and well-known meanings, and the implications of the definitions drive the debate. In the district court context, however, the meanings of these terms are radically different and these differences implicate a different set of concerns. Therefore, beginning here serves the additional function of appropriately repositioning the debate over unpublication for the district court context.

A. What Counts as an Opinion in the District Courts?

In the appellate courts, we know what we mean by “opinion.” Opinions are, for the most part, what appellate judges produce. In the district courts, though, “opinion” is not a term of art. Judges issue rulings, orders and decisions.47 They run the gamut from the most mundane, ministerial order, like a ruling on a motion for extension of time ("Granted" or "Denied" usually being the extent of the judge’s ruling) to an elegant ruling on a motion for summary judgment, consisting of facts, legal reasoning and citations.48

When I say “opinion,” I mean everything from the ministerial ruling on a motion for extension of time, to the fully-reasoned ruling on a motion for summary judgment, and everything in between. I cast the defini-

47. See Hoffman, Izenman & Lidicker, supra note 21, at 691 (explaining anatomy of opinion writing).
48. Id. at 12-13.
tion broadly (and perhaps controversially so) for two reasons. First, assuming we wanted to draw a line between those rulings we deemed important and those that we deemed unimportant, and wanted to preference the important ones with the designation “opinion,” I am not certain where we could draw such a line. A discovery ruling, for example, may look like a ministerial ruling (“Granted” or “Denied”) or like a ruling on a motion for summary judgment—or like some hybrid. Do we deem all of them important, or only some of them? And who chooses? For this reason, I think it is better to be over-inclusive rather than under-inclusive, sensitive rather than specific.

Second, and more fundamentally, the idea that some rulings are unimportant seems to me to be quite wrong. From a theoretical standpoint, a ruling on a motion for extension of time is an exercise of judicial power and the judge is supposed to apply a legal standard (discretionary though it may be) in ruling on it. More practically, such a ruling contains important information for the researcher and for the lawyer. For instance, a researcher could aggregate all of the rulings on motions for extension of time for a particular judge, seat of court, district or circuit throughout the country and determine whether judges are more likely to grant such requests for some kinds of litigants and lawyers rather than others—and then consider whether this would be good, bad or neither. This would teach us a great deal about the judiciary and the law itself, because it would tell us what judges actually do. Similarly, for the attorney representing a client, the ability to determine how a judge manages his or her docket is crucial. If so much information could be gleaned from this most mundane set of rulings, surely every other judicial action taken by a judge contains yet more information.

Therefore, it is neither possible nor desirable to differentiate—for the purposes of publication—among different kinds of rulings, and thus I call them all “opinions.”

B. Defining “Unpublished” for the District Court Context

As many commentators have noted, in the appellate court context, the word “unpublished” is a misnomer. With the exception of those produced by the Fifth and Eleventh Circuits, all unpublished appellate court opinions are available from the online legal research resources LEXIS and

49. See id. at 13.

50. Attorneys currently do this through word-of-mouth and judges develop reputations. See Hoffman, Izenman & Lidicker, supra note 21, at 726-27. Nevertheless, such information is incomplete, and access to it is uneven. Inevitably, those with the best access will be the most well-connected local lawyers, raising equity-related concerns about adversarial lawyering. Further, it may be impossible to detect certain patterns without the aid of sophisticated empirical techniques, which require access to data that reputation alone does not provide. See id. at 48-49.

51. See, e.g., Schiltz, supra note 19, at 1429 n.1 (describing meaning of “unpublished” in appellate court context).
Instead, in the appellate court context, "unpublished" usually means "non-precedential" and, until recently, "non-citeable."

I do not mean to suggest that the issue of unpublication in the appellate context is unimportant simply because most opinions are publicly available. At the very least, there is something deeply troubling about the old rules in some circuits that prohibited a lawyer or litigant from quoting judges’ own words back to them. Nevertheless, at least they are available; lawyers, scholars, judges and others may read them, analyze them, synthesize them and criticize them. Whatever the problems with unpublished opinions from the appellate courts, this fact offers at least some measure

52. See id. (stating that many "unpublished" opinions are in fact published); see also Kimberly D. Krawiec & Kathryn Zeiler, Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories, 91 Va. L. Rev. 1795, 1883-87 (2005) (discussing collection of data from Westlaw database); Mills, supra note 13, at 432-33 (describing accessibility of "unpublished" opinions).

53. See, e.g., Reynolds & Richman, Non-Precedential, supra note 13, at 1179-81 (discussing no-citation rules established by circuits for unpublished decisions).

54. See Richman, supra note 20, at 1724-25 (explaining new rule that prohibits restrictions on citation of unpublished decisions); see also Pether, supra note 9, at 2-6 (same).

55. See, e.g., Pether, supra note 9, at 2-9 (discussing no-citation rules associated with unpublication).

56. This, of course, is the upshot of a no-citation rule. Litigants could not cite to and argue from unpublished opinions to the very courts that issued them. Truly, that restriction was so bizarre that it invited criticism, even mockery. And, in all honesty, a small part of me regrets that the rule was changed; it presented such perfectly ripe, large and low-hanging fruit that anyone interested in taking a swing at the courts could not possibly miss. See Penelope Pether, Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari, 62 Wash. & Lee L. Rev. 1553, 1565 (2005) (describing no-citation rule as "the most embarrassing of the effects of the system of institutionalized unpublication"); see also David Greenwald & Frederick A. O. Schwarz, Jr., The Censorial Judiciary, 35 U.C. Davis L. Rev. 1133, 1174 (2002) (arguing against no-citation rules). The authors stated:

[T]here is nonetheless something unsettling about rules that say to litigants that although their cases were decided correctly, the judges do not want anyone to let their judicial colleagues know what they did; something censorious and upside-down about rules that say to lawyers that although they may cite district court opinions, state court opinions, law review articles, or even nonlegal materials in their briefs, those briefs may subject their authors to professional discipline if they refer to certain writings of the very judges who sit on the court hearing the appeal; something confiscatory about rules that say to members of the public that although they have, through their taxes, paid for the production of an opinion, they may not derive any use from that opinion in subsequent disputes; and something arrogant about rules that confer upon judges the power to determine prospectively what cases will provide useful precedential or persuasive authority in cases years down the line, cases that raise issues the judges, for all their experience and collective wisdom, cannot pretend to foresee. Id. (discussing negative effects of no-citation rules).

57. For a further discussion of the availability of "unpublished" decisions, see supra note 52 and accompanying text.
of transparency and accountability to the public for appellate court judges.

In district courts, though, "unpublished," as I use it, really does mean "unpublished." I refer to all district court opinions that are not available for systematic review and study because they are excluded from online databases. This includes an enormous number and variety of opinions, because there is no requirement that district judges send LEXIS and Westlaw their opinions. Indeed, although technically available online on PACER—the courts' online docketing system—and in physical case files at the courthouses, these resources are rarely accessible—one would have to know what to look for in order to find it.58 In this way, unpublished district court opinions are more like summary affirmances issued by some courts of appeal,59 which, as some persuasively argue, are a much more serious problem than unpublished appellate court opinions.60

Thus, for the purposes of this Article, I treat any opinion that is available on Westlaw or LEXIS (which includes all Reporters and all opinions available exclusively online) as "published."61 This is a very broad definition of the word "published;" to qualify, the only criteria is that an opinion be available in accessible and text-searchable form to the public. This excludes only those opinions that are available only in courthouse files or on court websites in non-searchable form. Even under this very broad definition of "published," though, only 3% of judicial opinions—a shockingly low percentage—qualify.62

C. The Process of Opinion Publication in the District Courts

The process and recent history of formalized and nationalized unpublication in the district courts63 is, not surprisingly, less clear than the parallel story in the appellate courts.

58. See Pether, supra note 13, at 1471-74 (discussing current state of unpublication and procedures for accessing such unpublished decisions).


60. See id. (stating that "room for abuse exists" when appellate panel must decide whether opinion has precedential value).

61. To be sure, there are legitimate concerns that litigants and attorneys with greater resources have greater access to the Westlaw and LEXIS online services. See, e.g., Pether, supra note 13, at 1468 (noting "the imbalance of access that wealthy and institutional litigants have to [opinions only available online]"). This issue is worthy of further consideration by legal scholars.

62. See Hoffman, Izenman & Lidicker, supra note 21, at 723-24 (discussing unreliability of using opinions as basis for quantitative analysis).

63. It is likely the case that district judges chose not to publish some of their opinions before the practice became official and systematized. However, I am content to focus on the more recent and institutionalized history of unpublication. Note that appellate court unpublication probably predates the introduction of the model guidelines as well. See Pether, supra note 13, at 1437 nn.7-8 (tracing unpublication practice before model guidelines). The scholarly debate focuses on the
The official reporter for most district court opinions is the Federal Supplement, published by West Publishing Company. West also publishes two specialized reporters: the Federal Rules Decisions—for those “[o]pinions concerned with the application of the federal rules”—and West’s Bankruptcy, for “[o]pinions dealing with bankruptcy issues.” West describes the opinions published in these reporters as “those of general interest and importance.” In addition, West publishes all of these opinions on Westlaw, together with other “[o]pinions selected exclusively for electronic reporting.” These additional, electronic-only opinions include “opinions of interest to the local bench and bar in a particular district,” and West encourages judges to “exercise liberal discretion in submitting opinions for possible reporting on Westlaw.” Because the Westlaw database is more robust than LEXIS’s, and because West’s reporters are considered more official, I focus my discussion on West and Westlaw. Nevertheless, LEXIS has its own parallel process; some opinions that are on Westlaw may not appear on LEXIS, and vice versa).

In determining which opinions to publish, West accepts submissions from judges and attorneys and also monitors court websites and PACER for other opinions of interest. This process is fairly opaque, and no West representative could provide me with precise information about how such determinations are made. Nevertheless, West has provided guidelines to judges instructing them how to make publication determinations and these guidelines shed some light on the process. According to the West guide, West publishes cases “of general interest and importance,” including those that “deal[ ] with issues of first impression[;] establish[ ], alter[ ], modify[ ] or explain[ ] a rule of law[;] provid[e] a review of the system of "institutionalized" or "systematized" unpublication that began in 1964 and gained steam in the 1970s.

64. See Rowland & Carp, supra note 37, at 19 (explaining that Federal Supplement is considered authoritative and official source for district court opinions by “most judges, lawyers, and public law scholars”).


66. Id.

67. Id.

68. Id.

69. Id. at 2-3.

70. Id. at 3.

71. Id.

72. See Hoffman, Izenman & Lidicker, supra note 21, at 710 (finding that Westlaw’s database contains more opinions than LEXIS).

73. See id. at 30 n.137 (showing results of using both processes).

74. See Krawiec & Zeiler, supra note 52, at 1884 (explaining how West populates its databases).

75. West appears to have either a stunning lack of information about its own operation or, more likely, a policy of not providing such information to the public. See id. (discussing lack of information regarding West’s selection process).
law[,] criticiz[e] existing law[,] involve[e] unique factual situations[,] present[,] a unique holding[,] or] involve newsworthy cases."

The opinions that do not meet these qualifications—all ninety-seven percent of them—can only be found in courthouse files and on PACER, the courts' online docket management system. The trouble with PACER is that it is not text-searchable. As a result, the researcher, whether attorney, judge or scholar, can only find what he or she is looking for if the researcher knows exactly what and where it is, or if he or she has the enormous resources necessary to page through courthouse or PACER files, one by one.

76. Publication Guide, supra note 65, at 2. Interestingly, these guidelines closely mirror the publication guidelines for appellate courts. The model rule for appellate courts created by the Federal Judicial Center (FJC) proposes publication for those opinions that "lay[,] down a new rule of law, or alter[,] or modify[,] an existing rule . . . ; involve[,] a legal issue of continuing public interest . . . ; criticiz[e][,] existing law; [and/or] resolve[,] an apparent conflict of authority." Fed. Judicial Ctr., Advisory Council for Appellate Justice, Standards for Publication of Judicial Opinions: A Report on Use of Appellate Court Energies of the Advisory Council on Appellate Justice, Federal Judicial Conference Research Series No. 73-2 15-17 (1973) [hereafter FJC, Standards]. The appellate courts have adopted variations on the FJC's model rule. See Schiltz, supra note 19, at 1430 nn.5-7 (providing useful rundown of each circuit's publication rules).

The first steps towards institutionalized unpublication in the appellate courts came in 1964, when the FJC initially recommended that only opinions of "precedential value" be published. See Pether, supra note 13, at 1442-43 (quoting Dir. of the Admin. Office of the U.S. Courts, Reports of the Proceedings of the Judicial Conference of the U.S. 14 (1964)); see also Karen Swenson, Federal District Court Judges and the Decision to Publish, 25 Just. Sys. J. 121, 136 (2004) (explaining that statistical analysis indicates that judges tend to publish opinions in cases where government, large corporations or large law firms are parties). In the mid-1970s, the practice was systematized and widely adopted based on reports from two committees of the FJC that issued detailed recommendations and model rules for appellate court publication standards. See Comm'n on the Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change 49-53 (1975) [hereinafter FJC, Revision] (recommending changes in opinion writing procedures for appellate courts); FJC, Standards, supra, at 15-17 (proposing standards for publication of appellate court opinions); see also Michael Hannon, Developments and Practice Notes: A Closer Look at Unpublished Opinions in the United States Courts of Appeals, 3 J. App. Prac. & Process 199, 207-08 (2001) (showing timeline for federal court publication rules); Pether, supra note 13, at 1442-45 (discussing origins of unpublished opinions); Robel, supra note 13, at 942 n.11 (explaining study showing that limited publication does not enhance productivity).

Some commentators have asserted that the recommendations and model rules proposed by the FJC committees for appellate courts were directed towards district courts as well. See, e.g., Swenson, supra, at 121 (describing Judicial Conference's guidelines regarding unpublication as directed at district and circuit courts). This is not technically correct, though it may well be the case in a practical sense. The FJC committees only addressed themselves to appellate courts, but given the similarities between the guideline standards, it appears that the interests driving district court publication practices are similar to those driving appellate court practices. See FJC, Standards, supra, at 15-17 (proposing standards governing publication of appellate court opinions); FJC, Revision, supra, at 49-53 (recommending changes in opinion writing procedures for federal appellate courts).
IV. THE TROUBLING IMPLICATIONS OF UNPUBLICATION IN THE DISTRICT COURTS

By this point, the implications of this system of unpublication should be obvious. They come in two categories: what I call the transparency problem and the accountability problem.

A. The Transparency Problem

The transparency problem begins as an informational limitation: as a result of unpublication, we cannot describe with confidence what the law is. We have every reason to believe that access to only three percent of all opinions leaves us with a skewed view of the law. After all, the published opinions are considered to be the “interesting” and “important” opinions, in the words of West’s publication guide; the upshot being that boring and unimportant opinions cannot be systematically reviewed and researched without immense resources. The iceberg metaphor comes immediately to mind: the published opinions, which lie above the surface, may not give us an accurate sense of what lies beneath. 77

Indeed, most of the few existing empirical studies on the subject conclude that we are missing out on quite a bit as a result of unpublication. For instance, using a database of environmental law decisions, two scholars found that the published opinions and the conclusions scholars have drawn from them are unrepresentative of unpublished opinions. 78 Studying employment law cases, two other scholars concluded that focusing only on published opinions meaningfully affects conclusions. 79 One scholar found that “published cases are neither a random sample of all district court cases nor a comprehensive selection of the important ones.” 80 Another scholar similarly concluded that unpublished opinions are not necessarily “trivial” and that the opportunity to avoid publication presented district judges with “potential law making opportunities in which their values could shape the outcomes.” 81 Further, that scholar discovered that among opinions that are appealed, unpublished opinions were as likely to be reversed on appeal as published opinions and in some

77. See Hoffman, Izenman & Lidicker, supra note 21, at 685-87 (describing unreliability of published opinions and applying iceberg metaphor).

78. See Ringquist & Emmert, supra note 36, at 33 (“These differences between published and unpublished case decisions should serve to remind us that in examining published cases alone, we are investigating an unrepresentative subset of decisions which in turn may seriously compromise the validity of conclusions regarding judicial behavior.”).


cases more likely.\textsuperscript{82} Even the one study that found no evidence of systematic differences between published and unpublished opinions concluded that empirical researchers must still contend with unpublished opinions.\textsuperscript{83}

In short, everyone who has empirically studied the issue has concluded that there are, or may well be, meaningful differences between published and unpublished opinions and that the general unavailability of unpublished opinions potentially leads to a misconception of the law itself. Additionally, those empirical researchers have all concluded that there is a "need for a systematic study of the unpublished decisions of federal courts," a recommendation that is at once unassailable and, by definition, nearly impossible.\textsuperscript{84} The implications here are staggering. Just for starters, the entire Restatement project of the realists\textsuperscript{85}—insofar as it seeks to codify the law by informing us what judges do in actual cases—and similar attempts at capturing just what it is that judges do\textsuperscript{86} are called into question.

So what, exactly, might we be missing out on as a result of unpublication? In answering this question, two examples are particularly illustrative. First, there are some kinds of opinions that are \textit{never} published.\textsuperscript{87} For instance, rulings on motions for extension of time never find their way into the Westlaw database. To some, the suggestion that these purely ministerial and entirely unappealable rulings may be of interest to legal researchers is absurd.\textsuperscript{88} But, as I have already described, from a legal realist perspective, studying such rulings could yield important information about the judiciary and the law itself. Thus, even the most "boring" and "unimportant" of all actions that a judge may take in a case turns out to be quite worthy of study. If this is true with respect to these most mundane rulings, everything else a judge does contains even more law and we are missing out on it.

Second, unpublication introduces severe limitations with respect to more "substantive" law. Because it is an area in which I have written in the

\textsuperscript{82} There are methodological problems with many of these studies, and each study has significant limitations. It is therefore possible that their findings are off-base or not amenable to generalization. Nevertheless, this is the best information we have; and if it is wrong, it is yet further evidence of the problems associated with having unpublished opinions in the first place.

\textsuperscript{83} See Hoffman, Izenman & Lidicker, \textit{supra} note 21, at 727-28 (cautioning empiricists of "underrepresentativeness" of opinions).

\textsuperscript{84} Songer, \textit{supra} note 81, at 213-14.


\textsuperscript{86} Here I think specifically of secondary research sources used by attorneys like annotated statutes, practice guides and treatises. Although these resources sometimes include unpublished opinions, the collection of such opinions is haphazard at best.

\textsuperscript{87} See Hoffman, Izenman & Lidicker, \textit{supra} note 21, at 710 (stating that "[m]inisterial orders never lead to opinions").

\textsuperscript{88} See \textit{id.} (discussing prevalence of ministerial orders).
past, I offer an example from choice of law. For the uninitiated, the basic question in choice of law is what state's law should apply to a lawsuit in which more than one state may have an interest. For example, if a resident of California collides with a resident of New York on a freeway in Michigan, which law would apply to the lawsuit?

Over the past four decades or so, American courts have adopted a variety of doctrinal frameworks to resolve such conflicts. These new and complex approaches were intended to introduce fairness and rationality into the choice of law field, which had previously been governed by rigid and dogmatic rules. However, the introduction of these self-consciously flexible and open-ended frameworks begged a question: how were they actually interpreted and implemented by judges?

The earliest quantitative empirical study of the practical impact of the modern approaches to choice of law was conducted in 1989 and focused on appellate court and state supreme court opinions. The goal was to determine how the different doctrines impacted case outcomes. Confronting the obvious potential objection that the exclusion of trial court opinions from the data set would render the findings questionable, the author conceded that "to be sure, coding only the top of the caselaw pyramid imperfectly reflects what is truly occurring in the lower courts, and the results must be treated with caution." Nevertheless, that author went on to argue that "the cases at the top are surely indicative of decision-making at the bottom, assuming precedent is followed . . . ."

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90. See SYMEONIDES, supra note 89, at 37-121 (discussing judicial dissent against previously “established conflicts system”). Symeonides meticulously chronicled the development of choice-of-law doctrine in American courts. See id. (analyzing judicial conflict of law revolution).

91. See, e.g., David Cavers, A Critique of the Choice-of-Law Problem, 47 HARV. L. REV. 173, 173 (1933) (explaining that “proper study” will lead to resolution of conflict of law controversies in favor of “appropriate jurisdiction”); Levin, supra note 89, at 250-52 (outlining revolution in conflict-of-law doctrine over past fifty years); see also SYMEONIDES, supra note 89, at 11-35 (discussing historical evolution of conflict of law doctrine).

92. See SYMEONIDES, supra note 89, at 11-35 (discussing initial scholastic dissent to then-existing conflict-of-law doctrine).


95. See id. at 82 (“The database was restricted to appellate courts in the state and federal systems as those courts are the ones with the highest publication rates and are generally conceded to undertake most of the law development function.”).

96. Id.

97. Id.
But, of course, therein lies the question: is precedent followed? More importantly, how is it followed? Choice of law standards are notoriously manipulable and there is little reason to believe that any "precedent" adopted by a higher court would provide any real constraints—or even useful guidelines—for trial judges.

As the modern choice of law field has developed, other scholars have built and improved on the early work by focusing on the bottom of the pyramid—trial courts. But because the vast majority of opinions were unpublished, and thus inaccessible, scholars based their studies on published opinions. These studies generally concluded that the doctrinal framework does not impact the choice of law determination. In other words, although the doctrines should yield different results in theory, in

98. See, e.g., In re Paris Air Crash of March 3, 1974 (Paris Air Crash), 399 F. Supp. 732, 739 (C.D. Cal. 1975) (describing choice of law as "veritable jungle" leading to "reign of chaos dominated . . . by the judge's 'informed guess'"); Levin, supra note 89, at 253 (describing Symeonides' analysis of choice of law jurisprudence). Choice of law determinations are flexible and indeterminate:

For example, the Second Restatement, which has been adopted by at least twenty-two jurisdictions for conflicts in tort cases, provides a "deliberately malleable list" of relevant factors for a judge to consider. To be precise, there are two lists, one that provides seven "principles," and another that enumerates the four relevant "contacts." It is difficult to imagine that mathematics of this sort could provide any "right" answer.


99. See, e.g., Paris Air Crash, 399 F. Supp. at 739 (describing choice of law as "veritable jungle" leading to "reign of chaos dominated . . . by the judge's 'informed guess'"); SYMEONIDES, supra note 89, at 70 ("[M]ethodology rarely drives judicial decisions."); Stewart E. Sterk, The Marginal Relevance of Choice of Law Theory, 142 U. Pa. L. Rev. 949, 951 (1994) ("[T]he result in the case often appears to have dictated the judge's choice of law approach . . . ."); Symeon C. Symeonides, Choice of Law in the American Courts in 1994: A View "From the Trenches", 43 Am. J. Comp. L. 1, 2 (1995) ("[O]f all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice-of-law methodology followed by the court.").


101. See, e.g., Patrick J. Borchers, The Choice-of-Law Revolution: An Empirical Study, 49 Wash. & Lee L. Rev. 357, 376 (1992) ("[T]he data include only reported cases . . . . Combing trial court records for unreported multistate cases would be a monumental undertaking."); see also SYMEONIDES, supra note 89, at 266-67 (noting limitations on data considered); Levin, supra note 89, at 256-58 (focusing on limitations inherent in studying only published decisions in choice-of-law context).

102. See, e.g., Stewart E. Sterk, The Marginal Relevance of Choice of Law Theory, 142 U. Pa. L. Rev. 949, 951 (1994) ("[T]he result in the case often appears to have dictated the judge's choice of law approach . . . ."); see also SYMEONIDES, supra note 89, at 70; Symeonides, supra note 99, at 2.
practice, they do not. This suggests that modern choice of law rules do
not work properly, or at least not as they were expected to.

In spite of all this, the inclusion of unpublished opinions could poten-
tially tell a different story. Perhaps the published trial court opinions and
the appellate cases included in the study are the hard cases, and, as such,
the judge’s intuition matters more than the methodology the judge pur-
ports to apply. The inclusion of unpublished opinions may reveal that
methodology and doctrine make a difference in the majority of cases, after
all.103

As Reynolds keenly noted:

One always wonders at the validity of a critique based only on a
sample of reported opinions. The success of a system depends in
part on how it handles the easy, as well as the difficult, cases. By
their very nature, however, the former will not be published, and,
therefore, not evaluated by scholars.104

In the final analysis, then, choice of law may work as advertised. Alterna-
tively, perhaps the unpublished cases reveal entirely different patterns of
choice of law decision-making by judges, and the system works differently,
for better or worse, than available studies suggest.105

Unfortunately, because we do not have access to the vast majority of
opinions, we cannot fully assess the revolution in choice of law. The real
story of the choice of law may be either better or worse than we now know,
which is another way of saying that we do not really know very much. And,
as a result of unpublication, this is potentially the case in all areas of legal
scholarship.

The consequences here should be obvious. For legal scholars, it
means that we cannot assess the state of the law with confidence or push it
normatively. We are left with a formalist view of the law, presuming that,
or at least acting as though, the law that is given is the law that is done. We
Teach and study the rules, standards, tests and doctrines given down in
Sinaitic form by legislatures and higher courts and we assume that these
control what actually goes on in the courts. Thus, to return to choice of
law, we are left teaching our students that courts in a plurality of American
jurisdictions will apply the following rule for conflicts in tort cases. First,
they will consider several guiding “principles”:

(a) the needs of the interstate and international systems; (b) the
relevant policies of the forum; (c) the relevant policies of other
interested states and the relative interests of those states in the

103. See Levin, supra note 89, at 256-58 ("[W]e really only know what some
unspecified and perhaps unrepresented sample of courts have done, which is not
at all the same as knowing what courts do").
104. Reynolds, supra note 93, at 1389 n.84.
105. See Levin, supra note 89, at 257-58 (emphasizing potential for unpub-
lished decisions to reshape way choice of law is determined).
determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. 106

Next, they will consider the relevant “contacts”:

(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicil, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. 107

And our students scratch their heads and continue scratching as they become lawyers, judges and law professors.

For practicing lawyers, all of this means that they cannot with confidence advise their clients about what a judge is likely to do in a particular case. After all, attorneys use judicial opinions “to predict and advocate the outcome of a client’s dispute, and to advise the client on an appropriate course of action.” 108 In order to accomplish these goals, “the availability of the facts and analysis of prior cases” to attorneys—that is, the availability of the opinions themselves—“is vital to the process of applying the law to current cases.” 109

For district judges, unpublication means that they may not know how other judges have decided in similar cases, thus stunting the development of the common law. Although they are not strictly bound by previous district court opinions, such opinions do carry persuasive value; 110 and, particularly where the facts of a case closely resemble those of a previous decision, the judge should grapple with the previous decision. 111 This is, after all, how law gets made in our common law system. But as a result of unpublication, this process is at best haphazard and inconsistent. 112 For example, similar choice of law questions may yield different outcomes, or similar discrimination lawsuits may fare differently on summary judgment,

106. Restatement (Second) of Conflict of Laws § 6 (1971).
107. Id. § 145.
109. Id. at 782-83 (explaining attorneys’ use of judicial opinions).
110. See Andrew P. Morriss, Michael Heise & Gregory C. Sisk, Signaling and Precedent in Federal District Court Opinions, 13 S. Ct. Econ. Rev. 63, 94 (2005) (finding district court opinion as persuasive, but not definitive, of appellate judge’s decision).
111. See id. (detailing judges’ use of previous decisions).
112. See Rowland & Carp, supra note 37, at 118 (“Failing to submit important cases for publication is deleterious because it can lead to inconsistencies among courts . . . ”).
and no one would be the wiser. Appellate judges, legislators and other policy-makers are also left in the dark.

Similarly, administrative agencies and officials that answer to district courts need to know what courts do with their cases. For instance, government officials shielded by the doctrine of qualified immunity would be interested in knowing whether a district court opinion addresses a particular kind of conduct because a district court opinion may "clearly establish" the law for the purposes of qualified immunity. And although such institutional actors may have the resources and wherewithal to keep track of at least some of the unpublished district court decisions, those on the other side of lawsuits against them probably do not.

To put it simply, anyone who cares (or should care) about what district courts do suffers as a result of unpublication. We cannot say with confidence what the law is and therefore, we cannot judge whether it works or decide what to do if it does not.

B. The Accountability Problem

Up to this point, all of the arguments I have made about the necessity of access to all opinions—to scholars, to judges, to attorneys and to potential litigants—have assumed good faith on the part of district judges. All of my arguments have been epistemological in nature: people have an interest in knowing what happens in our judicial system and the only way to gather that knowledge is to make judicial opinions, including those of district judges, meaningfully accessible.

But in addition to the transparency problem, unpublication creates a potential problem of accountability. Consider the purposes of written judicial opinions:

Undoubtedly [the requirement of a written opinion] will insure a careful examination of the cases, and result in well considered opinions, because they must come before the jurists of the country and be subjected to the severest criticism . . . . It tends to purity and honesty in the administration of justice.

In other words, written opinions are valuable because they provide a measure of accountability—they help to ensure that judges both pay fidelity to

113. See generally Jonathan M. Stemerman, Unclearly Establishing Qualified Immunity: What Sources of Authority May Be Used to Determine Whether the Law is "Clearly Established" in the Third Circuit?, 47 VILL. L. REV. 1221 (2002). Nevertheless, if the opinion is never published, affected parties might never know.

114. See Pether, supra note 13, at 1511 (commenting on disadvantage of poor and powerless litigants due to unpublication); Robel, supra note 13, at 955-59 (surveying advantages given to frequent litigants).

the law and are careful in their decisions. I suggest, however, that it is not the writing of an opinion that provides this accountability, but rather the publication of the opinion—because what good is a written opinion that will never be read?

In the absence of publication, then, there is, first, a real concern with the level of thought and care that judges put into their opinions. As Judge Posner put it in the appellate court context, "[i]t is a sort of a formula for irresponsibility." This is even truer in the district court context, where "unpublished" actually means unpublished, because judges are aware that virtually no one will read their opinions.

Second, unpublication potentially provides judges an opportunity to do unprincipled things. District judges do more with their opinions and rulings than inform the parties and the public of their decisions and reasoning on the legal questions raised by the case. In the common law tradition, of course, they can use their opinions to shape the law. But in the modern era of managerial judging, they also use their opinions to send messages to the parties or to shape case outcomes. To offer one example, a judge can use an opinion and ruling as an opportunity to push parties towards settlement. For instance, a judge may believe that a particular case is best resolved by private settlement, and therefore tailor a ruling on summary judgment in a way that that judge believes will most likely lead the parties to settle.

One's taste for this type of practice is likely to depend, at least in part, on one's taste for the modern trend of judges becoming involved in settlement negotiations and pushing parties towards settlement more generally. That is, those who believe that settlement generally leads to better outcomes for parties and the adjudicative system may not be bothered by the use of opinion-writing to facilitate that process. On the other hand, those who look askance at the push to settlement would probably view with suspicion the use of judicial opinions for this purpose.

But unpublication adds a wrinkle that should disturb even those most sanguine about the modern trend towards settlement. If the judge has guessed correctly, and his or her opinion leads the parties to settle, then the ruling will never undergo appellate review. And if the opinion is unpublished, no one would ever know what the judge did. Obviously, this

116. See Jeremy Bentham, Of Publicity and Privacy, as Applied to Judicature in General and to the Collection of Evidence in Particular, in Works of Jeremy Bentham, Vol. 6, ch. X, 351 (1843) ("Upon his moral faculties . . . publicity acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual faculties it acts as a spur, urging him to that habit of unremitting exertion, without which his attention can never be kept up to the pitch of his duty.").

117. Some will immediately suggest that in the district court context, accountability does not require publication, because parties may appeal as of right. As I argue infra, however, appealability does not adequately discipline judges in a variety of kinds of cases.

practice presents the opportunity for manipulation of the law and case outcomes by district judges. Publication would potentially subject such opinions to public scrutiny, thus incentivizing judges to act in principled ways.

To be sure, unpublication may allow judges to achieve what we might think are good results, and subjecting certain opinions to the public scrutiny afforded by publication may diminish that ability. Nevertheless, it is a sad statement indeed if judges require the cloak that unpublication provides in order to achieve justice—and this is hardly a strong argument in favor of allowing judges to decline to publish fully ninety-seven percent of their opinions.

I should conclude this section by making certain not to overstate my claims. Although I do believe that full publication would fully resolve the transparency problem, I do not believe that it would fully resolve the accountability problem. That is, the mere fact that a particular opinion—one among thousands—is published does not necessarily mean that the judge will be more careful or act in a more principled way. Nevertheless, to the extent that the costs of full publication are low, it would help, and it would signal to the public that judges are not afraid for the world to see what they do.

V. The Unconvincing Arguments in Favor of Unpublication

Given the costs of unpublication, why not publish everything? In other words, why do we have the system that we do? Not too long ago, when “publish” meant “put it in a book,” the answer would have been straightforward and unassailable: given the sheer volume of opinions generated by district court judges, it would simply be too costly to print each opinion in a Reporter. But today, with the relatively low cost of publishing online, that answer is anachronistic. As one advocate of full publication in the appellate context stated, “[t]he advent of virtually costless on-line publishing with no need for books or shelves makes nonpublication more questionable than ever.”

But there are likely to be other, more serious defenses to unpublication practices in the district court. These defenses fall into two general categories. First, that full publication is unnecessary or even undesirable; and second, that it is impossible.

119. West urged judges to exercise liberal discretion in submitting opinions for possible reporting on WESTLAW because “WESTLAW has a large storage capacity.” Publication Guide, supra note 65, at 3 (urging submission for potential reporting on Westlaw).

A. The Argument that Full Publication is Unnecessary or Undesirable

The first defense of institutionalized unpublication is likely to be that full publication is unnecessary or perhaps undesirable. Judge Kozinski, a zealous proponent of unpublication in the appellate context, argues that most cases just do not deserve the full attention of an appellate judge because they are easy and uninteresting.\(^{121}\) That is, they add nothing to the corpus of the common law and there is therefore no reason that the public requires access to them.\(^{122}\) This claim picks up on one of the primary justifications originally offered by the Federal Judicial Center (FJC) in 1973 for unpublication in the appellate context.\(^{123}\) The FJC concluded that "[m]any decisions do not call for opinions [because a] simple order or a brief memorandum may be sufficient to apprise the parties of the result and dispose of the case,"\(^{124}\) and it would no doubt be offered in the district court context as well. Indeed, the West publication guidelines specifically call for publication of those opinions that are of significance and interest.\(^{125}\) But this argument fails to persuade, and for reasons I have already covered: everything a judge does is law, it is all important; and even if not, we should hold judges accountable.

A stronger version of this argument may be that full publication is undesirable because it inevitably muddies the law and provides attorneys and judges with too much information, such that it complicates and increases the costs of legal research and creates too much bad law. This, too, is unpersuasive because we know that judges, lawyers and scholars include in their research as many unpublished opinions as they can possibly get their hands on.\(^{126}\) In other words, they want these opinions. Although it is the case that better access to opinions means better access to bad opinions as well as good ones, at least we could determine exactly what judges are doing in actual cases and hold them accountable for their bad opinions. Additionally, as I have suggested, bad opinions may be a product of unpublication—hardly an argument in its favor.\(^{127}\)

\(^{121}\) See Kozinski & Reinhardt, supra note 14, at 43-44 (discussing why publication is unnecessary where issue is simple and straightforward).

\(^{122}\) See id. (same)

\(^{123}\) See FJC, STANDARDS, supra note 76, at 15-17 (laying down standards for determining when case should be published).

\(^{124}\) Id. at 1-2.

\(^{125}\) For a discussion of West’s publication guidelines, see supra notes 65-76 and accompanying text.

\(^{126}\) See Pether, supra note 13, at 1487 (noting lawyers and judges follow and research unpublished opinions).

\(^{127}\) Some might argue that full publication is undesirable for another reason: it encourages judges to rule orally. Nevertheless, this seems unlikely to me, because there are sufficient incentives in place to discourage judges from doing so. First, parties prefer written rulings, and judges may be responsive to such preferences. See Hoffman, Izenman & Lidicker, supra note 21, at 694 (commenting on judges’ tendencies to write opinions when it advances their policy preferences, particularly when aware of audience). More importantly, appellate courts disfavor oral rulings and are quick to reverse them. See id. at 24 (noting that appellate
A third argument is that unpublication is unnecessary because the potential for appeal already provides for a measure of accountability. But this argument also fails to persuade. At best, appealability resolves the accountability problem; it does nothing to resolve the transparency problem. Further, even from an accountability standpoint, there are all kinds of rulings—like ministerial actions within the discretion of the judge—that are not appealable at all, and others—like discovery rulings—that are almost non-appealable. And of all of those rulings that are technically appealable, only a minority are actually subject to appellate review.

Finally, even assuming that these opinions are appealed, it is a mistake to assume that they receive the full appellate treatment and the attention of appellate judges. As Pether has devastatingly shown, in some circuits, the actual work of judging is performed more often than not by staff attorneys and law clerks, particularly in precisely those "uninteresting" and "unimportant" cases that are said to be the subject of the unpublished district court opinions. Appellate judges may never even see the file or the papers, and may trust the work entirely to their clerks and staff attorneys, who may dispose of the cases in unpublished opinions or, worse, summary dispositions without opinion. Thus, full publication would complement appealability as a disciplining measure for judges.

B. The Argument that Full Publication is Impossible

The more serious argument against full publication involves the allocation of judicial resources: do judges have the time necessary to make every opinion of publishable quality? This issue was one of the first identified by the FJC in its 1973 report proposing the model rule for publication

128. See Patrick J. Schiltz, The Citation of Unpublished Opinions in the Federal Courts of Appeals, 74 Fordham L. Rev. 23, 48 (2005) (noting that no-citation rules regarding unpublished opinions undermine accountability). Schiltz defended non-publication in the appellate courts on the grounds that unpublished appellate court opinions are written not only for the parties, but also for review by the en banc and the Supreme Court. See id. at 52. This argument is even stronger in the district court context, because a much higher percentage of district court decisions undergo review by a higher authority than do appellate court opinions.

129. See Hoffman, Izenman & Lidicker, supra note 21, at 689 (emphasizing lack of review for many lower court determinations).

130. See id. (listing factors why judges may believe decision will be appealed, including effect of procedural rules); see also Richard A. Posner, The Federal Courts: Challenge and Reform 176 (1985) (discussing reduction in incentives to appeal).

131. See Pether, supra note 13, at 1491-92 (pointing to reports showing circuits often assign responsibility of determining whether to publish to clerks).

132. See id. at 1492 (noting that judges often do not see files before signing off on unpublished opinion).

133. See id. at 1492 n.314 (highlighting examples of judges entrusting cases and their disposition to law clerks and staff attorneys).
in the appellate context and it is the first argument offered today by supporters of current practices in the appellate courts.\textsuperscript{134} As the Committee on Use of Appellate Court Energies wrote in 1973:

Appellate Judges have long been urging that many of their cases do not raise issues of types that, if discussed in depth, will contribute importantly to knowledge of the law or its development. At the same time, many of these judges bemoan the lack of time to consider and develop the solution to significant problems in other cases.\textsuperscript{135}

Or, more simply, "[p]ublication of opinions burdens the work of writing opinions."\textsuperscript{136}

This argument has featured prominently in the recent debates in the appellate context, with Judges Alex Kozinski and Stephen Reinhardt maintaining that judges simply do not have the time to write carefully considered (and thus publishable) opinions for every case that is appealed.\textsuperscript{137} Judge Kozinski has explained that he goes through at least fifty drafts for opinions intended for publication and that he simply cannot spend that much time on every case that comes before him.\textsuperscript{138} This argument is likely to be even stronger in the district court context because district judges are said to face ever-increasing caseloads.\textsuperscript{139} The "litigation explosion" and managerial nature of district court judging\textsuperscript{140} means that they have even less time to hammer out opinions that are "ready for prime time" than do their counterparts on the appellate courts. Concededly, this defense of unpublication is more serious than those arguments about necessity and desirability. After all, "should" implies "can," and if our district court judges truly do not have the time to write opinions of publishable quality, then any demand that they publish more is moot.

But I am not persuaded.

\textsuperscript{134} See FJC, STANDARDS, supra note 76, at 1 (reciting judges' complaints of delay due to time-consuming nature of writing opinions).

\textsuperscript{135} Id. (emphasis added).

\textsuperscript{136} Id. at 6.

\textsuperscript{137} See Kozinski & Reinhardt, supra note 14, at 43 (arguing that opinion-writing is too time-consuming to require it on every case); Thomas R. Lee & Lance S. Lehnhof, The Anastasoff Case and the Judicial Power to "Unpublish" Opinions, 77 NOTRE DAME L. REV. 135, 147-48 (2001) (recognizing large number of cases filed in court system would make rule requiring publication in all cases paralyzing one for judiciary).

\textsuperscript{138} See Kozinski & Reinhardt, supra note 14, at 43 (discussing considerations that make opinion writing so time-consuming).

\textsuperscript{139} See Miller, supra note 8, at 985-92 (tracing increase in cases filed in federal courts and explaining rise as partly due to development of new legislation and new rights).

\textsuperscript{140} See id. at 982-1016 (describing how critics of civil adjudication have used supposed "litigation explosion" to remake courts through procedural and substantive reforms).

\textsuperscript{141} See Resnik, supra note 2, at 386-413 (describing managerial judging).
As an initial matter, the litigation explosion claims themselves may be overstated. The judges’ refrain that they do not have the resources to produce publishable opinions has been sung over and over again in these debates, most significantly, during the debate over unpublishation in the appellate context. But the judges lost these arguments and our courts remain standing. There is therefore something of a “boy crying wolf” quality to this argument. As a result, before we adopt this problematic view, then—that judges face so much work that we cannot fully expect them to do their jobs—we ought to assign the burden of proof to those who hold it.

To be sure, I do not discount the possibility that a full publication rule will, at the margins, change the process, and even the substance, of judging in unpredictable ways. Indeed, as someone who believes that changes in procedure often have substantive repercussions, it would be odd for me to argue otherwise. I further concede that some of these changes might be negative. It is for this reason, as I explain in the concluding section below, that I support a pilot program that will allow us to study the effects of full publication in select districts. Still, I reject entirely the notion that it is likely that the benefits of full publication will be outweighed by the costs. Given the stakes, the opposite is true.

But let us assume for the moment that it is true that judges do not have more time to write. If we are mainly concerned with the transparency problem, then judges should not be bothered by a rule requiring full publication. After all, from a transparency standpoint, full publication does not require judges to write more; it only requires them to make public that which they already write. Judges who are confident that their rulings can withstand the modest public scrutiny that publication provides have nothing to fear from it.

We are left, then, with a strange and disturbing irony: the more that judges oppose full publication, the more it becomes apparent that full publication is necessary on the grounds of accountability. If they are right and they really do not have the time to be held accountable, then we have much greater and deeper problems than those I have addressed in this paper. That is, if the parade of horribles plays out and docket-processing comes to a screeching halt because judges are afraid that their writings will come back to haunt them, then unpublishation will be exposed as a tool to paper over much more problematic aspects of our judicial system. And so I not only believe that it is likely that this argument against publication is wrong, I very much hope that to be the case.

142. See Miller, supra note 8, at 992-96 (citing criticism of “litigation explosion” argument).

143. See Kozinski & Reinhardt, supra note 14, at 44-45 ("We are a large court with many judges. Keeping the law of the circuit clear and consistent is a full-time job, even without having to worry about the thousands of unpublished dispositions we issue every year.").
VI. A MODEST PROPOSAL

My goal for this Article is to explore the theoretical and practical costs of unpublication in the district courts and to provoke a conversation about the current norms and practices. It is not my intent to formulate the perfect practical solution. Nevertheless, it is readily apparent that available technologies allow us to move beyond this problem.

In an ideal world, opinions on PACER would be text-searchable and access would be free. The latter suggestion is fairly important because it would help to break the duopoly that LEXIS and Westlaw currently enjoy in the legal research market or at least to somewhat even the playing field between haves and have-nots. Equally important, the suggestion is not mere fancy; indeed, the courts hope to move in this direction. Further, because all opinions are already on PACER and are already produced by judges in text-searchable format, it would be simple enough to open opinions to the public scrutiny they deserve. Unfortunately, this solution would require the consent of the judges and/or an order by Congress, and so although it is the ideal, it is not necessarily the most likely in the short run. In the meanwhile, LEXIS and Westlaw should recognize the value of all opinions and should choose to include them all in their online databases.

It is tempting to argue that these changes should go into universal effect tomorrow. But I am cautious at heart and no radical, and it is possible that the consequences of full publication will be unpredictable and negative. And so I offer the relatively modest proposal that full publication be introduced, one way or another, in selected districts, in order to allow us to seriously study its makeup.

On one point, though, I throw caution to the wind: the stuff of law belongs to all of us, and as technology changes, our expectations for what ought to be available can, do and should change as well.

144. Olufunmilayo B. Arewa, Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market, 10 LEWIS & CLARK L. REV. 797, 821 (2006) (noting dominance of LEXIS and Westlaw in legal research market); Pether, supra note 9, at 20 (exhibiting concern that only those with significant resources can access “unpublished” opinions on duopoly of LEXIS and Westlaw); Pether, supra note 13, at 1468, 1473 (stating that Westlaw and LEXIS do not eradicate problem of unpublished opinions because access to those databases is limited and those sites select which unpublished opinions to include).

145. See Hoffman, Izenman & Lidicker, supra note 21, at 729 (pointing to proposals to make access to federal court trial docket free).