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## Bottom-Rung Appeals

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## BOTTOM-RUNG APPEALS

Merritt E. McAlister\*

*There are haves and have-nots in the federal appellate courts, and the haves get more attention. For decades the courts have used a triage regime where they distribute judicial attention selectively: some appeals receive a lot of judicial attention, some appeals receive barely any. What this work unearths is that this triage system produces demonstrably unequal results depending on the circuit handling the appeal and whether the appellant has counsel or not. Together, these two factors produce dramatic disparities: in one circuit, for example, an unrepresented appellant receives, on average, a decision less than a tenth the length of a similarly situated represented appellant in another circuit. Compounding that, in most federal circuits thousands of decisions issued annually in unrepresented appeals—especially those involving prisoners—are not available on free court websites, rendering them functionally unusable by those facing the greatest barriers to accessing justice in federal court.*

*This Article both unearths these systemic inequities and calls for greater attention to their consequences. These disparities threaten dignitary harm to litigants, but they also risk a disparate impact on the development of the law. The courts and Congress, if need be, should realign the existing triage regime to prioritize procedural justice values alongside efficiency. At a minimum, this Article argues for transparency reforms to better assess the effect of the federal appellate triage regime on marginalized litigants. More controversially, it also argues that Congress should establish minimum and uniform standards for federal appellate decisionmaking.*

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\* Associate Professor of Law, University of Florida Levin College of Law. For always being my best and earliest readers, I thank Andrew Hammond and Peter Molk. The empirical work in this Article involved hand coding, and I owe an enormous debt of gratitude to a team of research assistants who helped with this effort over many years. For diligent and careful work, I thank Julia Anderson, Shannon Anderson, Kiersten Ballou, Tyra Carroll, Maria Castro, Anthony Crum, Valentina Franco, Dominyka Plukaite, Madison Reeber, Jack Stephens, and Michael Dulman. Special thanks go to Shane Sahadeo, who was particularly tireless. Any errors that remain are my own. [More acknowledgements go here].

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INTRODUCTION

The haves come out ahead in the federal appellate courts. They benefit from a system that, for decades, has distributed judicial time and attention selectively: some appeals—those presenting issues deemed sufficiently important—receive lots of attention; but most appeals—those presenting “easy” or routine issues—receive hardly any.<sup>1</sup> The former usually benefit from oral argument and robust judicial engagement; the latter receive a judge’s rubber stamp on an “unpublished”<sup>2</sup> decision drafted by

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<sup>1</sup> See Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 443-46 (2013) (concluding that federal appellate case management practices that distribute judicial attention selectively are “loosely consistent with . . . the twin goals of error correction and law development”).

<sup>2</sup> “Unpublished” decisions are those not designated by the courts for inclusion in the official West *Federal Reporter*. The standards that govern publication decisions, the nomenclature the courts use to describe these decisions, and public access to them all vary across the circuits. See Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdieck, & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 19-25 (2022)

the central legal staff who read the parties' briefs. This two-tiered system of judicial triage self-consciously divides the world of federal appellate review into "haves" and "have-nots."<sup>3</sup> But we've all been wrong; the world of federal appeals doesn't just have two tiers. It has three. There's a bottom rung.

In some—if not in most—circuits there's a first tier of review for counseled appeals involving the most "important" or interesting cases; there's a second tier for the system's "haves" who have lawyers but present routine, boring, or easy issues; and there's a third tier for the system's "have-nots" who are unrepresented. Unrepresented appellants, on average, receive decisions half the length of their represented counterparts—even controlling for oral argument, outcome, and publication status. And in some circuits the disparity is even more dramatic: in one circuit an unrepresented appellant receives a decision that, on average, is less than a tenth the length of a decision in a similar, counseled appeal. Making matters worse, thousands of decisions issued annually in appeals involving unrepresented appellants are unavailable on free court websites (and, as a result, never make it to usable commercial databases).

Unrepresented litigants already face great barriers in accessing justice.<sup>4</sup> This work demonstrates just how high those hurdles have become in the federal appellate courts. Useful law is harder to find for many unrepresented appellants, and, if it is available, it's more likely to be thinly reasoned. It's also far more likely to be "non-

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(discussing circuit practices, rules, and nomenclature related to publication) [hereinafter Gluck, *et al.*].

<sup>3</sup> See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 278 (1996) (describing two-track system of federal appellate justice) [hereinafter Richman & Reynolds, *Elitism*]; see also Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1137, 1140 & nn.7-9, 1147-48 (2022) (arguing for "tiers" of federal appellate justice) [hereinafter McAlister, *Rebuilding*]; Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 20 (2007) (arguing that "have-nots" appellants often receive "second-tier justice" in federal appellate courts). Although some scholars describe the system as having two "tracks" (an argument track and a non-argument track), this work uses the term "tiers" given how value-laden the "tracking" decisions are. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 840-44 (1984) (discussing "value-express functions" of procedural choices).

<sup>4</sup> See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 8 (2004) ("As law becomes increasingly crucial and complex, access to legal services also becomes increasingly critical."); *id.* at 14-15 ("All too often, parties without lawyers confront procedures of excessive and bewildering complexity, and forms with archaic jargon left over from medieval England.").

precedential” or “unpublished,”<sup>5</sup> as well, a decisional status reserved for decisions that purport, on their face, to make no law because they break no new ground.<sup>6</sup> But this law remains freely citable as persuasive authority in federal courts,<sup>7</sup> and the volume of unpublished authority substantially dwarfs the precedential authority courts create.<sup>8</sup>

These forces combine to threaten systemic underdevelopment of the law in areas where marginalized litigants litigate the most: prisoner civil rights claims, asylum and other immigration matters, and habeas corpus law. Moreover, many of these are also areas of the law that depend, quite literally, on decisional law to develop and define the contours of constitutional rights and duties.<sup>9</sup> By issuing perfunctory decisions in civil rights cases, for example, courts are more likely to stymie efforts to overcome qualified immunity and to thwart the development of constitutional rights in the modern era. Procedural shortcuts thus create legal barriers to obtaining relief.

This work makes three main contributions to an emerging conversation around access-to-justice issues in the federal

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<sup>5</sup> In 2021, the nationwide rate of unpublished decisions in cases terminated on the merits (as opposed to cases terminated for procedural reasons) was 86.3%. ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS 2021, at tbl.B-12 [hereinafter *Judicial Business 2021*], [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b12\\_0930.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2021.pdf). That percentage has remained relatively consistent; the Administrative Office calculates that 87.8% of the regional circuit courts of appeals’ decisions on the merits were unpublished between 2015 and 2020. *Judicial United States Courts*, Table 2.5, U.S. Cts. (2020), [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_2.5\\_0930.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2020.pdf). I rely heavily on data from several issues of *Judicial Business* in this Article, which for convenience are cited simply as “JUDICIAL BUSINESS [year],” with a hyperlink to each table the first time it appears. For all reports, see *Judicial Business of the United States Courts*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts>. Note that the reporting period for the Administrative Office’s *Judicial Business* publication runs from October 1 to September 30 each year. *Id.*

<sup>6</sup> See Gluck, *et al.*, *supra* note 2, at 37 (concluding that “the federal judiciary is disproportionately and systematically not publishing cases brought by certain types of litigants—namely litigants representing themselves and incarcerated individuals”).

<sup>7</sup> FED. R. APP. P. 32.1.

<sup>8</sup> See *supra* note 5 (observing that approximately 87% of federal appellate merits decisions are unpublished).

<sup>9</sup> See Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 989 (2020) (recognizing that “precedents create affirmative legal obligations for state officials, even if those officials were not parties to the precedent-making lawsuits”).

appellate courts.<sup>10</sup> First, it demonstrates that not all unpublished decisions—the most common type of federal appellate decision, by far—are created equal. There’s a bottom rung of federal appellate justice for unrepresented appellants in most circuits. Using a unique dataset containing more than 11,000 hand-coded decisions issued by every geographic federal appellate court during a continuous six-month period,<sup>11</sup> this Article demonstrates that decisions in unrepresented appeals are, on average, about half the length of decisions in counseled appeals when controlling for publication status, outcome, and oral argument.

Second, this work proves that not all unpublished decisions are equally accessible, and this disparity, likewise, affects unrepresented litigants more than represented ones. Thousands of decisions issued by federal appellate courts on the merits during the study period are unavailable on the commercial database this study used. That finding builds on my earlier work revealing the existence of “missing” unpublished decisions from free court websites and commercial databases.<sup>12</sup> These decisions, instead, remain locked away behind the federal docketing system’s paywall, and thus out of easy reach of litigants and the commercial databases who use free court websites to access them.<sup>13</sup> This work offers the first detailed analysis of what is missing across all

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<sup>10</sup> This Article builds on a recent study on unpublished decisions from Abbe Gluck and colleagues. *See generally* Gluck, *et al.*, *supra* note 2; *see also infra* Part II.C.2 (situating this project in the context of other studies).

<sup>11</sup> Because of its unique jurisdiction, 28 U.S.C. § 1295, this project excludes the U.S. Court of Appeals for the Federal Circuit. But its decisional practices are certainly worthy of examination. *See, e.g.*, Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law by Saying Nothing?*, 71 VAND. L. REV. 765 (2018) (examining Federal Circuit’s use of summary affirmances in decisions involving patentable subject matter); Jason Rantanen, *Missing Decisions and the United States Court of Appeals for the Federal Circuit*, 170 U. PA. L. REV. ONLINE 73 (2022) (discussing failure of Federal Circuit to make certain decisions available on its website—in particular, decisions related to the appropriateness of an appeal and mandamus decisions).

<sup>12</sup> *See* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1103 (2021) (demonstrating that “approximately twenty-seven percent [of merits terminations] are missing from the most popular and powerful commercial legal databases”) [hereinafter McAlister, *Missing*]; *see also* Gluck, *et al.*, *supra* note 2, at 10 (“we found that court websites and commercial databases contained only limited subsets of all unpublished opinions, limiting the empirical study that could be undertaken” and noting that “recent study by McAlister confirms that commercial databases are indeed missing a significant share of federal appellate dispositions”).

<sup>13</sup> *See* McAlister, *Missing*, *supra* note 12, at 1105 (explaining that because commercial databases depend on free court websites for most of their content, they are unlikely to obtain merits decisions not available there (unless requested by a database user)); *id.* at 1138-40 (describing in detail how certain “judgments” are locked behind the First Circuit’s docketing paywall).

geographic circuits. Here, that’s more than 5,000 reasoned decisions, and 85% of those decisions involve marginalized litigants (including incarcerated persons, criminal defendants, and those without lawful or permanent status in the United States). Not only is there a bottom rung of federal appeals, but it’s also harder for the litigants the courts shunt there to find and use relevant law.

Third, this Article demonstrates that not all federal appellate courts are created equal, either. Decisional practices or habits across the circuits vary widely, risking the uneven development of the law in different regions and imposing differential dignitary harms on marginalized litigants. Disparities over the use of unpublished decisions across the circuits are well known.<sup>14</sup> But this work is the first to demonstrate that it’s not just the rates of publication that vary, but the extent of reason-giving itself. Assessing outcomes by decision length, the litigant experience (especially for unrepresented litigants) varies dramatically across the circuits—sometimes by as much as a factor of ten.

While some scholars have celebrated certain forms of dis-uniformity across the federal appellate courts as valuable “circuit personalities,”<sup>15</sup> this work identifies more pernicious circuit habits. These entrenched practices are cause for reform, I argue, not celebration. Indeed, they demonstrate the failure of the courts to oversee and evaluate the effects of their triage regime on the vulnerable litigants who frequently seek redress in the federal appellate courts.<sup>16</sup> At a minimum, this work calls on Congress to mandate transparency reforms to enable courts, scholars, and the public to better assess the disparities the triage system produces. More controversially, it also argues for a congressionally mandated minimum reason-giving requirement for all non-frivolous federal appeals.

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<sup>14</sup> See McAlister, *Rebuilding*, *supra* note 3, at 1178-79 (discussing disparities across circuits in rates of oral argument and publication); Merritt E. McAlister, “Downright Indifference”: *Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020) (discussing differences in circuit publication practices).

<sup>15</sup> See generally Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. \_\_\_\_ (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4035789](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4035789) (arguing that circuits have unique personalities that are important counterweights to increased judicial partisanship).

<sup>16</sup> Pro se or unrepresented appellants account for nearly half of all appeals in the federal appellate courts. JUDICIAL BUSINESS 2021 tbl.B-9 (pro se appeals account for nearly half of all appeals commenced and terminated (21,423 of 44,546 or 48% of proceedings commenced and 23,452 of 47,748 or 49% of proceedings terminated)).

This Article has three parts. It begins with a discussion of the current federal appellate triage regime, which, broadly speaking, generates two tiers of federal appellate review: one for argued cases and one for non-argued cases. That discussion focuses largely on the costs and benefits of this regime—for the courts, the litigants, and the public. The next part is the Article’s primary, descriptive contribution: it discusses the results of a study of more than 11,000 merits terminations from across the geographic federal appellate courts during a six-month period. This work demonstrates that controlling for outcome, publication status, and oral argument, unrepresented litigants receive decisions approximately half the length of similarly situated others. Further, appeals involving incarcerated persons are far more likely to be missing from commercial databases than other categories of civil appeals. The final part considers why these results matter—both as a matter of distributive justice and law development. The federal appellate regime is a system of haves and have nots, and that reality harms litigants and the law alike. Ultimately, these disparities, and the risks for dignitary harms and legal underdevelopment they create, are reasons for reform, including imposing a uniform reason-giving mandate across the federal appellate courts.

## I. THE BENEFITS AND COSTS OF FEDERAL APPELLATE TRIAGE

The two “tiers”<sup>17</sup>—or, more neutrally, the two “tracks”<sup>18</sup>—of federal appellate process are well established: in every appellate court, there’s a nonargument track and an argument track.<sup>19</sup> Cases

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<sup>17</sup> See Pether, *supra* note 3, at 20 (arguing that federal appellate courts provide “second-tier justice” to some); see also McAlister, *Rebuilding*, *supra* note 3, at 1140 & nn.7-9, 1147-48 (describing “tiers” of federal appellate justice).

<sup>18</sup> WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* 110 (2013) (discussing development of “two completely separate tracks for justice” in the federal appellate courts over past half-century) [hereinafter RICHMAN & REYNOLDS, *INJUSTICE*]. For a more thorough discussion of the history and development of these tracks for federal appellate review, William Richman and William Reynolds’ work is invaluable.

<sup>19</sup> See generally RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 18; Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315 (2011) [hereinafter Levy, *Mechanics*]; see also David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 (2005) (“To manage their burgeoning caseloads, courts have increasingly resorted to docket-management tools that have resulted in a bifurcation of how cases are considered and resolved by federal appeals courts. . . . There are now two separate and unequally tracks by which cases are considered and resolved in our federal appellate courts.”); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to*

resolved using the former process commonly result in unpublished decisions<sup>20</sup> authored primarily (but not exclusively)<sup>21</sup> by central staff attorneys hired and overseen by central legal staff.<sup>22</sup> Judges sign off on these decisions, but the urge to rubberstamp them may be, in the words of one judge, “great.”<sup>23</sup> This second-tier process permits courts to handle a substantial volume of routine matters and other low-value<sup>24</sup> or easy work by outsourcing its resolution mostly to other, non-judicial decisionmakers. Meanwhile, more complex or “important” cases receive first-tier review: they go to oral argument, end more frequently in published decisions, and receive more judicial attention.<sup>25</sup>

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*Caseload*, 1990 BYU L. REV. 3, 58 (observing that courts focus on “elite cases” and not “ordinary” ones). *But see* Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L. REV. 605, 613 (2020) (arguing that there are not only two tracks but “a sprawling, multilevel system of review” that includes “lower court and agency decisions . . . but also staff attorney, law clerk, and panel decisions”).

<sup>20</sup> Levy, *Mechanics*, *supra* note 19, at 346.

<sup>21</sup> These procedures are not uniform, and there are different triage regimes and screening practices within the circuits. For a more detailed discussion across the circuits, see Levy, *Mechanics*, *supra* note 19, and RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING ITS ORAL ARGUMENTS 49-61 (2017) [hereinafter POSNER, REFORMING].

<sup>22</sup> See McAlister, *Rebuilding*, *supra* note 3, at 1156-59 (discussing development of staff attorney program and key differences between staff attorneys and law clerks); see also Richman & Reynolds, *Elitism*, *supra* note 3, at 275 (“[T]he judge is now the manager of a staff, whose primary role is to conserve judicial effort by screening cases and participating significantly in the decision making process.”)

<sup>23</sup> See RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 162 (1996) (“The tendency to sign on the dotted line with little real consideration of the case [in those handled by staff attorneys] must be great.”).

<sup>24</sup> See Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 913 (1990) (considering expressive effect of labeling certain work “worthy [of] Article III judges” and other work not).

<sup>25</sup> See Richman & Reynolds, *Elitism*, *supra* note 3, at 278 (describing traditional, first-tier appellate practice as “the Learned Hand model,” which includes “[o]ral argument,” “a thorough discussion among the judges in a face-to-face conference, one panel member prepares a draft opinion, circulates the opinion among the panel, and then revises the draft in response to their comments”; further, the judge writes the opinion him or herself, using a “law clerk as a research tool and sounding board”; when the panel agrees, “it is published in a reporter accessible to everyone”).

Judges themselves<sup>26</sup> innovated what is now described as an appellate “triage” system,<sup>27</sup> where judges “lavish attention” on some appeals and spend only “a few minutes” on others.<sup>28</sup> The courts, and scholars, largely defended these procedural innovations—the development of unpublished decisions,<sup>29</sup> the reduction in oral argument,<sup>30</sup> and the use of staff attorneys<sup>31</sup>—as needed responses to caseload demands.<sup>32</sup> Because judicial

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<sup>26</sup> RICHMAN & REYNOLDS, INJUSTICE, *supra* note 18, at 115 (describing procedural innovations by federal appellate courts as occurring “unilateral[ly]”).

<sup>27</sup> See, e.g., Vladeck & Gulati, *supra* note 19, 1673; see also Copus, *supra* note 16, at 610 (describing “ad hoc triage system” in federal appellate courts).

<sup>28</sup> RICHMAN & REYNOLDS, INJUSTICE, *supra* note 18, at ix, xii.

<sup>29</sup> Literature critical of unpublished decisions is rich, vast, and varied, and mostly beyond the scope of this work. See, e.g., Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808 (2018) (arguing that some unpublished decisions violate retroactivity principles); Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003) (arguing that unpublished decisions violate common-law decisionmaking principles); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995) (arguing unpublished decisions threaten stare decisis principles); Richman & Reynolds, *Elitism*, *supra* 3, at 275 (arguing unpublished decisions violate judicial norms); see also Gluck, *et al.*, *supra* note 2, at 26-35 (discussing non-publication in the debate over access to justice and collecting sources).

<sup>30</sup> This topic, too, is the focus of its own scholarly critique. See, e.g., David R. Cleveland & Steven Wisotsky, *The Decline in Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119 (2012); John B. Oakley, *The Screening of Appeals: The Ninth Circuit’s Experience in the Eighties and Innovations for the Nineties*, 1991 B.Y.U. L. REV. 859; Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to Conventional Wisdom*, 72 IOWA L. REV. 1, 3 (1986);

<sup>31</sup> All three are constituent parts of the procedural triage regime the courts developed to tackle their caseload demands. See McAlister, *Rebuilding*, *supra* note 3, at 1147-63 (discussing development of federal appellate triage system and its constituent parts).

<sup>32</sup> See POSNER, FEDERAL COURTS, *supra* note 23, at 168-69 (“Given the workload of the federal courts of appeals today, the realistic choice is not between limited publication, on the one hand, and, on the other, improving and then publishing all the opinion that are not published today; it is . . . between giving the parties reasons for the decision . . . and not”); Levy, *Judicial Attention*, *supra* note 1, at 443-46 (concluding that appellate case management practices are “loosely consistent with . . . the twin goals of error correction and law development”); Jon O. Newman, *The Second Circuit’s Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 437 (2008) (explaining that Second Circuit’s use of a non-argument track is “fair[], effective[], and efficient[]”); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 178-79 (1999) (arguing that unpublished decisions are “necessary, and not necessarily evil, part of the job”); see also Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L. J. 2025, 2025-26 (1999) (agreeing that

appointments did not keep pace with rising caseload volume,<sup>33</sup> the courts were forced to innovate ways to maintain a handle on rising caseload while minimizing delay.<sup>34</sup>

This Part considers the attendant advantages and disadvantages that accompany the modern federal appellate triage regime. Undoubtedly, these reforms reflect some needed evolution in the traditional appellate process. Not every appeal may demand the same level of attention from the courts. But the benefits of these reforms may not outweigh their costs—or, at least, those costs may call for a recalibration of the system itself. We already know, for example, that caseload pressures, triage reform, or some combination thereof has reduced reversal rates across the federal appeals courts.<sup>35</sup> No costs may be weightier than the possibility that error goes undetected, but there are still other, systemic costs that federal appellate triage imposes—especially from a distributive or procedural justice perspective. This Part considers those tradeoffs.

#### A. The Benefits

Where resources are limited, a “procedural triage” regime operates to ensure the most efficient distribution of resources: more attention where it is needed most—based on whatever values one seeks to maximize—and less attention where it is needed least—again, based on the values one seeks to maximize.<sup>36</sup>

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unpublished decisions “play an important, even a necessary role in the workings of the courts of appeals” but arguing that such decisions might also permit legal innovation and experimentation in circuit courts).

<sup>33</sup> See McAlister, *Rebuilding*, *supra* note 3, at 1148-49 (explaining that whereas caseload grew by 900% between 1960 and 1988, authorized judgeships increased only from 68 to 167 or by 245%) (citations omitted).

<sup>34</sup> There was another, obvious response: to ask Congress for more judges, a topic that Reynolds and Richman have discussed at length. See Richman & Reynolds, *Elitism*, *supra* note 3, at 277 (explaining that triage “transformation was not inevitable” but, rather, the result of “[t]he Judicial Establishment . . . steadfastly resist[ing] the one obvious solution: to ask Congress for a radical increase in the number of judges”).

<sup>35</sup> See generally Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011) (demonstrating causal link between caseload demands or judicial burdens and outcomes on appeal); see also Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 289 (2006) (identifying a decline in reversal rates from 1945 to 2005, where rate dropped from nearly 28% nationwide to 9% nationwide while case numbers rose dramatically); see also John J. Gibbons, *Illuminating the Invisible Court of Appeals*, 19 SETON HALL L. REV. 484, 487 (1989) (questioning “quality of the supervision which courts of appeals are supposed to be exercising over [lower] courts, given that “reversal rates . . . have declined markedly in recent times”).

<sup>36</sup> See Matthew B. Lawrence, *Procedural Triage*, 84 FORD. L. REV. 79 (2015) (introducing concept of “procedural triage,” whereby administrative agency

In medicine, where “triage” regimes may be most familiar, doctors sort and allocate treatment to maximize survivors.<sup>37</sup> Judges, however, have developed the federal appellate triage regime without being particularly explicit about what values they have sought to maximize. For example, as one court explained: “[A]ppellate courts certainly have the inherent authority to allocate scarce judicial resources among the petitions and appeals that press for their attention, and such allocations become especially necessary in this era of burgeoning appellate dockets.”<sup>38</sup> But the question of allocation presupposes that institutional design choices have been undertaken to maximize *something*.<sup>39</sup>

The features of the second-tier process or nonargument track all redound to time-savings for the courts. Opinion writing, for example, is one of the most time-intensive exercises for judges.<sup>40</sup> If that work can be outsourced to others, as it often is in the context of unpublished decisions issued without oral argument,<sup>41</sup> the time-savings is even greater. Second-tier cases conserve judicial resources for first-tier cases; that’s how the system’s been designed. The less time that judges must spend on second-tier cases, presumably the better—and the better, as well, if the triage decision itself is made by another actor (or happens by default rule).<sup>42</sup> Only in one circuit—perhaps not coincidentally, the least

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“ration[s] process among claimants based on the inherent value of participation to particular claimants”); *see id.* at 83 n.11 (defining “procedural triage” to describe . . . proposal to sift among claimants in distributing procedural protections based on their capacity to derive inherent benefit from those protections”).

<sup>37</sup> *Id.* at 83 n.11 (quoting Merriam-Webster Dictionary (11<sup>th</sup> ed. 2014)); *see also* Katharyn Kennedy, Richard V. Aghababian, Lucille Gans & C. Phuli Lewis, *Triage: Techniques and Applications in Decisionmaking*, 28 ANNALS EMERGENCY MED. 136, 138 (1996) (describing triage regimes across multiple contexts).

<sup>38</sup> *Pillay v. I.N.S.*, 45 F. 3d 14, 17 (2d Cir. 1995) (per curiam).

<sup>39</sup> *See* Levy, *Judicial Attention*, *supra* note 1, at 422 (recognizing that setting a “baseline” in evaluating how judges allocate decision is “challenging to frame” and observing, further, that “it is difficult to identify what variables should be maximized” and to measure those variables maximized”).

<sup>40</sup> Although surely an outlier, one federal judge observed that opinion drafting sometimes involves 20 or 30 or as many as 60 drafts. Alex Kozinski, Essay, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1711 n.9 (1991). That unpublished decisions “significantly enhance[] the court’s productivity” is well-recognized. Martin, *supra* note 32, at 190.

<sup>41</sup> *See* Gluck, *et al.*, *supra* note 2, at 106 & n.408 (recognizing that “judges can also reduce their drafting time to the extent they limit their reason-giving or rely on staff attorneys to submit drafts for their approval and noting that staff attorneys are at least “sometimes involved in drafting unpublished opinions”).

<sup>42</sup> In most circuits, this is the case. *See* POSNER, REFORMING, *supra* note 21, at 49-61, 162-65 (discussing how circuits use their staff attorneys’ offices); *see also* Levy, *Mechanics*, *supra* note 19, at 333-39 (discussing screening or triage

busy circuit—do judges make the triage decisions themselves and decline to send certain classes of appeals to staff by default.<sup>43</sup>

In the most comprehensive and forceful defense of the federal appellate triage regime, Marin K. Levy has argued that the federal appellate courts use these case management practices to allocate judicial attention to maximize two outputs: “error correction and law development.”<sup>44</sup> Levy recognizes that one could use a procedural system to further other objectives,<sup>45</sup> and by those measures, the federal appellate regime may be less successful. But Levy has argued that the current system “comports fairly well with an attempt by the courts to maximize their error-correction and law-development functions with their limited resources.”<sup>46</sup> What works, she suggests, is the basic triage framework that identifies certain “complex” cases with “novel issues” for “argument and consideration in chambers,” while “separat[ing] certain kinds of cases—repeating appeals, patently frivolous appeals, and those that have received at least one meaningful review”—for less judicial attention.<sup>47</sup> Levy argues for improvements to “facilitate the identification of those traditional nonargument cases that require full judicial attention,” but she concedes the rationality of sorting cases—even by default rules—

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procedures in D.C., First, Second, Third, and Fourth Circuits). Third Circuit judges actively screen cases for oral argument, *id.* at 371, but the court screens unrepresented cases and most immigration cases to nonargument panels by default, *id.* at 351.

<sup>43</sup> See McAlister, *Rebuilding*, *supra* note 3, at 1160-61 (discussing triage schemes and identifying Tenth Circuit as the only circuit that “appears not to rely on central staff to screen appeals or handle certain classes of appeals by default” and observing further that “the Tenth Circuit is the least busy of the geographic circuit courts”).

<sup>44</sup> Levy, *Judicial Attention*, *supra* note 1, at 405-06. And, of course, as Levy observes, there’s a good deal of literature that suggests these are two functions the appellate courts have been designed to do. See *id.* at 424-25 nn.140-44 (citing, among others, KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 12-13 (1969); ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 3 (1941); DANIEL JOHN MEADOR, *APPELLATE COURTS IN THE UNITED STATES* 3 (2d ed. 2006)).

<sup>45</sup> See *id.* at 425-26 (recognizing “alternative objectives” for appellate system, including those arguably subsumed within error correction and law development, as well as those independent of them, like legitimacy and constraining costs).

<sup>46</sup> *Id.* at 406.

<sup>47</sup> *Id.* at 435; see also K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 418 (2001) (concluding that “some decisions do have the potential to play a more significant role in shaping future decisions” and that “[c]ourts should be permitted to spend additional time in producing these decisions” and to weigh them more heavily as precedent).

“based on characteristics of the claims and not the status of the parties.”<sup>48</sup>

What emerges from Levy’s work is that the primary benefit of the current regime is efficiency.<sup>49</sup> The triage regime, in Levy’s view, both rationally and efficiently allocates the scarcest judicial resource—that is, judicial attention—to produce desired outputs—again, error correction and law development. Ryan Copus’s recent work suggests there’s a mechanism for Pareto optimization<sup>50</sup> of Levy’s framework: his is a proof of concept that machine learning could generate a better triage system that more accurately identifies cases that need more attention (assuming, again, that error correction and law development are the triage system’s optimal outputs).<sup>51</sup> Copus would replace default triage rules—driven, often, about presumptions around the relative merits of certain types of appeals (like those by unrepresented parties)—in favor of a more complex algorithmic triage regime that predicts “degree of error” and “degree of instability” to better allocate judicial attention.<sup>52</sup> Copus may have built a better mousetrap—or at least produced a blueprint for doing so—but his proposal likewise values efficient distribution of error correction and law development above other values.

That efficiency emerges as the prime benefit of the triage system is no surprise.<sup>53</sup> The triage regime is perhaps the federal

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<sup>48</sup> Levy, *Judicial Attention*, *supra* note 1, at 440. Those characteristics include frivolity and repeated claims, among others. *Id.* at 438-39.

<sup>49</sup> “Efficiency,” of course, is itself “chameleon-like,” but it is nevertheless the animating force behind the triage regime. Joseph Sanders, *Road Signs and the Goals of Justice*, 85 MICH. L. REV. 1297, 1297 n.4 (1987).

<sup>50</sup> Under Pareto theory, “[a] legal rule is efficient if it induces people to behave in such a way that no one can be made better off (in terms of [his or] her own preferences) without making someone else worse off.” Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 688-89 (1986).

<sup>51</sup> See Copus, *supra* note 19, at 624-625 (identifying Levy’s framework as “conceptual foundation” for use of “statistical precedent”—that is, a machine-learning tool that identifies more systematically cases that would benefit from more judicial attention based on likely need for error correction or law development).

<sup>52</sup> *Id.* at 613; see *id.* at 654 (explaining there is “little justification” for assigning high-error rate pro se appeals to staff attorneys by default and observing that “10% of civil pro se appeals have error estimates that place them within the range of other civil cases”).

<sup>53</sup> See RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 18 at 115 (“[The Appellate Triage Regime] ha[s] certainly helped the courts process appeals in a timely fashion. Dispositions per judge have increased dramatically over the past thirty years, and the number of pending appeals is small. Limited publication, central staff, and reduced oral argument have done what they were supposed to; the trains do run on time.”); see also Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 164-65 (2012) (“Unpublished opinions are an

appellate system’s embodiment of federal judges’ contemporary managerial stance.<sup>54</sup> In her pathbreaking work on “managerial judging,” Judith Resnik has argued that, among others, efficiency concerns—or, rather, inefficiency concerns—propelled courts to innovate “systems management as the solution.”<sup>55</sup> Richman and Reynolds have made a similar point about the appellate triage regime: they argue that “[j]udges on the federal courts of appeals now run something that resembles an office in a large law firm.”<sup>56</sup> These managerial reforms concentrated judicial power, permitting judges to play “a critical role in shaping litigation and influencing results.”<sup>57</sup> Judges wield managerial powers “beyond the public view, off the record, with no obligation to provide written, reasoned opinions”—a process that, according to Resnik, “may be redefining *sub silentio* our standard of what constitutes rational, fair, and impartial adjudication.”<sup>58</sup>

The triage regime’s efficiency boon is usually described as conveying benefits for the courts, the public, and the development of law alike. We suppose that courts should issue decisions more quickly, and that litigants might prefer such a system to one where judicial review takes more time.<sup>59</sup> Likewise, we presume that the public benefits from judicial curation—that is, that not all decisions should have “precedential” status because that both clutters the *Federal Reporter* and makes governing law more difficult to find.<sup>60</sup> The triage system itself is a way for the court to convey useful information to the public: pay attention to this decision because we did (because we gave it oral argument and published treatment) and don’t pay attention to this decision

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efficiency mechanism—a way of dispensing more quickly with cases that supposedly break no new legal ground.”).

<sup>54</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982) (“judicial management may be teaching judges to value their statistics, such as number of case dispositions, more than they value the quality of their dispositions”) [hereinafter Resnik, *Managerial*].

<sup>55</sup> *Id.* at 398-99.

<sup>56</sup> RICHMAN & REYNOLDS, INJUSTICE, *supra* note 18, at 115.

<sup>57</sup> Resnik, *Managerial*, *supra* note 54, at 379.

<sup>58</sup> *Id.* at 380.

<sup>59</sup> See, e.g., William H. Pryor, Jr., *Conservatives Should Oppose Expanding the Federal Courts*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html> (federal appellate judge arguing that litigants would prefer “routine cases based on settled precedent” should not be “delay[ed]”).

<sup>60</sup> See, e.g., William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168-69 (1978) (explaining that concerns over the growing volume of decisional law was one reason for the courts to innovate unpublished decisions) [hereinafter Reynolds & Richman, *Non-Precedential*].

(because we didn't). It serves as a signal for what matters, or what should matter, and litigants take heed. A recent study from Abbe Gluck and a team of colleagues, for example, demonstrates that litigants infrequently cite to unpublished decisions (compared to published adjudications).<sup>61</sup> Whether that's because they are, overall, unhelpful on their face or simply duplicative of well-established principles in published opinions is difficult to know, however. And the fact that some unpublished decisions have been cited more than a hundred times, as the Gluck team finds,<sup>62</sup> suggests that courts aren't always good at predicting the need for precedent<sup>63</sup>—a suggestion that triage sometimes fails at providing needed law-development.

Even if we recognize that the triage regime preserves scarce judicial resources in a rational way—that is, that it is an efficient system or something close to it—that assessment, itself, carries value-laden judgments.<sup>64</sup> That efficiency might be the primary boon of the triage system is itself an assertion about “the relationship between the aggregate benefits of [the] situation and the aggregate costs of the situation.”<sup>65</sup> That is to say that embedded within claims about efficiency are claims about what the system *should* be designed to achieve—claims that are contested and competing. The system is only efficient in so far as it permits judges to spend time on the cases they deem most “important,” in whatever way *they* define importance. That appraisal of importance may center, as Levy argues, on error correction and law development.<sup>66</sup> But what if what's “important”—and thus what the triage system enables judges to

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<sup>61</sup> Gluck, *et al.*, *supra* note 2, at 85-88 (discussing citation practices related to unpublished decisions in appellate decisions and appellate briefs).

<sup>62</sup> *See id.* at 88 & n.336 (discussing of citation of certain unpublished decisions more than a hundred times).

<sup>63</sup> Reynolds & Richman, *Non-Precedential*, *supra* note 60, at 1191-94 (arguing that judges have a hard time predicting accurately when precedential decisions are needed and when they are not).

<sup>64</sup> *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 590, 609 (2021) (arguing that “efficiency” in law and economics is “incoherent” because “where one starts as a baseline determines what counts as efficient and inefficient”); *see also* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1797 (2015) (noting that “[h]ow one measures ‘costs’ and ‘benefits’ necessarily turns on an evaluative judgment about what is a benefit and what is a cost,” which is “inevitably subjective”).

<sup>65</sup> *See* Coleman, *supra* note 64, at 1796 & n. 118 (quoting A. Mitchell Polinsky, *An Introduction to Law and Economics* 7-11 (4<sup>th</sup> Ed. 2011)); *id.* at 1796 (asserting that quote is “efficiency” “at its most basic level”).

<sup>66</sup> Levy, *Judicial Attention*, *supra* note 1, at 406.

prioritize—is just what a particular judge finds interesting?<sup>67</sup> Is such a system still efficient, if the benefits it serves are primarily personal to the judge (and where public benefits may be secondary)? What if we’ve just grown accustomed to the distortions that triaging produce? For example, we expect unrepresented cases to be meritless because the law has developed more slowly in those areas where unrepresented appellants litigate most; that those cases are perceived as repetitious and meritless thus only propels the seeming rationality of the triage regime.

Moreover, the view that the system efficiently serves the ends of error correction and law development depends on one’s view of how much risk of error to tolerate (and in what kinds of cases) and how much law development is optimal. Take, for example, law development. It’s conceivable that *too much* triage—and, indeed, too much triage for certain kinds of cases (like prisoner litigation)—may lead to the under-development of the law in certain areas.<sup>68</sup> Depending on one’s view, that may create inefficiencies, because it requires courts to resolve more disputes in areas of the law where rights and duties could have been better developed to give all parties sufficient notice.<sup>69</sup> This is a particularly great risk given what this work reveals about decisions missing from commercial databases and court websites. Where unpublished decisions are not just non-precedential, but also unfindable, one might argue the system is quite inefficient in developing useful legal rules (to say nothing of other values like transparency, equality, and dignity).<sup>70</sup> Unpublished decisions are

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<sup>67</sup> See Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 190 (1998) (“To the extent that the judges share a distaste for a particular area [the examples given are “veteran’s benefits or prisoners’ rights cases”], the availability of the [summary disposition] can mean that the hard cases in these areas will receive less attention and the case law will be underdeveloped. . . . The availability of the [summary disposition] distorts the development of the law toward areas that judges enjoy.”).

<sup>68</sup> The Gluck Study confirms this risk. See Gluck, *et al.*, *supra* note 2, at 38 (asserting that “certain areas of the law may be developing more slowly and less broadly because they are deprived of precedential, reasoned opinions” and “these areas of the law correlate with claims brought by disempowered litigants”).

<sup>69</sup> See David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45, 50 (2015) (arguing that [t]he inclusion or exclusion of unpublished opinions as evidence of clearly established law [in the qualified immunity context] may alter the ‘contours of the right’ and the clarity with which an official would understand that the right has been violated”).

<sup>70</sup> Cf. Nancy Gertner, *Loser’s Rules*, 122 YALE L.J. ONLINE 109, 110, 123 (2012) (recognizing distortion effect where judges write “more detailed decisions when *granting* summary judgment” and not when denying it); Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 516-17 (2016)

still useful law;<sup>71</sup> indeed, in areas where litigants frequently lose, they may be even more useful as clear signals of what arguments have been tried before and have failed (perhaps even repeatedly).

Similarly, we tolerate some risk that error goes undetected whenever courts relegate certain types of appeals to a second-tier process by operation of default rules. For example, Levy has argued that some appeals may categorically involve lower risk of error because they've already been subject to an additional layer of review or because they involve straight-forward issues commonly seen (immigration and Social Security matters, for example).<sup>72</sup> That's hardly true for all cases relegated to second-tier process by default. Levy acknowledges that unrepresented appeals do not neatly fit those categories for low error risk,<sup>73</sup> even though some unrepresented prisoner claims may be "repeating claims," which are common claims arising from well-developed law.<sup>74</sup> The decision to screen these appeals to a nonargument track by default may rest on the courts' view that they involve "a higher percentage of frivolous claims" than other civil, represented appeals.<sup>75</sup> But that is, itself, a subjective assessment—one that may be just as influenced by bias against incarcerated litigants as it is rooted in reality. The reversal rate in all civil appeals is still quite low,<sup>76</sup> and Copus's recent work underscores that "while 'pro se' is not an awful proxy for low merit, it is far from perfect."<sup>77</sup> Nevertheless, it's largely the proxy that fuels the current triage regime—perhaps, partly, because it's efficient to administer (a binary choice) and results in the default screening of nearly half

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(arguing that unavailability of district court decisions on commercial databases "obscur[es] decisional law" and "undermine[s]" core values of "fairness, efficacy, and legitimacy").

<sup>71</sup> See generally McCuskey, *supra* note 70 (arguing for a capacious view of precedent where district court decisions, which are never precedential, are useful as precedent).

<sup>72</sup> See Levy, *Judicial Attention*, *supra* note 1, at 432-33 & n.177 (discussing rationality of screening immigration matters, Social Security matters, and unfair labor practices claims to a non-argument track because they involve issues commonly seen by the courts or issues that have already been reviewed by multiple decision-makers or both).

<sup>73</sup> *Id.* at 436.

<sup>74</sup> *Id.* at 437.

<sup>75</sup> *Id.* at 438.

<sup>76</sup> JUDICIAL BUSINESS 2021 tbl.B-5 (national average reversal rate is 8.7%; the reversal rate for federal prisoner litigation is 4.9%; the reversal rate for non-federal prisoner litigation is 4.0%; and the reversal rate for civil matters not involving the federal government is 11.7%).

<sup>77</sup> Copus, *supra* note 19, at 654.

of all filed appeals.<sup>78</sup> Efficiency spurred and continues to propel the triage regime.

Finally, the triage system's efficiency calculus and the tradeoffs it entails may change over time, but the system's path-dependency may make such re-evaluations difficult. Decades of reform have created institutional beauracracy that supports and perpetuates triage. And the system seems largely impervious on-the-ground changes. For example, the need for unpublished decisions—as a time-savings device—appears to have lessened over time: courts receive more than 20,000 fewer appeals today than they did at the caseload zenith in 2005,<sup>79</sup> yet the nonpublication rate is approximately 5% higher today than it was then.<sup>80</sup> The justification for the use of unpublished decisions—a crushing workload—has weakened over time. Judges still have lots of work, to be sure, but they also have more help to do it. Yet they continue to rely on procedural and decisional shortcuts at very high rates. The reason surely has something to do with a certain amount of path-dependence: now that the operations for triage and procedural shortcuts are firmly in place, there's little incentive to re-align circuit priorities as workload reduces.<sup>81</sup> The courts have redefined our expectations for federal appellate process—and perhaps not always for the better. I turn next to consider some of the costs of these reforms.

## B. The Costs

Just like its purported benefits, the triage regime's potential costs are subjective and difficult to quantify. An appraisal of cost necessarily privileges a certain view of the tirage regime's goals

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<sup>78</sup> JUDICIAL BUSINESS 2021 tbl.B-9 (pro se appeals account for nearly half of all appeals commenced and terminated (21,423 of 44,546 or 48% of proceedings commenced and 23,452 of 47,748 or 49% of proceedings terminated).

<sup>79</sup> Compare JUDICIAL BUSINESS 2005 tbl.B, [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/b0.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/b0.pdf) (68,473 filings during reporting period), with JUDICIAL BUSINESS 2021 tbl.B, [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b\\_0930.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b_0930.2021.pdf) (44,546 filings during reporting period).

<sup>80</sup> Compare JUDICIAL BUSINESS 2005 tbl.B-12, [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/s3\\_1.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/s3_1.pdf) (81.6% national unpublication rate), with JUDICIAL BUSINESS 2021 tbl.B12 (86.3% national unpublication rate); see also McAlister, *Rebuilding*, *supra* note 3, at 1170-71 (discussing trends and continued reliance on unpublished decisions).

<sup>81</sup> See Gluck, *et al.*, *supra* note 2, at 78-79 (explaining how “highly path dependent” the federal triage regime is); McAlister, *Rebuilding*, *supra* note 3, at 1216 (observing that “[e]ven as judicial workload has eased, the courts have not begun publishing more cases or hearing more oral argument,” reflecting a seeming “path dependence to [the courts’] procedural shortcuts”).

and its failures. Moreover, other procedural values—like equality, dignity, transparency, and legitimacy—are all in some tension with efficiency.<sup>82</sup> Asking courts to do more to further other objectives may be costly and time-intensive;<sup>83</sup> in this way, the triage system has been constructed to minimize inefficiency (as measured only by cost and time),<sup>84</sup> while maximizing federal appellate docket control. A readjustment in those priorities may flow from a recognition that the system’s costs are greater than its efficiency benefits. This section briefly considers those costs through the lens of those disadvantaged most by the current system: the everyday litigants whose appeals receive second-tier treatment.

Most fundamentally, the triage regime defies core notions of distributive justice, fairness, and equality.<sup>85</sup> Matthew Shapiro’s recent work categorizing the various “goods”<sup>86</sup> that access-to-justice arguments seek to distribute recognizes that “judicial resources” is among those goods.<sup>87</sup> A system that distributes judicial attention sparingly and selectively is one that is distributionally unequal. Other systemic needs—including, of course, efficiency interests in the face of a substantial workload—may justify that disparity, but we must recognize from the outset that the distribution of judicial attention has been triaged and is, as a result, distributed unevenly.<sup>88</sup>

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<sup>82</sup> Gluck, *et al.*, *supra* note 2, at 106; *see also* 8-9 (“[T]he system’s values as they intersect with nonpublication—for example equality vs. efficiency—are sometimes in tension with each other.”).

<sup>83</sup> *Id.*

<sup>84</sup> As with many of our modern procedural schemes, the appellate triage system’s exaltation of efficiency may also reflect a certain myopia about the nature of efficiency itself. As Brooke Coleman has argued, “efficiency” is not a single-minded talisman to render litigation cheaper and faster; rather, the drafters of the Federal Rules originally conceived of efficiency “to unburden civil litigation of needless administrative distraction.” Coleman, *supra* note 59, at 1788. Put differently, even those more difficult to quantify costs should affect our “efficiency” calculus.

<sup>85</sup> *See* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. Rev. 885, 889 (1981) (“The demand that the techniques for making collective decisions not imply that one person’s or group’s contribution (facts, interpretation, policy argument, etc.) is entitled to greater respect than another’s merely because of the identity of the person or group is so ubiquitous and intuitively plausible”).

<sup>86</sup> Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1477 (2021).

<sup>87</sup> *Id.* at 1491-92.

<sup>88</sup> *See, e.g.*, RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 119-120 (recognizing “that cases involving prisoner rights, social security, criminal convictions, and the like [are] disproportionately subject to second-class treatment”); Pether, *Sorcerers*, *supra* note 3, at 20 (similar); *see also* *see also* David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 147 (2009) (“The

That unequal distribution creates risks and harms for both the claimants who receive the least attention and for the system itself. The triage regime runs on, and perpetuates, inequalities in how the courts process and resolve disputes.<sup>89</sup> It sets up a favored track for resolving “important” matters (in the eyes of federal judges) and a lesser track for handling “disfavored” matters—principally, those brought by “prisoners, the poor, immigrants.”<sup>90</sup> That these procedures favor and are designed by and to the benefit of the “one percent”—that is, the elite within the system—is not a new concern, as Brooke Coleman has demonstrated, nor is it one that affects only the appellate system.<sup>91</sup>

The effects of triage on disfavored claimants operate on multiple levels. Systemically, triage regimes threaten public values. The cases on the losing end of triage are those that Owen Fiss once described as involving “significant distributional inequalities,”<sup>92</sup> like “the struggle between a member of a racial minority and a municipal police department over alleged brutality, or a claim by a worker against a large corporation over work-related injuries.”<sup>93</sup> In that context, adjudication serves “broader” aims by “explicat[ing] and giv[ing] force to the value embodied in authoritative texts.”<sup>94</sup> Moreover, Fiss argued that in a system where “imbalances of power can distort judgment,” including “the quality of presentation,” we depend “on the guiding presence of the judge . . . to lessen the impact of distributional inequalities.”<sup>95</sup> But the federal appellate judge operating within the triage regime does quite the opposite: much like the criticisms that Fiss lodged at settlement, the appellate judge takes advantage of distributional inequalities to make the process of judgment easier.<sup>96</sup> He or she relies on the unrepresented status of the

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discrimination that occurs in a regime of non-precedential opinions is that similarly situated litigants, indeed even the same litigant in the same factual setting, may be treated differently by the courts.”).

<sup>89</sup> See Gluck, *et al.*, *supra* note 2, at 78-79 (identifying some of the “path dependent” aspects of the triage regime, where the initial decision about oral argument “leads to a presumption of nonpublication, but also a presumption of staff drafting and cursory review by judges”).

<sup>90</sup> RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 18, at 116.

<sup>91</sup> Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1008 (2016) (defining “one percent procedure” as “a system where the metaphorical ninety-nine percent of relatively small cases that are the bread and butter of federal and state dockets are governed by a set of rules made by and for the elite”).

<sup>92</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984).

<sup>93</sup> *Id.* at 1076.

<sup>94</sup> *Id.* at 1085.

<sup>95</sup> *Id.* at 1077.

<sup>96</sup> These practices, as the Gluck Study warns, “exacerbate concerns about equality.” Gluck, *et al.*, *supra* note 2, at 99.

appellant to shortchange the amount of judicial attention an appeal receives—often by default rule and irrespective of the nature of the claim.

Inequalities arising from, and perpetuated by, the triage regime also threaten to retard legal development in particular areas of the law. One of the findings of this work, and other recent work on the federal appellate courts, is that “courts systematically treat certain types of litigants or certain subject matters differently.”<sup>97</sup> Although the curation that publication and nonpublication entail have been lauded as valuable efficiency reforms for the development of the law—that is, they make it easier to identify what has precedential value<sup>98</sup>—there’s something of a Goldilocks problem in this effort. How much precedential development is enough?<sup>99</sup> When have the courts gotten it just right, as opposed to under-developing or over-developing certain areas of the law in certain ways or in certain regions of the country?<sup>100</sup> Ultimately, these effects can, as the Gluck Study recognized, “skew[] the development of the law in areas that judges find less interesting or important.”<sup>101</sup>

Devaluing classes of cases, categorically, as “meritless” stymies legal innovation writ large, as Alexander Reinert has argued.<sup>102</sup> There’s a big difference, for example, between the claims of so-called “Sovereign Citizens”<sup>103</sup>—a quintessential

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<sup>97</sup> *Id.*

<sup>98</sup> One of the concerns animating the creation was systemic non-publication was that the volume of decisional law was becoming unwieldy. Reynolds & Richman, *Non-Precedential*, *supra* note 60, at 1168-69.

<sup>99</sup> And why, for that matter, do the issuing courts themselves have exclusive control over when they are bound by precedent and when they are not? See Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and the New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705 (2006) (arguing that decision on precedential status of decisions should be “made with the benefit of time, and with input from lawyers, litigants, and other judges”); see also *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th Cir. 2000), *vacated as moot* by 235 F.3d 1054 (2000) (striking down circuit law on non-precedential decisions as violating Article III’s “judicial power” because judges do not have the power “to avoid the precedential effect of . . . prior decisions”). *But see* Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) (disagreeing with *Anastasoff*).

<sup>100</sup> *Cf.* Gertner, *supra* note 70, at 113-15 (discussing “asymmetrical” pressures to write decisions only when granting dispositive relief thus creating “Losers Rules” and distorting law to advantage defendants).

<sup>101</sup> Gluck, *et al.*, *supra* note 2, at 30-31.

<sup>102</sup> Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 Ind. L.J. 1191, 1198-1201 (2014).

<sup>103</sup> See Jessica K. Phillips, Note, *Not All Pro Se Litigants Are Created Equally: Examining the Need for New Pro Se Litigant Classifications Through the Lens of the Sovereign Citizen Movement*, 29 GEO. J. L. ETHICS 1221, 1222 (2016) (explaining that “Sovereign Citizens” are “[a]dherents of [a] loosely organized, borderline-cultish group [that] disclaim[s] the legitimacy of the United States federal

“frivolous” filing—and legal arguments that push the envelope or just fail to overcome the high bar for qualified immunity. The latter examples, which predominate the second tier, are necessary for innovation;<sup>104</sup> only the former, the Sovereign Citizen, can be safely screened without imposing any systemic or dignitary harm on the litigant. Brooke Coleman has made a similar argument in the context of federal pleading standards.<sup>105</sup> The “restrictive”<sup>106</sup> turn in procedural doctrine—a turn mirrored in how the appellate triage regime restricts access to judicial attention—imposes uneven burdens and advantages. Certain kinds of “vanishing plaintiffs”—those without access to legal resources and those whose cultural narratives render them “others”<sup>107</sup>—suffer “distinctly” in this new, restrictive regime.<sup>108</sup> And the public loses opportunities for “path-breaking” law as a result.<sup>109</sup>

Triaging judicial attention also threatens dignitary harms on litigants themselves.<sup>110</sup> As Jerry Mashaw has argued, “decisional processes” can “preserve and enhance human dignity and self-respect.”<sup>111</sup> The “form” of governmental decisionmaking, Mashaw has explained, has the capacity to “nurtur[e] or suppress[]” those “values inherent in or intrinsic to our common

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government and, therefore, all laws and financial obligations arising under the purview of the federal government” and noting that their ultimate goal is “to use the courtroom as a forum of protest against the very existence of the judicial system and Federalism itself”).

<sup>104</sup> Reinert, *supra* note 102, at 1226-30 (arguing that meritless cases are “necessary to the development of a doctrine” and have the ability to “prompt more direct change in the law,” including through congressional action; they also have the ability to bring “institutional conduct and behavior” to light, even where claims may not succeed under current frameworks).

<sup>105</sup> Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 503-504 (2012).

<sup>106</sup> *Id.* at 502 (“While in the early 20<sup>th</sup> Century procedural rules were animated by a ‘liberal ethos’, today’s procedural regime is undeniably more restrictive . . . The articulated reason for this move is that frivolous claims undermine the civil justice system [including by] drain[ing] scarce judicial resources . . . .”); see also A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010).

<sup>107</sup> Coleman, *supra* note 105, at 503.

<sup>108</sup> *Id.* at 505 (explaining that the “vanishing plaintiff distinctly suffers” under a restrictive procedural regime).

<sup>109</sup> *Id.* at 504.

<sup>110</sup> Dignitary harm, in turn, raises issues of legitimacy. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 162 (2006) (“Procedural justice is the key normative judgment influencing the impact of experience on legitimacy”); see generally McAlister, *supra* note 11 (arguing that, from a procedural justice perspective, unpublished decisions can be “marginalizing and (potentially) legitimacy threatening—a consequence . . . that may follow when courts are insensitive to procedural justice concerns [like dignity]”).

<sup>111</sup> Mashaw, *supra* note 85, at 886.

humanity—values such as autonomy, self-respect, or equality.”<sup>112</sup> Taking claims by disfavored litigants seriously thus has the capacity to legitimate unfavorable rulings, making them easier for litigants to accept.<sup>113</sup> But, structurally, the triage system appears to do the opposite: it tells litigants who receive unpublished decisions that their decision is “summary” or “nonprecedential,” which may lead the litigant to question whether she has received attention and respect from the court<sup>114</sup>—a concern that may only grow if the decision is also perfunctory, circular, or unreasoned.<sup>115</sup>

Ultimately, the courts treat second-tier appeals differently and they communicate that difference to the litigants in a variety of ways: by refusing argument, by issuing shorter decisions, and by issuing “unpublished” decisions. Litigants might conclude that their appeal has received short shrift, even if they are unaware of the extent of judicial attention it has (or has not) received. “We do distinguish,” Mashaw has argued, “between losing and being treated unfairly.”<sup>116</sup> Whether the federal appellate triage system has crossed that line—that is, whether, through its unequal processes, it has communicated to disfavored parties that it has not taken their problems seriously—may be unknowable. But the risk is great, and persistent, and it is more present in some circuits than others. What we can observe is the extent of disparate treatment litigants receive—and those facts may inform how we weigh the tradeoffs of the current regime.

## II. THE BOTTOM RUNG: UNREPRESENTED APPEALS

This Part describes this Article’s primary contribution: it discusses the results of a multi-year project examining the substance of more than 11,000 unpublished decisions issued across the geographic federal appellate courts during a six-month period in 2017. What this study shows is that unpublished decisions themselves are not created equal. Not only are unpublished decisions used more frequently in cases involving

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<sup>112</sup> *Id.*

<sup>113</sup> TYLER, *supra* note 110, at 149 (“Authorities can enhance the acceptance of their decisions by the way they present them to affected parties.”).

<sup>114</sup> See Gluck, *et al.*, *supra* note 2, at 101 (arguing that labeling on unpublished decisions “may shape parties’ perception of the respect the legal system offered to them” and that dignitary harms may “increase” if the litigant is aware of the triage process itself).

<sup>115</sup> See McAlister, “Downright Indifference,” *supra* note 11, at 580-81 (describing how litigants might respond to perfunctory and circular unpublished decisions that undermine procedural justice values).

<sup>116</sup> Mashaw, *supra* note 85, at 888.

unrepresented litigants,<sup>117</sup> but it also appears that unrepresented appellants usually receive decisions half the length of decisions in comparable, represented appeals. In some circuits, the disparity is even greater. These data suggest that unrepresented appeals occupy the bottom rung of appeals in the federal appellate courts. Those proceeding without a lawyer rarely receive oral argument or published, law-making decisions.<sup>118</sup> They are also more likely to receive shorter decisions, and decisions in these cases are more likely to be harder to find on court websites—frustrating interests of transparency and law development asymmetrically.

Before describing the data supporting these results in Section C, this Part first describes the data collection process and what is missing from the compiled dataset. The extended discussion of what is missing adds to my earlier work on the incompleteness of commercial resources to find and research unpublished decisions, and it strengthens the argument for identifying a bottom rung of federal appellate process for unrepresented litigants.

#### A. Data Collection

This study evaluates “merits terminations”<sup>119</sup> from across the geographic circuits issued between January 1, 2017, and June 30, 2017. “Merits terminations” are decisions that resolve appellate proceedings on the merits (as opposed to on procedural

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<sup>117</sup> See Gluck, *et al.*, *supra* note 2, at 37 (“the data reveal that the federal judiciary is disproportionately and systematically not publishing cases brought by certain types of litigants—namely litigants representing themselves and incarcerated individuals”).

<sup>118</sup> In this study, less than 4% of cases terminated on the merits after oral argument involved appellants who were unrepresented throughout the proceeding. And less than 3% of published decisions were issued in appeals brought by unrepresented appellants.

<sup>119</sup> This is something of a term-of-art, which refers to the “last opinion or final order,” whether reasoned or not, whether signed or not, issued to resolve an appeal or other proceeding that originates in the appellate court in the first instance (that is, something other than appeal from a final judgment or a decision reviewing final agency action). See, e.g., JUDICIAL BUSINESS 2021 tbl.B-12. “Merits” terminations are distinct from procedural ones, where the court does not reach the merits of the appeal and, instead, dismisses on procedural grounds (with or without the consent of the parties). Compare JUDICIAL BUSINESS 2021 tbl.B-5A. When scholars discuss “unpublished decisions” as a category, they generally mean “unpublished decisions in merits terminations,” because that is the category of unpublished decisions that the Administrative Office of the U.S. Courts tracks. So, whenever you see percentages of unpublished decisions that rely on Administrative Office statistics, those are merits terminations. The courts reach more decisions or terminations than those numbers convey, but those are decisions in cases that end for procedural reasons.

grounds).<sup>120</sup> Procedural terminations—which are occasionally published, usually unpublished, and often just clerk orders<sup>121</sup>—are not formally reported by publication status by the Administrative Office. Scholars don't tend to focus on that pool of decisions for a variety of reasons—not the least of which is that they're hard to find, typically have no reasoning, and often (but certainly not always) have little independent value.<sup>122</sup>

The project began in early 2019, and I selected a six-month study period from 2017 because it was the most recent period (at the time) for which data from the Administrative Office of the U.S. Courts was available for a comparison. Working with various Bloomberg Law databases,<sup>123</sup> I trained a team of research assistants (RAs) to extract basic case information into Excel and then hand-code decisions across a variety of fields, including, among other categories,<sup>124</sup> decision word count<sup>125</sup> and whether a rehearing petition<sup>126</sup> or a petition for a writ of certiorari had been

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<sup>120</sup> For a more thorough discussion of the Administrative Office terminology and how it reports data, see McAlister, *Missing*, *supra* note 10, at 1115-16. Appellate proceedings most commonly involve appeals as of right, but they also involve original applications and petitions like writs of mandamus or requests for certificates of appealability. *Id.*

<sup>121</sup> See JUDICIAL BUSINESS 2021 tbl.B-5A; Gluck, *et al.*, *supra* note 2, at 43-44 & n.195 (discussing procedural terminations).

<sup>122</sup> See, e.g., Gluck, *et al.*, *supra* note 2, at 43 n.195 (explaining decision to exclude most procedural terminations from study).

<sup>123</sup> I selected Bloomberg Law, initially, because of its integration of two databases: an opinions database and a dockets database, which makes it easy to work backwards from an opinion to that appeal's docket. To obtain the initial opinions list, we searched Bloomberg Law's Court Opinion Database by circuit, without any restriction except for the date range of 1/1/2017 to 6/30/2017. Unfortunately, obtaining data from the Bloomberg docket system was quite cumbersome, and it often involved manually updated the relevant docket to retrieve pertinent information.

<sup>124</sup> RAs coded the following for each opinion retrieved: panel members by judge name; word count; whether a rehearing petition had been filed; and whether a petition for a writ of certiorari had been filed with the Supreme Court. They were also asked to review the substance of the decision and answer "Yes" or "No" as to the following based only on the text of the opinion: (1) whether the RA could determine the underlying cause of action or criminal offense; (2) whether the RA could identify the issues decided on appeal; (3) whether the appellate court offered reasons for the resolution or outcome; and (4) whether the appellate court expressly and exclusively rested its decision on the district court's decision below (and therefore the appellate court did not offer any independent reasons for its result).

<sup>125</sup> Students were instructed to count only the body of the decision, excluding any header material. Where a concurring or dissenting opinion was filed, those opinions were excluded from the word count.

<sup>126</sup> Because some circuits treat petitions for rehearing en banc in unpublished decisions as petitions for panel rehearing, 11th Cir. L.R. 35-4, and to simplify the coding, I did not ask students to distinguish between these

filed. Another RA randomly cross-checked approximately 400 of these entries, finding a low rate of disagreement (4 of 396) for these fields.<sup>127</sup>

I vastly underestimated the difficulty of this undertaking in a variety of ways. My RAs devoted hundreds of hours to this project; the work—even at its most basic (like identifying word count)—was far more burdensome and time-consuming than I imagined. The laborious nature of hand-coding aside, the most important difficulty involved data access. The number of decisions available on Bloomberg Law (and on other commercial databases) do not match what the Administrative Office reports the courts issue—sometimes by substantial margins.<sup>128</sup> It is nearly impossible to gather a complete set of published and unpublished merits terminations from across the circuits for any period using the easiest and most accessible tools: commercial databases.<sup>129</sup>

To address this limitation, I decided to use the Federal Judicial Center (“FJC”) Integrated Database (“IDB”)<sup>130</sup> as a baseline comparison for our hand-coded dataset from Bloomberg Law.<sup>131</sup> That database is “the most comprehensive dataset on federal judicial appeals available,” and, thus, “the dataset typically used by

petitions, treating either as an indication that the losing party on appeal sought further review.

<sup>127</sup> The rate of error or disagreement for other fields was considerably higher. For more subjective assessments of reason-giving described in note 124, *supra*, the coders disagreed with each other approximately 12.4% of the time (or in 49 out of 396 entries). Admittedly, the task was more difficult than I anticipated. Some examples were clear-cut. Some were less so. As a result, I have less confidence in these results, compared to objective indicia—in particular, word count—that may be a proxy (however imperfect) for these same kinds of concerns about reason-giving quality. Because of the disagreement rate, I’ve prioritized the discussion of word count throughout.

<sup>128</sup> For a thorough discussion of this problem, *see generally* McAlister, *Missing*, *supra* note 12.

<sup>129</sup> *See also* Gluck, *et al.*, *supra* note 2, at 10, 45-46 (discussing issues related to accessing data and confirming findings in *Missing Decisions*).

<sup>130</sup> *Integrated Database*, FED. JUD. CTR., <https://www.fjc.gov/research/idb>. The IDB, which the Administrative Office makes available for public use, contains detailed case information for all federal appeals (from the geographic circuit courts) filed, terminated, and pending from fiscal year 2008 to the present. The FJC codes many categories that describe aspects of the appeal. Researchers can use the database to identify and isolate unpublished decisions, decisions reached without oral argument, appeals brought by unrepresented parties, and appeals involving similar claims, and similar outcomes (among other variables). For a complete overview of coded material, *see* FJC Appeals Codebook.

<sup>131</sup> By combining the FJC data with the hand-coded data from Bloomberg Law, I was able to supplement the FJC data with information contained only in the docket and decision itself, including information about word count, the identity of the panel, and post-decision history.

scholars studying the judiciary.”<sup>132</sup> This dataset is generally reliable,<sup>133</sup> but the FJC acknowledges (yet fails to explain) data quality concerns for “specific fields related to under-served populations,” including “regarding pro se litigants, in forma pauperis (IFP) status, and class action allegations.”<sup>134</sup> FJC data entry is not centralized, which can lead to some discrepancies in how courts record certain variables.<sup>135</sup> Nevertheless, it is a powerful, and generally accurate,<sup>136</sup> tool.

For each line of hand-coded data describing an entry in the Bloomberg Law database, I matched<sup>137</sup> those data to an entry from the FJC database.<sup>138</sup> This was a laborious process,<sup>139</sup> but one that allowed me to overcome the central limitations of the IDB: it doesn’t contain the text of the relevant opinion or order. At the same time, the matching process also enabled me to isolate what

<sup>132</sup> Gluck, *et al.*, *supra* note 2, at 114.

<sup>133</sup> *Id.*

<sup>134</sup> *The Integrated Database: A Research Guide*, FED. JUD. CTR., <https://www.fjc.gov/research/idb>.

<sup>135</sup> The Administrative Office uses some IDB data to generate its annual *Judicial Business* publication (which includes reports on unpublished decisions, among others), and which, as a result, are subject to quality checks. *See* Gluck, *et al.*, *supra* note 2, at 114-15 (discussing data quality issues with IDB and its limitations).

<sup>136</sup> *See* Adam M. Samaha, Michael Heise & Gregory C. Sisk, *Inputs and Outputs on Appeal: An Empirical Study of Briefs, Big Law, and Case Complexity*, 17 J. EMPIRICAL LEGAL STUD. 519, 529-30 (2020) (discussing confidence in Administrative Office data).

<sup>137</sup> The matching process involved comparing case numbers. Unfortunately, the two systems do not use the same unique number to identify cases, but it is relatively easy to derive the FJC IDB number—a seven-digit number—from the docket number reported by the court on the face of the opinion in the Bloomberg Law database. Where courts use six-digit case numbers, e.g., 15-3216, the IDB reports those as “1503216,” replacing the hyphen with a “0.” *See* FJC Appeals Codebook, Integrated Data Base Appeals Documentation FY 2008 – Present, FED. JUD. CTR., at 1, <https://www.fjc.gov/sites/default/files/idb/codebooks/Appeals%20Codebook%202008%20Forward%20rev%20202102021.pdf> [hereinafter FJC Appeals Codebook]. Where a court—specifically, the Fifth, Ninth, or Eleventh Circuit—uses a seven-digit case number, e.g., “15-13216,” the IDB reports the number as “1513216.” *Id.*

<sup>138</sup> To obtain the FJC baseline, I ran searches by circuit and judgment date (between January 1, 2017 and June 30, 2017) in the IDB Appeals database.

<sup>139</sup> To accomplish the task, I married the two datasets by case number. The marrying process involved some automation, whereby I used Excel’s “MATCH” function to identify line matches between the Bloomberg Law dataset and the FJC IDB dataset. That allowed easy identification of mismatches (both duplicate matches and non-matches), and to investigate whether any data-entry error (e.g., a transcription error in the manual conversion of the case number into a seven-digit number to pair with the IDB) created the mismatch. The rate of mismatches remaining after error check appear below in Table 1.

was missing from Bloomberg Law during the same period and identify certain key features of what was missing. Although the volume of what was missing was too great to retrieve by hand (a task that becomes necessary if the opinion is not on a commercial database), the IDB enables us to identify a significant amount of descriptive information about those missing decisions in each circuit. In the end, this time-consuming process gave an accurate snapshot of what the courts were doing during that six-month period and what researchers can find of that work on at least one commercial database.

Table 1 identifies the data retrieved from and matched between both the IDB and Bloomberg Law's Court Opinions database. Overall, the match rates—meaning the ability to associate a Bloomberg Law Court Opinions database hit with termination case information from the IDB—were quite high. But, as the raw numbers in Table 1 also reveal, Bloomberg Law has far fewer entries than the IDB has for the same period: those are mostly the missing decisions discussed below (as well as procedural terminations). For now, what's important is that this process matched nearly all Bloomberg Law Court Opinions database entries with an associated IDB entry: the match rate was at or more than 92% (and usually higher) across all but two circuits.

**Table 1: FJC IDB to Bloomberg  
Law Database Entries**

<u>Fed. Cir.</u> <u>Ct.</u>	<u>FJC</u> <u>IDB</u>	<u>BL Op.</u> <u>DB</u>	<u>Matched</u>	<u>%</u> <u>Matched</u>
D.C.	547	449	328	73%
First	762	263	242	92%
Second	2093	873	838	96%
Third	2162	779	765	98%
Fourth	2412	1727	1688	98%
Fifth	4014	1742	1706	98%
Sixth	2675	1000	927	93%
Seventh	1519	621	605	97%
Eighth	1656	918	733	80%
Ninth	6324	2680	2563	96%
Tenth	1013	589	573	97%
Eleventh	3307	1166	1136	97%

Let me say a few words about the outliers: the D.C. Circuit and the Eighth Circuit, both of which had match percentages significantly lower than their peers. The Bloomberg Law Court Opinions database entries for these circuits had a large volume of miscellaneous, non-dispositive orders, including (predominantly)

orders denying panel rehearing or rehearing en banc.<sup>140</sup> Where multiple Bloomberg Law Court Opinions database hits had the same case number, and thus where I had multiple matches for the same line of IDB data,<sup>141</sup> I only retained the Bloomberg Law entry associated with the termination decision.<sup>142</sup> My combined dataset contains 12,104 total matched entries; approximately 8.6% of those entries involved procedural terminations, which I have excluded.<sup>143</sup>

The remaining dataset of merits terminations has decisional features comparable to the reported statistics for 2017, but the problem of missing decisions results, generally, in a dataset that is slightly under-inclusive in terms of unpublished decisions and cases decided without oral argument in most circuits. Appendix B compares my dataset with 5-year means (between 2015 and 2020) and the 2017 reporting year for rates of unpublished decisions and cases decided without oral argument. If anything, the dataset presents a slightly rosier picture of the decisional practices in some circuits (especially those with more significant numbers of missing decisions, as discussed below). Taken as a whole, the dataset generally comports with (that is, is within one standard deviation of) the national averages during the same period. There's no reason to think that the data discussed here are exceptional or unusual, as opposed to representative of overall

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<sup>140</sup> *See, e.g.*, *United States v. Trabelsi*, No. 15-3075, 2017 BL 108217 (D.C. Cir. Mar. 31, 2017) (denying rehearing en banc); *Rothe Dev., Inc. v. Dep't of Def.*, No. 15-5176, 2017 BL 11544 (D.C. Cir. Jan. 13, 2017) (same); *Thompson v. Shock*, No. No: 16-1643, 2017 BL 188750 (8th Cir. June 05, 2017) (same); *United States v. Reccarro*, No. 16-1414, 2017 BL 17667 (8th Cir. Jan. 20, 2017) (same).

<sup>141</sup> A database search retrieves these orders as individual data entries in a date-limited search (and they each have unique database or citation numbers), but they would not pair with a single FJC IDB entry (or sometimes even one from the relevant period), because the IDB date-search retrieved termination information (as opposed to information about any order issued during the period). The IDB also generally contains only one line of data for each final decision.

<sup>142</sup> To increase matching speed, I did this visually most of the time, by comparing word counts (e.g., I assumed a 1,000-word decision was the merits decision and a 50-word decision was a miscellaneous order) or by retaining the last filed decision based on date (unless the hand-coded data indicated the last decision related to the denial of rehearing because of relative word count). Where it was unclear, I looked up multiple entries to determine the best fit by date of decision according to the IDB.

<sup>143</sup> Of the procedural terminations, 544 of 1,038 or more than 52%, were judge-issued terminations. During that same period, only 26.5% of procedural terminations were judge-issued. It's unsurprising that judge-issued procedural terminations are more likely to appear in commercial databases, given the greater likelihood that they are reasoned decisions (compared to clerk-issued dismissals).

trends in the circuits during the same period. Where discrepancies exist, that’s generally the result of missing decisions, which are, merits terminations not available on Bloomberg Law but reported as having been issued by the courts—a topic I turn to next.

### B. Missing Decisions

Contrary to a longstanding assumption,<sup>144</sup> scholars now agree that commercial databases (and free court websites) do not contain all unpublished merits terminations from the federal appellate courts.<sup>145</sup> Commercial databases generally populate their databases with the decisions freely available on court websites, but courts are required to post only content they deem to satisfy a federal “written opinions” standard on free court websites.<sup>146</sup> Courts, judges, and court clerks all seemingly take different views on what meets the “written opinions” standard, thus generating disparate access regimes across the courts of appeals.<sup>147</sup> Decisions not made available for free remain locked behind a docketing system paywall; they remain publicly available, but for a price<sup>148</sup> (and one that commercial databases appear to pay only when a customer requests inclusion of these decisions in the database).<sup>149</sup>

It is important, then, to start with what was missing from the commercial database—Bloomberg Law—I used to construct this dataset. Consistent with recent work on this topic, my study

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<sup>144</sup> See, e.g., RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 59 (“Unpublished decisions are now available online and can be easily accessed and analyzed there.”).

<sup>145</sup> See generally McAlister, *Missing*, *supra* note 12 (discussing existence of “missing decisions,” which are unpublished decisions that courts say they issue but are not available on free court websites and commercial databases); see also Gluck, *et al.*, *supra* note 2, at 10 (confirming finding in *Missing Decisions* and observing that “court websites and commercial databases contained only limited subsets of all unpublished opinions”).

<sup>146</sup> See McAlister, *Missing*, *supra* note 12, at 1114-16 (explaining how databases obtain federal appellate content); *id.* at 1160-62 (explaining that only decisions designated as “written opinions” must be available for free under federal law). For a thorough treatment of the E-Government Act’s “written opinions” requirement, see Peter W. Martin, *District Court Opinions that Remain Hidden Despite a Long-Standing Congressional Mandate of Transparency—The Result of Judicial Autonomy and Systemic Indifference*, 110 L. LIB. J. 305 (2018).

<sup>147</sup> See McAlister, *Missing*, *supra* note 12, at 1161 (discussing implementation problems with the “written opinions” requirement for accessing federal judicial decisions).

<sup>148</sup> For example, in earlier work, I amassed more than \$80 in fees to obtain approximately 250 missing decisions from one circuit during a one-year period. See *id.* at 1139 n.161.

<sup>149</sup> *Id.* at 1158-59 (discussing dynamics between databases and their customers and circumstances for adding material to databases).

confirmed (at least the historical)<sup>150</sup> incompleteness of the Bloomberg Law Court Opinions database, which has coverage comparable to LexisNexis’s commercial database.<sup>151</sup> What’s missing, predominantly, are decisions in prisoner appeals among those missing decisions from appeals of final judgments, as well as decisions in original proceedings, which also largely involve prisoner litigation (for example, a request to file a second or successive habeas petition<sup>152</sup>). Bear with me: this gets a bit complicated to explain, as I walk through in some detail what’s missing (and how I identified those cases).

Let’s start with the raw numbers of what the FJC IDB database contains for the six-month period at issue.<sup>153</sup> Table 3 details the number of merits terminations<sup>154</sup> reported in the database for the study period (January 1, 2017 to June 30, 2017). It also breaks down (and then excludes) consolidated cases from these totals; we would not expect more than one commercial database hit for consolidated cases, even though each case (even if consolidated with another) will have a unique line of IDB data.<sup>155</sup> Table 2 then compares those post-consolidation merits terminations with the merits terminations matched from the Bloomberg Law (“BL”) database; the difference is what is “presumed” missing—and by that, I mean, the apparent shortfall between what Bloomberg Law reports and what the IDB contains. Figure 1 graphically identifies the percentage of merits terminations presumed missing across the circuits. Those data

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<sup>150</sup> By historical, here, I mean the incompleteness of the database for the period at issue; this work does not offer any insight into whether the databases have greater coverage for decisions issued today.

<sup>151</sup> See McAlister, *Missing*, *supra* note 12, at 1129 n.135 (noting similarity between LexisNexis and Bloomberg Law coverage).

<sup>152</sup> 28 U.S.C. § 2244(b) (requiring applicant to request permission by motion in the court of appeals to file a second or successive habeas petition).

<sup>153</sup> Because the Administrative Office of the U.S. Courts only reports data on a 12-month rolling basis in three-month intervals, it was necessary for me to derive these numbers from the FJC IDB raw data. All data are on file with [LAW REVIEW].

<sup>154</sup> To identify “merits terminations,” I used a COUNTIFS function to identify the number of IDB entries from each circuit coded with a “merits” termination in the IDB’s disposition field. See FJC Appeals Codebook, at 9 (describing “DISP” field).

<sup>155</sup> This approach is consistent with the evaluation of missing decisions in other work, which also relied on post-consolidation merits terminations; the major difference is that earlier work used numbers reported by the Administrative Office in its annual *Judicial Business* publication and compared those numbers to database hits. See McAlister, *Missing*, *supra* note 12, at 1120-25 (describing data collection process). That study predicted Bloomberg Law’s missing decisions to be around 27% for this period. See *id.* at 1128, fig.2. These data demonstrate it is significantly higher.

demonstrate that the problem of missing decisions, and concerns over the completeness of a dataset, are uneven across the circuits.

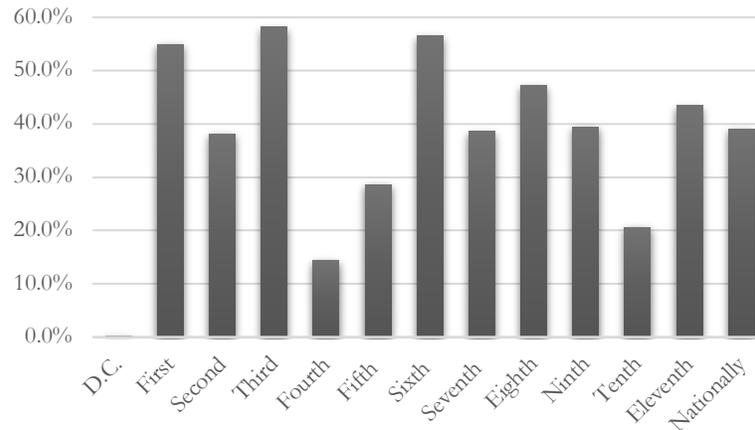
**Table 2: Comparing IDB Merits Terminations to Bloomberg Law Database Entries for Merits Terminations Between January 1, 2017 and June 30, 2017**

<u>Fed. Cir.</u> <u>Ct.</u>	<u>Merits</u> <u>Terms.</u> <u>in IDB</u>	<u>Consol.</u> <u>Cases</u> <u>Term.</u> <u>on</u> <u>Merits</u> <sup>156</sup>	<u>Post-</u> <u>Consol.</u> <u>Merits</u> <u>Terms.</u>	<u>Merits</u> <u>Terms.</u> <u>in</u> <u>BL</u> <sup>157</sup>	<u>Presumed</u> <u>Missing</u>	<u>% of Merits</u> <u>Terms.</u> <u>Presumed</u> <u>Missing</u>
D.C.	349	95	254	253	1	0.4%
First	498	39	459	207	252	54.9%
Second	1368	97	1271	786	485	38.2%
Third	1648	22	1626	679	947	58.2%
Fourth	1865	87	1778	1520	258	14.5%
Fifth	2715	453	2262	1613	649	28.7%
Sixth	1954	62	1892	821	1071	56.6%
Seventh	916	55	861	528	333	38.7%
Eighth	1363	64	1299	686	613	47.2%
Ninth	4208	211	3997	2420	1577	39.5%
Tenth	657	10	647	513	134	20.7%
Eleventh	1925	89	1836	1039	797	43.4%
<b>TOTAL</b>	<b>19466</b>	<b>1284</b>	<b>18182</b>	<b>11065</b>	<b>7117</b>	<b>39.1%</b>

<sup>156</sup> To identify consolidated appeals, I used a COUNTIFS function to identify all “merits” terminations (based on disposition), *see supra* note 156, with a joined appeal, which would be either a cross appeal or a consolidated appeal (a “1” or “2” under the “JOINAPP” field). FJC Appeals Codebook, at 12-13.

<sup>157</sup> These are “matched” Bloomberg Law entries—meaning entries that matched with a merits termination from the same period as reported in the IDB.

**Figure 1: Percentage of Merits Terminations Presumed Missing Across the Circuits in Dataset**



In an earlier study of this problem I observed that my estimates of coverage were likely “overly optimistic,”<sup>158</sup> and, unfortunately, I was right. Those estimates pegged coverage for merits terminations during this period on Bloomberg Law as near 73% total (with roughly 27% of merits terminations missing).<sup>159</sup> The results here find closer to 40% of merits decisions presumed missing from the database based on comparing matched Bloomberg Law database entries for merits terminations to the total number of IDB entries for non-consolidated or lead case merits terminations during the same period.<sup>160</sup> Consistent with that earlier work, coverage in the D.C. Circuit is outstanding, and the single presumed missing decision is a result of a reporting glitch explained below—one that likely accounts for some portion, but certainly far from all, of these missing entries.

Because of how I constructed the dataset, I’m able to do more than identify presumptively missing decisions: I can identify decisions that are, in fact, missing from Bloomberg Law’s Court Opinions database. By taking a closer look at trends in the decisions that are missing, we can learn more about what kinds of decisions are under-reported on commercial databases. Table 4 describes the collection of “missing” or unmatched entries from

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<sup>158</sup> I described estimates of missing decisions as “overly optimistic” because I was not able to exclude procedural terminations, duplicate entries, and miscellaneous orders from commercial database comparisons. *See* McAlister, *Missing*, *supra* note 12, at 1127-28 (explaining likelihood that some non-trivial percentage of database “hits” are not merits terminations, therefore making estimates of coverage “optimistic”).

<sup>159</sup> *Id.* at 1128 & fig.2.

<sup>160</sup> These are appeals coded as either “0” (for no consolidation) or “3” (designated as the lead case) in the “JOINAPP” field. FJC Appeals Codebook, at 12-13.

the IDB database—that is, those entries for which I could not identify a Bloomberg Law database match in the hand-coded dataset. It’s possible, of course, that some of these unmatched entries resulted from a data-entry error (mine or the court’s), but that’s unlikely to account for all missing decisions (especially given the high-overall matching rate). But there do appear to be some significant court errors—or discrepancies—that may account for a substantial portion of missing decisions in at least some circuits, as I will explain below. For now, Table 3 identifies the number of entries among IDB entries for merits terminations that are missing from Bloomberg Law. These decisions are subdivided by those that have been resolved with or without oral argument, and the numbers reported here reflect only those decisions that were identified either as not consolidated or as a lead case in an otherwise consolidated appeal. For both categories of cases, we would expect a corresponding decision in Bloomberg Law. The final column notes the margin of error based on the numbers of presumed missing decisions from Table 2.

**Table 3: IDB Entries Missing from Bloomberg Law Database (Unconsolidated Merits Terminations with and without Oral Argument)<sup>161</sup>**

<u>Fed. Cir. Ct.</u>	<u>Uncons. Merits Terms. After Argument</u>	<u>Uncons. Merits Terms. w/o Argument</u>	<u>All Uncons. Merits Terms.</u>	<u>Percentage Prediction Error</u>
D.C.	1	1	2	50%
First	17	230	247	-2.0%
Second	22	454	476	-1.9%
Third	523	426	949	0.2%
Fourth	1	254	255	-1.2%
Fifth	2	593	595	-9.1%
Sixth	4	1061	1065	-0.6%
Seventh	1	328	329	-1.2%
Eighth	2	606	608	-0.8%
Ninth	43	1528	1571	-0.4%
Tenth	35	98	133	-0.8%
Eleventh	4	791	795	-0.3%

<sup>161</sup> These numbers reflect missing entries satisfying the following criteria: using the “DISP,” field, the termination was one on the merits issued after oral argument (“1”) or without oral argument (“2”), which are the totals in the first and second columns. FJC Appeals Codebook, at 9. All entries were counted only if the “JOINAPP” field, which tracks consolidation, was either a “0” (no consolidation) or a “3” (lead case). *Id.* at 12-13.

TOTAL	655	6370	7025	-1.3%
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Overall, this approach—comparing database hits against expected entries based on court-side data—appears predictively sound for estimating missing decisions for most circuits. But something in Table 4 likely jumps out at you (and may strike you as suspicious): the number of missing decisions from the Third Circuit involving unconsolidated merits terminations issued after oral argument. Indeed, nearly 80% of all missing decisions following oral argument in this dataset are from the Third Circuit. It turns out that’s a reporting glitch from the Third Circuit. That year, the court treated at least 510 appeals in the Fosamax multi-district litigation<sup>162</sup> (all of which were filed against the same defendant Merck & Co., which makes them easy to spot in the raw data) as un-joined appeals.<sup>163</sup> These appeals were all resolved after one oral argument, involved joint briefing, and one, final published opinion.<sup>164</sup> In my view, they should have been treated as consolidated appeals for reporting purposes, especially because treating the cases as un-joined skews the Third Circuit’s statistics on oral argument and publication (both of which count un-joined or post-consolidation cases).<sup>165</sup>

If we remove the Fosamax MDL from the data, the number of missing decisions drops to 6,515 overall and only 145 missing merits terminations decided after oral argument. It’s entirely

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<sup>162</sup> In re Fosamax (Alendronate Sodium) Prods. Liab. Litig., 852 F.3d 268, 271 at \* (2017) (noting that the “opinion applies to all appeals listed in Appendix A”).

<sup>163</sup> See Matthew Stiegler, I’ve updated yesterday’s post about Third Circuit case statistics: data I originally thought was significant turns out to be meaningless, CA3blog, March 16, 2018, <http://ca3blog.com/suggestionbox/ive-updated-yesterdays-post-about-third-circuit-case-statistics-data-i-originally-thought-was-significant-turns-out-to-be-meaningless/> (recognizing that increase appeared “jaw-dropping” but that the “source of the problem” was treating the Fosamax appeal as over 500 separate cases).

<sup>164</sup> *Id.*

<sup>165</sup> I think it’s fair to characterize this as an error. At some point between when I wrote an article (in 2019) that relied on publication statistics from the Administrative Office of the U.S. Courts, see McAlister, “*Downright Indifference*,” *supra* note 14, at 597 fig. A-4, and now, the Administrative Office adjusted the publication statistics for the Third Circuit to treat these cases as consolidated for those purposes. Table B-12 for 2017 now indicates that “[t]otals for cases terminated on the merits in the Third Circuit and in the nation have been revised following resolution of a technical issue affecting the data.” JUDICIAL BUSINESS 2017, tbl. B-12. This “technical issue” was so significant as to affect the national non-publication rate that year (from 86.9%, as I had used in “*Downright Indifference*,” McAlister, *supra* note 14, at 550, fig. 1, to 88.2%, as it is now corrected, JUDICIAL BUSINESS 2017, tbl. B-12).

possible that some of those numbers are misleading for the same reason—that is, that there are other cases where the court resolves more than one appeal with a single decision yet treats the appeal as un-joined. But it’s unlikely that happens so frequently as to account for more than 6,000 missing decisions. Indeed, within the entire 2017 reporting year, only 3,022 appeals were reported as consolidated; it seems improbable that within a six-month period there were more than twice as many pocket consolidations that would skew the statistics so substantially. That said, it’s quite likely that all or nearly all 145 missing decisions from terminations after oral argument result from the same Fosamax MDL-type problem,<sup>166</sup> and for this reason I will assume these decisions are not really “missing” for the same reason.<sup>167</sup>

Among the 6,369 remaining merits terminations that did not match with any Bloomberg Law Court Opinions entry, it’s likely that more than 75% of those decisions are substantive—at least in the sense that the courts self-reported that these decisions were “reasoned.” Figure 2 identifies the relative percentages of court-reported reason-giving among what’s missing. Of course, courts self-report these figures, and there’s reason to believe they may be more generous than a reader might be in how they describe the extent of their reasoning.<sup>168</sup> But what we do know is that many of these decisions at least say *something*, as opposed to simply “affirmed.” It’s important to keep in mind, though, that even

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<sup>166</sup> See, e.g., *Serrano-Alberto v. Attorney General*, 859 F.3d 208 (3d Cir. 2017) (listing Case No. 16-1586 in caption but case appears in missing decision data and court does not denote it as a joined appeal); *United States v. Barret*, 848 F.3d 524, 524 (2d Cir. 2017) (identifying Case No. 13-3800 in caption but case appears in missing decision data and court does not denote it as a joined appeal).

<sup>167</sup> Going forward, I also exclude the D.C. Circuit from the discussion of missing decisions. One of its two missing decisions is a consolidated decision. *Ampersand Publ’g, LLC v. NLRB*, No. 15-1074, 2017 BL 67821 (D.C. Cir. March 3, 2017) (identifying Case No. 13-3800 in caption but case appears in missing decision data and court does not denote it as a joined appeal). The other—the only *real* missing decision—is an order granting a petition for leave to file a successive motion for relief under 28 U.S.C. § 2255. *In re Nugent*, No. 16-3118 (D.C. Cir. Apr. 10, 2017).

<sup>168</sup> For example, the Fourth Circuit reported issuing no unreasoned decisions during the relevant reporting period. JUDICIAL BUSINESS 2017 tbl.B-12. Yet it would be difficult to describe all decisions in Appendix A, which are all from the Fourth Circuit, as “reasoned” within the meaning of that report, which defines reasoned decisions ones “only opinions and orders which expound the law as applied to the facts of the case and detail the judicial reasons upon which the judgment is based.” JUDICIAL BUSINESS 2017 tbl.B-12; see also McAlister, “Downright Indifference,” *supra* note 14, at 576-77 & n.220 (discussing extent of reason-giving in perfunctory decisions with examples from Fourth and Eighth Circuits, where one decision was labeled as “reasoned” and one was not).

where there's no reasoning, an unreasoned or summary affirmance may still have value as an indication of appellate approval of a district court decision. Missing unreasoned decisions in direct appeals thus risk misrepresenting the procedural history of an appealed district court decision that appears in a commercial database.<sup>169</sup>

**Figure 2: Proportion of Reason-Giving in Unpublished Decisions Among Missing IDB Entries**

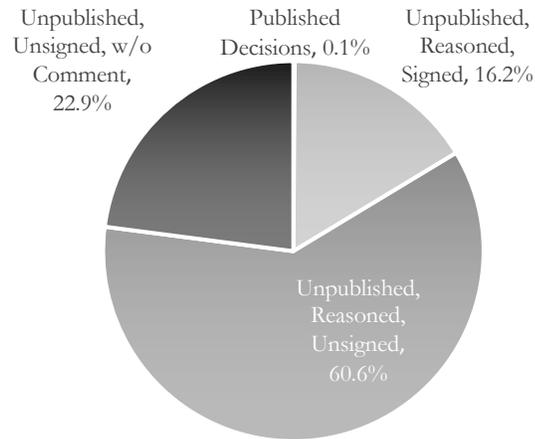
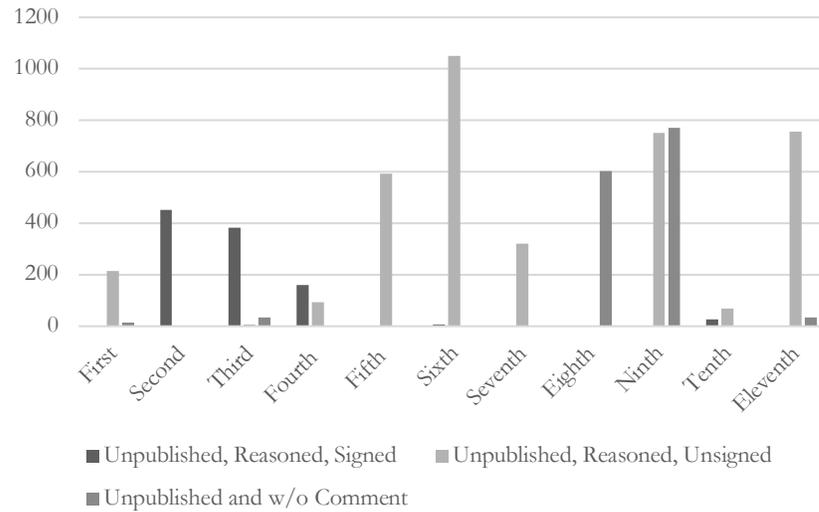


Figure 3, below, represents what's missing across the circuits based on the expected extent of reason-giving. Observe that in the only two circuits (the Eighth and Ninth Circuits) that report meaningful numbers of unreasoned decisions, many were missing (more than 1,300 in total). Large numbers of reasoned decisions were missing from the Second, Fifth, Sixth, Ninth, and Eleventh Circuits—all of which are busy circuits. Keep the existence of missing decisions from these circuits in mind when considering the average word count statistics below. In each of these circuits, the observed disparities between represented and unrepresented appellants may be artificially diminished because of the effect of missing decisions. Table 4 provides a more detailed breakdown of the data represented graphically in Figure 3.

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<sup>169</sup> See McAlister, *Missing*, *supra* note 12, at 1147-48 (observing that missing decisions “skew the procedural history information of the district court decisions otherwise included in those databases” and relaying that commercial databases describe one-word affirmances as “highly valuable as part of the overall case history”).

**Figure 3: Entries Missing by Reason-Giving Across the Circuits****Table 4: Reason-Giving in Missing IDB Entries<sup>170</sup>**

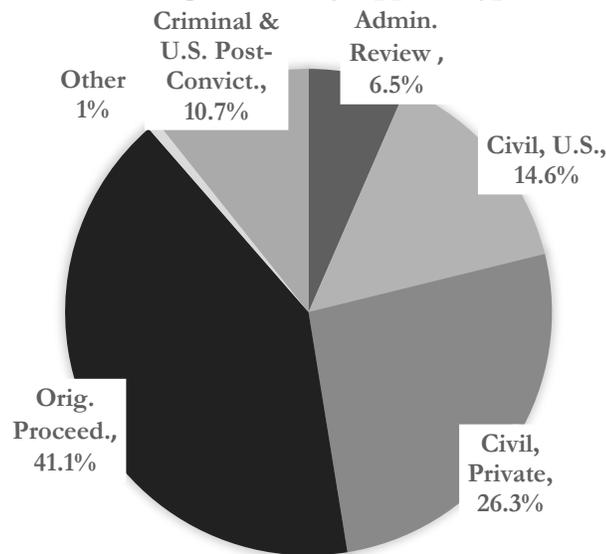
<u>Fed. Cir.</u> <u>Ct.</u>	<u>Unpub.,</u> <u>Reasoned,</u> <u>Signed</u>	<u>Unpub.,</u> <u>Reasoned,</u> <u>Unsigned</u>	<u>Unpub.,</u> <u>Unsigned,</u> <u>and w/o</u> <u>Comment</u>
First	0	215	14
Second	452	1	0
Third	383	7	35
Fourth	161	93	0
Fifth	0	592	0
Sixth	6	1050	2
Seventh	0	321	3
Eighth	0	3	603
Ninth	0	750	771
Tenth	27	69	0
Eleventh	1	756	34
<b>TOTAL</b>	<b>1030</b>	<b>3857</b>	<b>1462</b>

<sup>170</sup> This totals to 6,349, which is slightly less than the 6,369 number of non-argued missing entries noted above. Eight decisions were published, and I have omitted those for the same reason I exclude the argued missing entries. The remaining shortfall reflects a small handful of entries that were missing the relevant coding criteria.

The numbers here reflect those missing decisions from each circuit that satisfied the following conditions: the “DISP” code was “2,” meaning the decision was on the merits and reached without oral argument; the “JOINAPP” code was either a “0” or “3,” to exclude consolidated or non-lead appeals; and the “PUBSTAT” code was either “3,” “5,” or “7,” respectively to identify the type of unpublished decision (signed is 3; unsigned but reasoned is 5, and unreasoned is 7). *See* FJC Appeals Codebook, 9, 12-13.

Many of these missing decisions—likely around 50%—involve a decision in an appeal from a final judgment in the district court. Figure 4 identifies the relative percentage of missing termination decisions by appeal type (with some categories combined for clarity). Table 5 provides more detailed information about what appears graphically in Figure 4; it identifies the number of missing entries by type of appeal across each circuit.<sup>171</sup> What’s perhaps most significant about these data is that they demonstrate that two expected categories of missing decisions—original proceedings<sup>172</sup> and immigration matters<sup>173</sup>—only account for a little less than half of the missing entries in this dataset.

**Figure 4: Relative Percentage of Missing Entries by Appeal Type**



Overall, across most circuits many missing decisions arise from ordinary civil proceedings in appeals as of right (or on requests for certificates of appealability). Figure 5 graphically reflects the

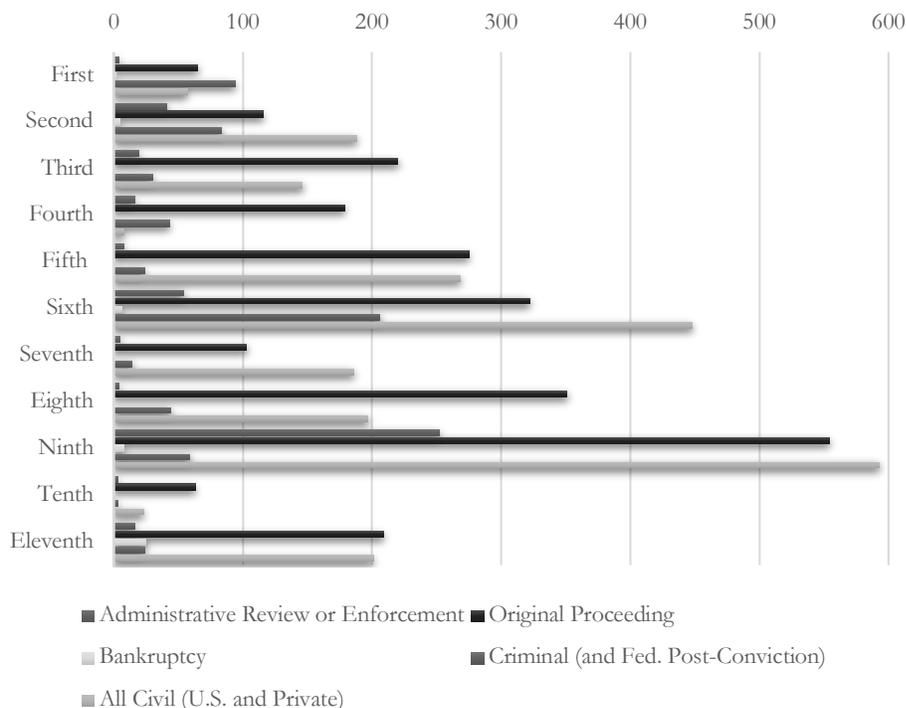
<sup>171</sup> This Table reports “APPTYPE” for the IDB entries not recovered from the same date-limited search in the Bloomberg Law Opinions database. See FJC Appeals Codebook, at 2-3. The category “Criminal” here includes appeals coded with 13, 14, 15, 16, 17, 18, 19 or 20. *Id.* at 3. “Federal post-conviction” identifies only those appeals coded as “21,” which are “appeal[s] arising from a USDC order entered after the judgment of conviction,” and thus does not include 28 U.S.C. § 2254 proceedings. *Id.* at 3.

<sup>172</sup> See McAlister, *Missing*, *supra* note 12, at 1134-35 (hypothesizing that original proceedings may account for some, but not all, of what’s missing from commercial databases).

<sup>173</sup> See Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 685-86 (2018) (establishing that many unpublished decisions in immigration matters are unavailable on Westlaw and, to a lesser extent, LexisNexis).

number of missing decisions across the major appeal types in each circuit, while Table 6 provides exact numbers on what Figure 5 represents graphically.

**Figure 5: Missing Decision by Appeal Type Across the Circuits**



**Table 5: Missing IDB Entries in Unpublished Decisions by Appeal Type<sup>174</sup>**

<u>Fed. Cir.</u> <u>Ct.</u>	<u>Admin.</u> <u>Review</u> <sup>175</sup>	<u>Admin.</u> <u>Enforce.</u>	<u>Civil.</u> <u>U.S.</u>	<u>Civil.</u> <u>Private</u>	<u>Orig.</u> <u>Proc.</u>	<u>Bankr.</u>	<u>Criminal</u> <u>(and Fed.</u> <u>Post-</u> <u>Conviction)</u>
First	3	1	25	32	65	2	94
Second	38	3	39	149	116	5	83
Third	16	3	48	98	220	0	30
Fourth	13	3	4	4	179	1	43
Fifth	8	0	86	182	275	1	24
Sixth	49	6	155	293	322	6	206
Seventh	5	0	96	90	103	0	14
Eighth	4	0	105	92	351	0	44
Ninth	248	4	132	461	554	8	59

<sup>174</sup> These are appeals that satisfy all conditions in Table 5 counted by “APPTYPE” field. *See* FJC Appeals Codebook, at 2-3.

<sup>175</sup> Ninety-seven percent (or 391 of 403) administrative review proceedings involve immigration-related appeals. To obtain this number, I identified the number of appeals involving Administrative Review that also involved the Immigration and Naturalization Service as the designated Agency in the IDB (code “6” in “AGENCY” field). FJC Appeals Codebook, at 6.

Tenth	3	0	11	12	63	1	3
Eleventh	16	0	201	209	291	1	24
TOTAL	403	20	902	1622	2359	25	624

Drilling down a bit deeper into these categories, it quickly becomes apparent that most missing entries involve litigation with vulnerable populations: criminal defendants, prisoners, undocumented persons, or persons without permanent status in the United States. Of the missing original proceedings, 2,202 of 2,539 or 86.7% involve petitions requesting permission to file a second or successive habeas corpus petition. Among the two categories of civil litigation (which, together, are the largest category), 2,158 of 2,524 or 85.5% of all missing terminations in civil proceedings involve prisoner litigation. Table 6 identifies the prisoner nature of suit codes for the missing decisions for “Civil, U.S.” and “Civil, Private”<sup>176</sup> appeal types. Of the prisoner appeals that are missing slightly more than 60% involve state defendants.<sup>177</sup> Collectively, that means that 5,021 of 6,349 or 79.0% of missing terminations with unpublished adjudications involve appeals or original proceedings brought by either a prisoner or a criminal defendant. If we add immigration matters (391) to those totals, then 85.2% of missing entries involve litigation with vulnerable populations.

**Table 6: Civil Appeal Types by Prisoner Nature of Suit Codes in Missing Entries Dataset<sup>178</sup>**

<u>Fed. Cir.</u> <u>Ct.</u>	<u>Prisoner</u> <u>Petitions</u> <u>(Vacate</u> <u>Sentence)</u>	<u>Prisoner</u> <u>Petitions</u> <u>(Habeas)</u>	<u>Death</u> <u>Penalty</u> <u>Habeas</u>	<u>Prisoner</u> <u>Petitions—</u> <u>Mandamu</u> <u>&amp; Other</u>	<u>Prisoner</u> <u>Civil</u> <u>Rights</u>	<u>Prisoner—</u> <u>Prison</u> <u>Condition</u>	<u>Total</u>
First	17	11	0	0	6	0	34
Second	18	46	0	2	35	8	109
Third	31	93	0	1	4	2	131
Fourth	1	2	0	0	0	1	4

<sup>176</sup> This name is a bit mis-leading, as it should not imply civil, non-governmental; it means civil matters not involving the United States as a party. Many prisoner lawsuits (including petitions under 28 U.S.C. § 2254 and civil rights claims under 42 U.S.C. § 1983) fall within this large, umbrella category.

<sup>177</sup> To derive this figure, I used the “JURIS” field for Prisoner Petitions (identified by the “NOS” field, *see infra* note 180), which has a special value/interpretation in the IDB for prisoner appeals. *See* FJC Appeals Codebook, at 6.

<sup>178</sup> This table uses the “NOS” field in the IDB. *See* FJC Appeals Codebook, at 6-7 & 21-23. Prisoner appeals are identified as follows: “510 Prisoner Petitions-Vacate Sentence”; “530 Prisoner Petitions-Habeas Corpus”; “535 Habeas Corpus: Death Penalty”; “540 Prisoner Petitions -Mandamus and Other”; “550 Prisoner -Civil Rights”; “555 Prisoner – Prison Condition.” *Id.* at 22.

Fifth	83	178	0	0	1	1	263
Sixth	124	219	2	1	18	15	379
Seventh	69	92	0	3	0	4	168
Eighth	91	51	2	2	15	17	178
Ninth	83	312	1	3	73	11	483
Tenth	6	2	0	1	4	0	13
Eleventh	188	168	4	1	24	11	396
						TOTAL	2158

Given the large volume of prisoner litigation among the missing entries, it's no surprise that the vast majority of what's missing involves appeals where the appellant was unrepresented throughout the proceeding: 4,578 of 6,370 missing decisions or more than 71% of all missing decisions involve proceedings with a unrepresented appellant. In every circuit, the share of missing entries involving unrepresented appellants exceeds the five-year means for unrepresented (or pro se) appeals in the circuit. Table 7 details these findings across the circuits.

**Table 7: Representation Status of Appellants in Missing Entries (and Compared to Overall Rate in Circuit)<sup>179</sup>**

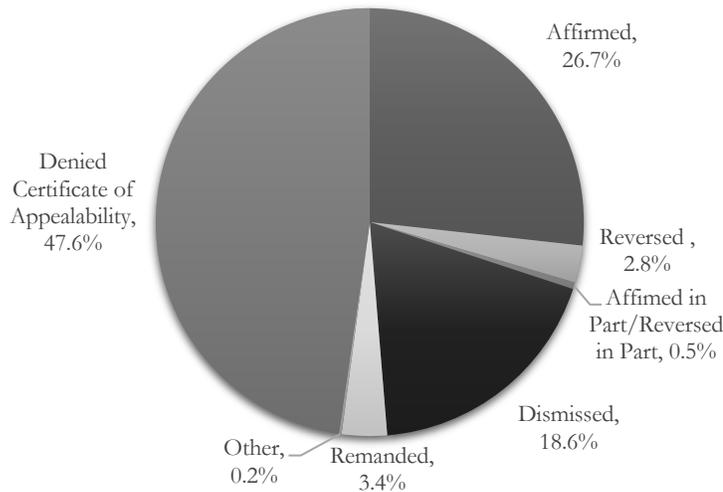
<u>Fed.</u> <u>Cir. Ct.</u>	<u>Appellant Pro</u> <u>Se at Filing</u> <u>and</u> <u>Termination</u>	<u>% of Overall</u> <u>Missing</u> <u>Entries</u>	<u>5-YR Mean</u> <u>for % of Pro</u> <u>Se Appellants</u> <u>(SD)</u>
First	120	52.2%	34.6% (2.1%)
Second	309	68.1%	39.5% (4.2%)
Third	239	56.1%	52.9% (4.3%)
Fourth	176	69.3%	60.7% (1.3%)
Fifth	519	87.5%	45.3% (1.3%)
Sixth	735	69.3%	57.4% (0.7%)
Seventh	265	80.8%	59.1% (1.1%)
Eighth	491	81.0%	52.4% (1.6%)
Ninth	1031	67.5%	45.4% (1.8%)
Tenth	66	67.3%	47.3% (2.4%)
Eleventh	627	79.3%	58.2% (2.1%)
TOTAL	4578	71.8%	49.1% (9.1%)

As we might expect, nearly 75% of what's missing from merits decisions on appeal (as opposed to in original proceedings) involves affirmances or denials of certificates of appealability,

<sup>179</sup> To generate this table, I counted those merits terminations issued without oral argument ("DISP" code "2") that were either not consolidated or were lead cases ("JOINAPP" code "0" or "3") and where the appellant was pro se at filing and termination ("PROSEFLE" and "PROSETRM" both equal "1"). See FJC Appeals Codebook, at 2, 12-13, & 17-18.

which function as affirmances in habeas corpus proceedings.<sup>180</sup> But what may be surprising is that nearly 7% of the missing entries involve an arguably favorable result for the appellant: a reversal (2.8%); a reversal in part (0.5%) or a remand (3.4%). The nationwide reversal rate for the same period—a rate that does not count reversals in part or remands—was only 7.8%.<sup>181</sup> Figure 6 identifies these outcomes graphically, while Table 8 describes the outcomes in the missing terminations from across the circuits.

**Figure 6: Outcomes by Percentages Among Missing Entries Across All Circuits**



**Table 8: Outcomes in Missing Entries (Excl. Original Proceedings)<sup>182</sup>**

Fed. Cir. Ct.	<u>Affirmed/Enforced</u>	<u>Reversed</u>	<u>Aff'd in part/Rev'd in part</u>	<u>Dismissed</u>	<u>Remanded</u>	<u>Other</u>	<u>Denied Cert. of Appeal</u>
First	114	8	2	7	2	0	24
Second	45	7	1	196	11	0	58
Third	59	3	0	9	14	1	110
Fourth	6	2	0	41	17	0	2
Fifth	2	0	2	11	29	0	258
Sixth	314	23	9	49	8	0	314
Seventh	38	10	0	8	12	4	137

<sup>180</sup> Under 28 U.S.C. § 2253, a person seeking habeas corpus relief from state custody or seeking relief under 28 U.S.C. § 2255, which governs motions challenging the lawfulness of federal custody, must seek a certificate of appealability to appeal the denial of relief. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (describing standard for obtaining certificate of appealability).

<sup>181</sup> JUDICIAL BUSINESS 2017 tbl.B-5.

<sup>182</sup> Table 9 reports the IDB’s “OUTCOME” field for those decisions terminated on the merits (“DISP” is “2”). FJC Appeals Codebook, at 10-11. The “OUTCOME” field is not used for original proceedings. *Id.* at 10.

Eighth	92	3	1	12	7	01	123
Ninth	240	28	2	263	14	0	368
Tenth	20	2	0	2	2	0	5
Eleventh	44	17	2	78	8	4	335
TOTAL	974 (26.7%)	103 (2.8%)	19 (0.5%)	676 (18.6%)	124 (3.4%)	10 (0.2%)	1734 (47.6%)

Similarly, the merits terminations arising from original proceedings also include some favorable results (more than 10% were granted), even though the vast majority (over 85%) were not favorable to the petitioner. That so many granted decisions in original proceedings are missing may be especially problematic for those who file the most common type of original proceeding missing from the dataset: a request to file a second or successive habeas corpus petition under 28 U.S.C. § 2244(b). More than 86% of the missing entries in original proceedings involve requests under § 2244(b). Table 9 identifies the outcomes in missing termination decisions from original proceedings.

**Table 9: Outcomes in Original Proceedings in Missing Entries<sup>183</sup>**

<u>Fed. Cir.</u> <u>Ct.</u>	<u>Granted</u>	<u>Denied</u>	<u>Dismissed/</u> <u>Other</u>
First	6	63	4
Second	6	128	2
Third	9	216	5
Fourth	6	179	1
Fifth	7	281	3
Sixth	39	303	2
Seventh	7	103	9
Eighth	10	355	2
Ninth	186	412	15
Tenth	7	60	0
Eleventh	10	247	46
TOTAL	293 (10.7%)	2347 (86.0%)	89 (3.3%)

What's missing, ultimately, is what many frequent users of commercial databases might miss the least: claims brought by vulnerable litigants against the government. I will discuss the implications of this finding in Part III, but, for now, I will observe that the harm from missing decisions may be asymmetrical—

<sup>183</sup> This table identifies the “OPDISP” field in the FJC IDB among those missing entries that involve original proceedings. *See* FJC Appeals Codebook, at 12.

exacerbating inequities already present within a system that makes it much more difficult for unrepresented litigants and prisoners to obtain relief. The government may be aware of a missing decision because its attorneys have litigated the issue before, but the prisoner will have great difficulty finding relevant missing authority (because it will not be available on court websites or, should they have access, in commercial databases or volumes of the *Federal Reporter* or *Federal Appendix*). Missing decisions ultimately require a certain level of inside knowledge to find—knowledge that most unrepresented litigants likely lack.

### C. Results

This Section describes the main findings from the matched pair dataset for merits terminations—that is, the results based on what was found in Bloomberg Law’s Court Opinions database and matched to information in the FJC’s IDB. These results should be understood against the backdrop of what’s missing from the dataset, because inclusion of those missing decisions may only deepen the disparities discussed below. Any examination of the output of the federal appellate courts’ second tier process is necessarily tentative and incomplete without that dataset. Nevertheless, these data offer some insights and observable trends that suggest our understanding of a two-tier system of federal appellate justice may be incomplete: there may be, instead, three tiers of decisional quality and process.

This section begins with a high-level summary of findings and limitations. It then explains those findings in greater depth—first by comparing this dataset with the longitudinal work of the Gluck Study before turning to this project’s unique contribution to the study of unpublished decisions. Part III will separately consider the implications of these findings.

#### 1. *Summary of Findings and Limitations*

This study suggests that unpublished decisions are not all created equal. Controlling for outcome, oral argument, and publication status, pro se or unrepresented litigants are more likely to receive unpublished decisions half the length of similarly situated counseled appeals. That these disparities exist even when a large volume of unrepresented appeals cannot be included—because the decisions are missing from commercial databases—only underscores the likely extent of the disparity.

This work also demonstrates significant differences in unpublished decisions across the circuits. For example, the difference in decisional length in unpublished affirmances is more than five times greater in circuits with the most robust decisions

compared to the circuits with the shortest decisions. Those differences exist for no obvious reason.<sup>184</sup> Some differences may reflect circuit culture, adding to our understanding of how “circuit personalities,”<sup>185</sup> may shape litigation experience on the ground.

Ultimately, these findings suggest that in some—if not in most circuits—there may be three tiers of federal appellate review: a first tier for the system’s “haves” and the most “important” or interesting cases; a second tier for the system’s “haves” who have lawyers but present routine, boring, or easy issues; and a third tier for the system’s “have-nots” who are unrepresented. Put differently, the results here suggest that the triage decision, which funnels certain kinds of cases to staff attorneys, may have a disparate effect even within the class of unpublished decisions.

Now, for the limitations. First, consistent with other studies of this type, this work relies on word count as a proxy for reason-giving.<sup>186</sup> But it is only a proxy. Data gathered relying on more subjective assessments of the strength of a decision’s reason-giving correlate with the mean word count of unpublished decisions in each circuit.<sup>187</sup> Although there was greater disagreement among coders on this more subjective measure, and thus it has not been used to supplement the word-count data, the strength of the correlation generally suggests that fewer words are more likely to reflect thinner reasoning.

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<sup>184</sup> See RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 18, at 94 (arguing that it’s unlikely that “caseload differences, either in number or kind account for the[se] differences” in how courts use shortcut procedures and asserting that while some “experimentation” may be “tolerable,” there’s “no apparent reason” for these differences); see also McAlister, *Rebuilding*, *supra* note 3, at 1182-86 (considering the extent to which docket composition may affect use of oral argument and unpublished decisions across the circuits).

<sup>185</sup> See generally Larsen & Devins, *supra* note 15 (arguing that circuits have unique personalities that are important counter-weights to increased judicial partisanship).

<sup>186</sup> Gluck, *et al.*, *supra* note 2, at 70 n.260 (using word count “[a]s a proxy for how much reasoning unpublished opinions contain” and noting that “[t]he word count of an opinion, of course is only a rough proxy for whether an opinion is in fact ‘well-reasoned’”). I note that, unlike the Gluck Study, *id.* at 70 n.261, this work excludes header material in its word counts. I note, further, that this category of coding had a low error rate in a random cross-check of 396 fields of data (only 4 such disagreements, based, primarily on whether a concurrence or dissent had been included).

<sup>187</sup> The Pearson coefficient between average word count of unpublished decisions in each circuit and the number of decisions hand-coded as lacking independent reasoning is -.53, which suggests a strong negative correlation between word count and reason-giving (that is to say that fewer average words correlates with fewer overall decisions with independent reason giving). See JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* 82 (2d ed. 1988) (stating that where Pearson correlation coefficient is greater than .5, it reflects a strong correlation).

Second, the existence of missing decisions is also a limitation. The absence of these decisions from the dataset—many of which are likely to be shorter and more perfunctory than the unpublished decisions included—may well skew the results in meaningful ways. To the extent inclusion of those data would change the story, there’s every reason to believe it would likely change the story for the worse. Based on the nature of what’s missing, and the reason why shorter forms of decisions may be excluded from court websites,<sup>188</sup> it is reasonable to assume that inclusion of what’s missing likely would exacerbate existing differences in decisional length observed in decisions in unrepresented and represented appeals. The discussion above demonstrates that the missing decisions mostly affect unrepresented and other vulnerable litigants and likely involve more “summary” adjudications.

Third, it’s entirely possible that there are other meaningful differences between unrepresented appeals and represented appeals within the second tier for which this study cannot account but that may explain the disparity seen. I believe that the richness of the data—it contains more than 4,700 direct comparative observations in counseled and unrepresented appeals from the second tier—supports the assertions made here, but I have not accounted for any difference in relative complexity between counseled and unrepresented appeals within the second tier. Put differently, this study assumes that there is no meaningful difference in complexity between unrepresented and counseled appeals that do not go to oral argument and end in unpublished affirmances. But that’s only an assumption, and one with which not all may agree.

Finally, this study is limited in time. That said, I have no reason to think the period studied—the first six months of 2017—is aberrational. In Appendix B, I contextualize the data within five-year means to demonstrate the sample’s consistency with overall trends.<sup>189</sup> The trends are also consistent, generally, with the longitudinal work of another recent student, which used a significantly larger dataset of FJC data but a substantially smaller coded sample.<sup>190</sup> At the very least, I have confidence that this work is a snapshot in time that accurately describes the decisional practices of the courts of appeals during the first six months of 2017.

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<sup>188</sup> See Gluck, *et al.*, *supra* note 2, at 10, 21, 45-46 (discussing different decisional schemes and how some types of decisions, especially those related to summary orders, are not made available on court websites).

<sup>189</sup> See *infra* Appendix B tbl.1-B.

<sup>190</sup> Gluck, *et al.*, *supra* note 2, at 46.

## 2. *Comparison with Other Studies*

My results here are consistent with recent work by Abbe Gluck and her colleagues that evaluated certain features of unpublished federal appellate decisions based on aggregate IDB data from 2008 to January 2020.<sup>191</sup> The Gluck Study included nearly 420,000 terminations from IDB data, supplemented by a hand-coded sample containing approximately 1,400 observations across six circuits.<sup>192</sup> This project provides a closer examination of all decisions issued across all geographic circuits for a limited period within the longitudinal reach of the Gluck Study.<sup>193</sup> This Article's hand-coded dataset with more than 11,000 observations allows for a comparative account within unpublished decisions and across the circuits that the Gluck Study does not address. The work is complementary; it both confirms and deepens the discussion of disparity that emerges from the Gluck Team's work, and it offers a more comprehensive account of the interplay between and among the circuits.

But it is important to underscore that my findings are consistent with some of the key insights of the Gluck project. This study's overall word count comparison between published and unpublished decisions is consistent with the Gluck Team's findings, which compared word length of published and unpublished decisions through 2017.<sup>194</sup> They pegged the mean word count for published decisions since 2010 at approximately 5,000 words, whereas the mean length of unpublished decisions has been consistently at or near 1,000 words since 1991.<sup>195</sup> They conclude that "unpublished opinions are usually a fraction of the length of published opinions—about one-fifth on average in recent years from 2010 on."<sup>196</sup> This study's observations are consistent. Across all unpublished decisions in the dataset, the mean word count is 962; the mean word count for published decisions is 4,607.

The rates of publication for unrepresented and represented appeals across both studies are similar, as well. In the Gluck Study, "just 2.1% of unrepresented" appellants received published

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<sup>191</sup> *Id.* at 42 n.189.

<sup>192</sup> *Id.* at 46-47.

<sup>193</sup> This work occurred in parallel, and I was unaware of the Gluck Team's findings until publication of their article in May 2022.

<sup>194</sup> *Id.* at 47-48, 70-71. The Gluck Study analyzed (through an automated process) the total word count of just under 600,000 federal appellate decisions issued between 1991 and 2017 to derive their word count data.

<sup>195</sup> *Id.* at 71 & fig.17.

<sup>196</sup> *Id.* at 40.

decisions.<sup>197</sup> In this study’s sample, 2.9% or 133 of 4,606 merits terminations involving unrepresented litigants resulted in published decisions. Conversely, 27.9% or 1,792 of 6,415 terminations involving represented appellants resulted in published decisions. The Gluck Study concluded that “unrepresented appellants were twelve times less likely to receive a published opinion than appellants represented by counsel.”<sup>198</sup> For this study, unrepresented litigants were slightly less than ten times less likely to receive a published decision—a difference for which the missing decisions could account (because the Gluck Study used aggregate FJC data for this finding and not the universe of matched pairs discussed here).

Ultimately, the Gluck Study concluded that the disproportionate rates of publication between unrepresented and represented appellants “merits further investigation.”<sup>199</sup> They recognized that “[n]eutral explanations for this differential treatment may exist,”<sup>200</sup> but that “bias could be another explanation” for the disparities observed.<sup>201</sup> This work suggests one answer to that important question by demonstrating that even where represented parties raise routine, non-novel, or easy issues, they still seemingly receive more attention from the courts. That finding increases the possibility that bias—or inequities built into the triage system itself—may partly drive observed disparities.

### 3. *Findings in Greater Depth*

This section explores in greater depth the main claim of this Article: if the second tier is full of “easy” cases, the courts of appeals differ markedly in how much reasoning they provide in “easy” cases. Not all “easy” cases are treated alike, and circuits are not alike in how they treat “easy” cases. To be sure, we might expect some disparities or differences within the second tier and across the courts of appeals. But the extent of the disparities observed, and the risks they pose, raise significant concerns about equal access to justice, law development, transparency, and litigant dignity. Before turning to these implications in Part III, this section details the observed disparities within and across the courts of appeals in how they resolve second-tier appeals.

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<sup>197</sup> *Id.* at 37.

<sup>198</sup> *Id.*

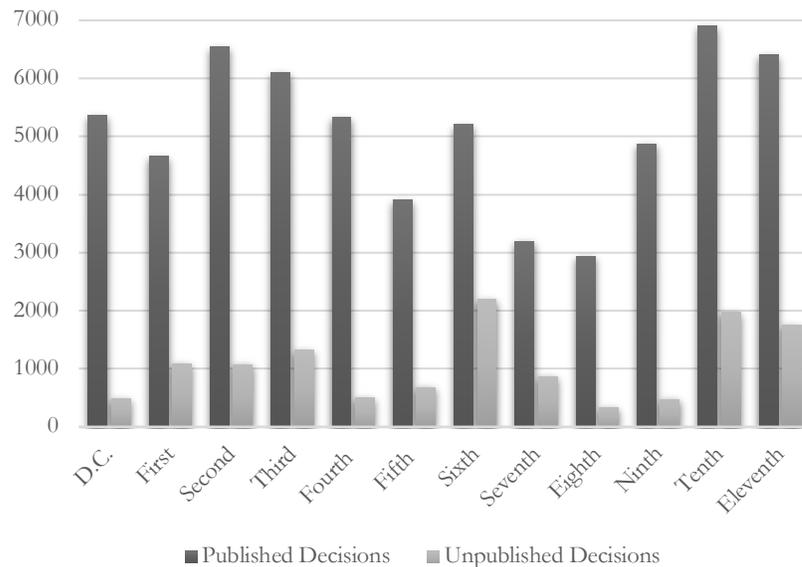
<sup>199</sup> *Id.* at 52.

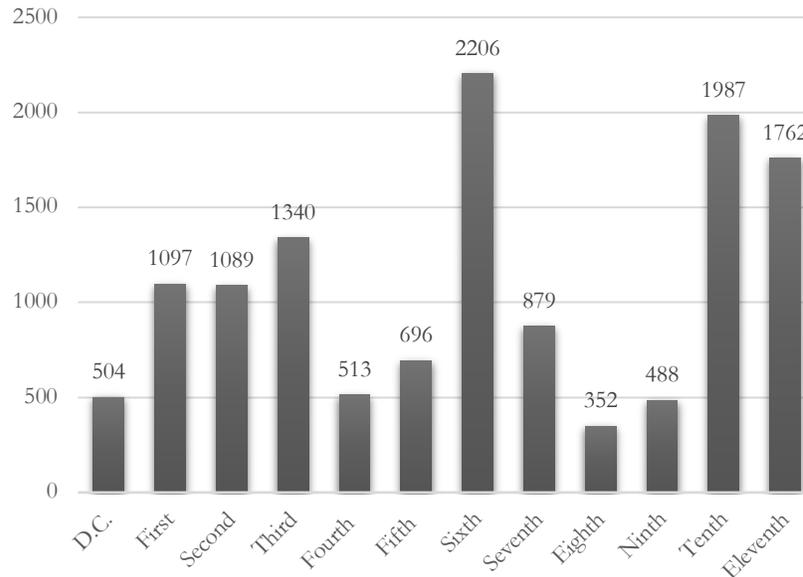
<sup>200</sup> *Id.* Among those “[n]eutral explanations” are the possibility that such appeals are “less likely to raise meritorious claims or novel issues” or that they involve “poor advocacy.” *Id.* at 52-53.

<sup>201</sup> *Id.* at 53.

Let's begin by examining the differences among the courts of appeals in how much written attention they give to second-tier appeals compared to first-tier appeals by comparing word length across the circuits in published and unpublished decisions. At its most stark, consider the Fourth Circuit and the Sixth Circuit: the mean word count for unpublished affirmances issued on the briefs in the Fourth Circuit is 392; in the Sixth Circuit, it's 1,965. That's five times as long as the decisions in the Fourth Circuit. And that's far from the only difference in how courts approach unpublished decisions—and published decisions, for that matter. Figure 7, below, compares the mean word counts for published and unpublished decisions across the circuits, whereas Figure 8 more closely examines the mean word counts for unpublished decisions across the circuits.

**Figure 7: Mean Word Counts in All Published and Unpublished Decisions Across the Circuits**



**Figure 8: Mean Word Counts in All Unpublished Decisions Across the Circuits**

Recall that we’re missing a substantial number of decisions from the Sixth Circuit and the Eleventh Circuit, which might lower these particularly high means (compared to other circuits). But another outlier here—the Tenth Circuit—has particularly good coverage. It also happens to be the least busy federal appellate court (in terms of filings per judge)<sup>202</sup> and the only court where judges perform all triage decisions themselves. If the adage that, with more time, one would write a shorter letter, is true, it seems not to hold much sway in the context of unpublished decisions. More reasoning, and thus longer decisions, may reflect greater judicial (or staff) effort and provide a more robust precedential (or quasi-precedential) foundation across more areas of the law. Less is not always more, when it comes to unpublished decisionmaking, where the temptation may be to say as little as possible to save time.

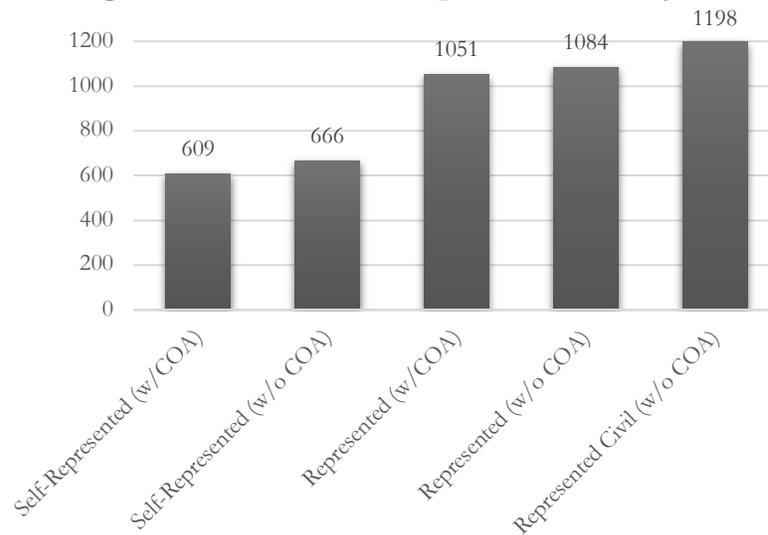
The differences across the circuit do not end there. Disparities in how courts resolve appeals within the second tier of appellate process also appear to exist. Even where an appeal does not receive oral argument, is affirmed, and results in an unpublished decision, appellants who are represented by counsel receive decisions nearly twice the length of those who are unrepresented. Removing criminal appeals from the group of represented

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<sup>202</sup> See McAlister, *Rebuilding*, *supra* note 3, at 1211 tbl.17; *id.* at 1160 (discussing Tenth Circuits screening process); see also Larsen & Devins, *supra* note 12, at 11-12 (discussing triage process in Tenth Circuit and noting that judges consider screening to be “their most urgent task”).

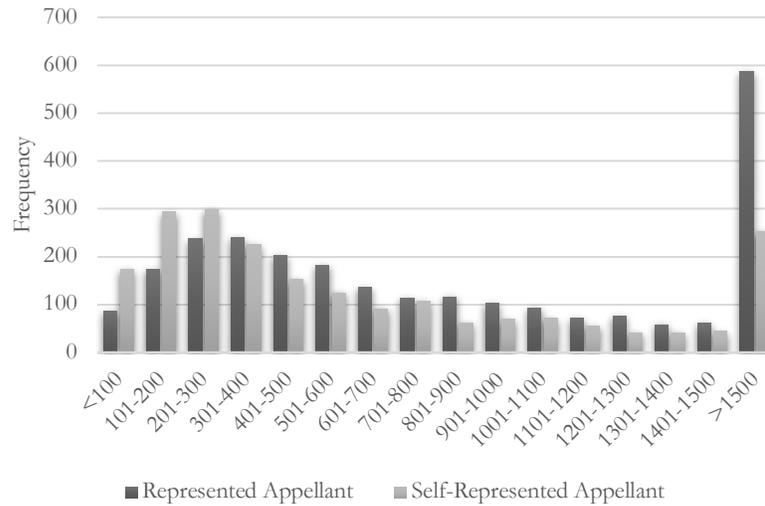
appellants (and thus comparing civil appeals to civil appeals) deepens the disparity. Adding proceedings involving denials of certificates of appealability (which functions as an affirmance in a habeas corpus proceeding), does not meaningfully change the story. The bottom line: on average, a unrepresented litigant is more likely to receive a shorter decision disposing of her appeal than a represented party (even when neither receives oral argument, a published decision, or a victory). Figure 9 identifies average word counts in all merits terminations across the circuits based on representation status (and controlling for outcome, oral argument, and publication status).

**Figure 9: Word Count Comparisons in “Easy” Cases**



What drives these differences, it appears, are significant differences at both the high and low ends of the distribution. Figure 10 identifies the relative frequency of decisions in certain length ranges up to decision over 1,500 words. In most ranges, there’s an observable disparity between appeals involving represented appellants (dark gray) and appeals involving unrepresented appellants (light gray), but the discrepancies are particularly pronounced at the high and low ends of the distribution.

**Figure 10: Frequency of Decisions Within Word Count Bands in Represented and Unrepresented “Easy” Appeals**

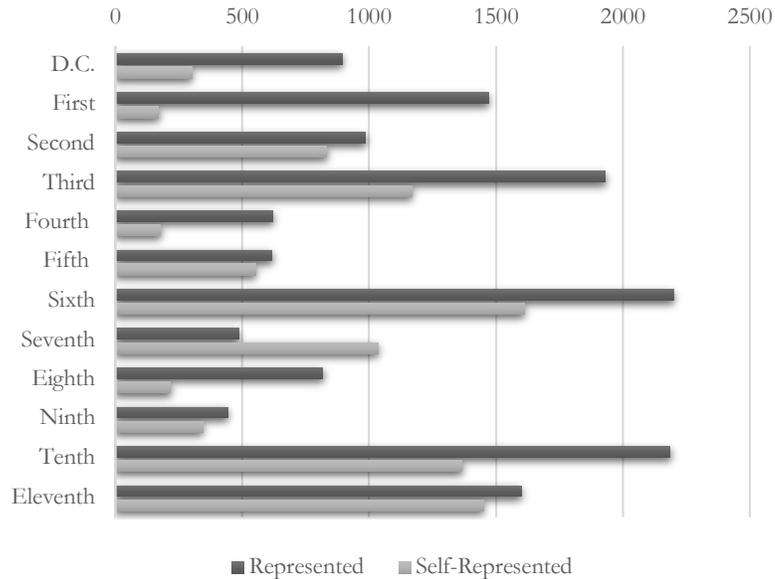


Differences exist within circuit decisional practices, too; in some circuits there’s little meaningful difference between how courts resolve unrepresented appeals and represented appeals; in others, the difference is stark. Figure 11 graphically depicts the difference between average word counts across the circuits between represented (dark gray) and unrepresented (light gray) appellants, whereas Table 10 details the mean word count and number of observations ( $n$ ) across the circuits for represented and unrepresented second-tier appellants.<sup>203</sup>

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<sup>203</sup> These figures do not include denials of certificates of appealability; they thus compare only decisions issued in appeals as of right depending on the representation status of the appellant only (and they include criminal and civil appeals). Note that above in Figure 9, and below in Table 10, I have used all circuit means to reflect the total number of words in all similarly situated counseled and unrepresented terminations, divided by the total number of such terminations, which should mitigate the effect of some extreme outliers with few observations.

**Figure 11: Average Word Counts in Represented and Unrepresented “Easy” Appeals Across the Circuits**



**Table 10: Average Word Count in Unpublished Affirmances Issued Without Oral Argument Based on Representation Status**

<u>Fed. Cir. Ct.</u>	<u>Represented</u>	<u>Unrepresented</u>
D.C.	894 ( <i>n</i> =20)	301 ( <i>n</i> =62)
First	1471 ( <i>n</i> =25)	171 ( <i>n</i> =13)
Second	985 ( <i>n</i> =181)	832 ( <i>n</i> =70)
Third	1931 ( <i>n</i> =162)	1170 ( <i>n</i> =199)
Fourth	621 ( <i>n</i> =370)	178 ( <i>n</i> =392)
Fifth	617 ( <i>n</i> =332)	552 ( <i>n</i> =247)
Sixth	2201 ( <i>n</i> =209)	1610 ( <i>n</i> =144)
Seventh	487 ( <i>n</i> =3)	1034 ( <i>n</i> =95)
Eighth	818 ( <i>n</i> =94)	218 ( <i>n</i> =155)
Ninth	444 ( <i>n</i> =580)	346 ( <i>n</i> =527)
Tenth	2186 ( <i>n</i> =106)	1366 ( <i>n</i> =109)
Eleventh	1600 ( <i>n</i> =479)	1450 ( <i>n</i> =162)
Mean Across All Circuits	1084 ( <i>n</i> =2561)	666 ( <i>n</i> =2175)

Some of these differences, and the low number of observations, reflect the effect of missing decisions.<sup>204</sup> But, again, it’s unlikely

<sup>204</sup> The First Circuit is a good example. We’re missing at least 120 decisions involving pro se appeals from that circuit. Other work indicates the mean word count for these decisions is 249 words; the median is 140. *See* McAlister, *Missing*, *supra* note 12, at 1144 tbl.10. In other words, I’m confident that the

that including what's missing would make the picture better; it's more likely that what's missing are the poorest quality decisions with the least reasoning, as those are more likely to be issued through a summary procedure and not as written opinions.<sup>205</sup>

More than 30% of the unrepresented appeals involving appeals of right (and thus not including certificates of appealability in habeas corpus proceedings) involved prisoner claims. The mean word count in those 710 appeals was 638. There were 90 counseled appeals involving prisoners among the dataset of "easy" cases, and those appeals generated substantially longer decisions, with an average word count of 1455. In some circuits, like the Eleventh Circuit, the difference was especially sharp (an average word count of 2,702 in prisoner cases with counsel and 1,274 in cases without counsel). In other circuits, the presence of counsel seemed to make no difference, as all prisoners received perfunctory decisions: in the Eighth Circuit, the average word count for all prisoner appeals was only 99.<sup>206</sup>

Admittedly, these results are not nearly as dramatic as the difference in length between published and unpublished decisions, which is closer to one-fifth as opposed to one-half.<sup>207</sup> But bear in mind that we're already looking within the second tier, where judicial time and attention is slight, and the decisions are more perfunctory, overall. None of these appeals went to oral argument. None has been designated for publication or is precedential. And it's likely that many have been written by staff attorneys (and perhaps even rubber-stamped by a judge). These data suggest that, in conducting that limited review for error correction in second-tier appeals, the judge who reviews a staff attorney or law clerk's recommendation will generally have less-reasoned decisions to review for approving a result in an unrepresented appeal than in a counseled appeal. And there could be cascading effects: future unrepresented litigants may have less

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disparities we see would persist (and perhaps even deepen) were missing decisions included.

<sup>205</sup> For a more thorough discussion of how decisions may go missing based on the different types of decisional outputs in at least one circuit, see McAlister, *Missing*, *supra* note 12, at 1137-40.

<sup>206</sup> The *n* here is small, of course; there were 46 unrepresented prisoner appeals (excluding certificates of appealability) and only two with counsel in the Eighth Circuit; in the Eleventh Circuit, there were more counseled prisoner appeals (18) and 48 unrepresented appeals.

<sup>207</sup> Of course, comparing the word count in published unrepresented appeals to published decisions is even more dramatic: in this study unrepresented appellants received decisions that were approximately 14% the length of published decisions.

guidance, should they pursue similar claims, and the law may develop more slowly in these areas over time.

One may argue that these are not apples-to-apples comparisons, because the nature of the suit and the types of claims may be different across represented and unrepresented proceedings. That's undoubtedly true (and also sort of the point). Ultimately, however, those differences are exceedingly difficult to quantify. The constants here—oral argument, publication status, and outcome—are meant as proxies for “easy” cases. If the animating presumption in sending unrepresented cases to the second tier by default, or in publishing decisions in those cases at a fraction of the rate of represented appeals, is that these cases are “easy” or “routine,” then it's helpful to compare “easy” cases to “easy” cases based on the treatment they received. That easy unrepresented cases receive less reasoned decisions even within that second tier suggests that, perhaps, what these decisions look like may have less to do with the merits than with possible bias towards unrepresented (and prisoner) litigants. Put it this way: if all of these appeals are losers, why should the reasoning in one class of appeals be, on average, substantially thinner than in the other class of appeals?

Now, it's still possible that unrepresented appeals have a higher rate of frivolity than even similarly situated second-tier, counseled appeals. Were that true, it would presumably be a neutral reason for any disparate treatment of unrepresented litigants (compared to those with counsel). Again, that's also a reason that's difficult to test. But here's one indication that the presumption of frivolity and litigiousness around unrepresented litigants may be overblown. On average, unrepresented litigants are no more likely than average to seek rehearing or file a cert petition after a loss. For all merits terminations during the study period, the rate of rehearing was 19.2%, which means I observed 2,128 rehearing (or rehearing en banc) petitions filed from 11,065 merits terminations. The rehearing rate where the appellant was unrepresented at termination was roughly similar: 20.5% or 946 rehearing petitions were filed in 4,606 unrepresented merits terminations. The same was true for petitions for writs of certiorari to the Supreme Court of the United States.<sup>208</sup> The overall rate for seeking certiorari review was 12.9% (or in 1,432

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<sup>208</sup> Compared to represented litigants whose appeal did not receive oral argument or a published decision (that is, second tier represented appellants), the rate of seeking rehearing in unrepresented appeals was higher. Only 369 of 3144 similarly situated represented appellants or 11.7% filed for rehearing (compared to 20.5%). The rate for filing cert petitions was roughly equivalent (348 cert petitions filed out of 3144 merits terminations or 11.1%).

of 11,065 merits terminations); the rate for those who were unrepresented at termination was 11.4% (or 526 of 4,606 terminations). To be sure, it's possible that unrepresented appellants are less familiar with post-decision options for review than those appellants with counsel, and that more would file for such relief if they knew it were available, but this is at least some indicia that unrepresented appellants are no more given to frivolous filings than other kinds of appellants.

There may be other, neutral reasons to treat appeals with similar merit (or lack thereof) differently, but the effects may lead to something of a self-fulfilling prophecy: by writing shorter decisions and issuing more unpublished decisions in some areas of the law than in others, it will be harder for those bringing similar claims to find useful precedent. The law will retard, and it will retard more quickly in some circuits than in others. Compare the experience of the unrepresented appellant in the Fourth Circuit or the Eighth Circuit to the experience in the Tenth Circuit or the Eleventh Circuit: in the latter, the appellant is more likely to receive a decision ten times as long as in the former. The difference between those types of decisions is as significant as the difference between published and unpublished decisions themselves. The outcome in that unrepresented appellants' case represents the bottom rung of federal appellate procedure. The next Part explains why we should care about the bottom rung, and what we might do to ameliorate it.

### III. WHY WE SHOULD CARE, AND WHAT WE CAN DO ABOUT IT

That the “easiest” cases percolating through the federal appellate courts receive the least written attention is neither controversial nor groundbreaking. At least not anymore—it's been that way for decades; that's why we have published and unpublished decisions, in the first place. And few if any—including me—would suggest that *all* appeals should receive the same treatment or amount of attention from very busy courts. But what these data suggest is that it's not just that “easy” cases are getting less, but that particular kinds of “easy” cases, in particular circuits, are getting much less. At its most extreme, consider this: the average represented appellant in the Tenth Circuit receives an unpublished decision more than twelve times as long as an unrepresented appellant in the Fourth Circuit. That's far more written attention for the represented appellant in one circuit than for an unrepresented appellant in another. That disparity raises a host of concerns about law development, equality, dis-uniformity,

and litigant experience across the federal appellate courts.<sup>209</sup> This Part explains why we should care about these inequities, and it offers some solutions.

#### A. Why the Disparities Matter

If we judge the health of our institutions by how they treat the least powerful among us, then the triage regime needs a check-up. We might disagree about the prescriptions, but hopefully we're moving towards agreement about the basic need for an examination. The facts on the ground demonstrate that our federal appellate courts are a system of haves and have-nots—and that depends not only on the resources of the appealing party but, also, the court that hears the appeal.

The results discussed here are a call to action: they reveal potentially intolerable systemic inequities within the federal appellate courts' existing triage regime. The disparities are at least two-fold: first, there's the difference in how many courts seem to be treating cases that are superficially alike (that is, how dismissive courts are of “easy” cases) and then, perhaps even more problematic, how uneven that treatment is across the circuits. The latter may be leading to the former: circuit disparities in reasoning may be driving the trends observed in how courts address unrepresented appeals overall.

Circuits have different cultures and norms,<sup>210</sup> and those distinctions may be important to the vitality of the institutions themselves. Allison Orr Larsen and Neal Devins, two esteemed chroniclers of the federal courts, have recently argued that “circuit personalities” are essential bulwarks against rising judicial partisanship.<sup>211</sup> But there is a difference between cultivation of

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<sup>209</sup> See Gluck, *et al.*, *supra* note 2, at 94 (asserting that publication practices should be assessed through the lens of judicial system values, principally “development of the law, equal treatment, dignity, transparency, efficiency, and perceived legitimacy”).

<sup>210</sup> See also Levy, *Mechanics*, *supra* note 19, at 319 (observing that “the mechanics of the federal courts of appeals . . . vary so greatly”); Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 662 (2007) (recognizing substantial “differentiation in the processing of individual appeals” and “adaptations to caseload growth” have created “substantial variation in the norms governing the appellate process across the circuit”); see also Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1352 (2005) (“Over time, circuits appear to implicitly develop cultures that manifest themselves in various ways.”).

<sup>211</sup> Larsen & Devins, *supra* note 15, at 8 (observing that “unique traditions foster bipartisanship relationships and a joint commitment to the rule of law”).

vibrant and unique circuit cultures that provide interconnection and collegiality and circuit cultures that seemingly tolerate the deterioration of adjudicative and process values. We can encourage the former without tolerating the latter.<sup>212</sup>

These data reveal some uncomfortable disparities—disparities that may be produced by and perpetuated through circuit triage regimes. Take, for example, the data from the Third Circuit, where the average word count in represented appeals without oral argument and publication is nearly 2,000 words (twice the national average) and in similar unrepresented appeals it's closer to 1,170—consistent with the disparities observed nationally (but way better than what *any* litigant receives, on average, from any unpublished decision issued by the Fourth Circuit). There's reason to think the Third Circuit's unique triage regime contributes to that disparity, as its judges set many cases for oral argument (only later to remove them), while it sends unrepresented appeals to staff attorneys (and standing panels) by default.<sup>213</sup> The judges handle cases set for argument, even if they ultimately remove them from the argument calendar, by dispositions drafted in chambers.<sup>214</sup> There's every reason to think that some of what these data show is the difference in reasoning between triage by default for unrepresented litigants and judicial resolution for represented appeals.

Of course, the seeming quality of decisionmaking from the Third Circuit, overall, might well make other circuits—like the Fourth or Eighth or Ninth Circuits—blush. The effort the Third Circuit extends in unrepresented appeals—to say nothing of represented appeals—dwarfs the output in other circuits. The average word count in the Third Circuit for unrepresented appeals is more than six times the average length of unrepresented appeals in the Fourth Circuit, for example. It's hard to imagine what might justify that kind of disparity as a circuit value. And if the Third

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<sup>212</sup> Marin Levy made a similar point when recognizing that uniformity in circuit case management practices is neither obtainable nor desirable. Levy, *Mechanics*, *supra* note 19, at 382-83. “[D]eep value disuniformity,” she asserted “may be indefensible, [and] would mean the resulting priority disuniformity may also be problematic.” The problem, of course, as Levy recognized, is that we have little transparency into the values that may animate some of the differences we observe. *Id.* at 383-84 (“to improve current court practices and facilitate discussions about how practices relate to the courts’ underlying values, greater transparency and information sharing among the circuits are needed”). Levy, Larsen, Devins, and Linquist have all done much to educate us about these differences.

<sup>213</sup> See Levy, *Mechanics*, *supra* note 19, at 357-58 (discussing Third Circuit’s triage process).

<sup>214</sup> *Id.* at 358 (cases that go on oral argument calendar, even if later removed, “are decided in dispositions drafted in chambers”).

Circuit has prioritized reason-giving as one of its circuit values, it's equally difficult to imagine why that should not be a *shared* value across all circuits—as a matter of transparency, equality, and litigant dignity.

The comparison between the Third Circuit and the Fourth Circuit draws to light another point: if seemingly “neutral” (or non-discriminatory) reasons—like poorer briefing or more frivolous filings—produce systemic disparities between represented and unrepresented appellants, what acceptable, “neutral” reasons might account for the disparities observed across circuits? It's highly unlikely that the Fourth Circuit sees demonstrably more meritless unrepresented appeals than its neighboring circuit.<sup>215</sup> Indeed, it's difficult to resist the conclusion that the difference between these two circuits confirms that disparities between represented and unrepresented litigants result, at least in part, from cultural disdain for unrepresented appellants<sup>216</sup>—a disdain that may be particularly great in the Fourth Circuit, which sees a larger share of unrepresented appeals than any other circuit.<sup>217</sup>

The stability over time that the Gluck Study describes in the length of unpublished decisions—compared, that is, to published decisions, which have swelled—underscores these observations about decisional disparities.<sup>218</sup> The average length of unpublished decisions has held steady at around 1,000 words for twenty-six years.<sup>219</sup> That suggests there's a floor for decisional length that assures sufficient reason-giving to communicate key facts and the basis for the court's decision to the parties,<sup>220</sup> and that floor is

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<sup>215</sup> Both see rates of unrepresented appeals above fifty percent, but the Fourth Circuit's rate is the highest in the nation (60.7%). *See* McAlister, *Rebuilding*, *supra* note 3, at 1185 tbl.7 (citing JUDICIAL BUSINESS 2020 tbl.B-9 and preceding years).

<sup>216</sup> *See* Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. Times (Sept. 11, 2017) (quoting former federal appellate judge Richard Posner as saying that “most judges regard these people [meaning unrepresented and indigent litigants] as kind of trash not worth the time of a federal judge”).

<sup>217</sup> *See supra* note 215.

<sup>218</sup> *See* Gluck, *et al.*, *supra* note 2, at 71 & fig.17.

<sup>219</sup> *Id.* at 71 (identifying mean word count for federal appellate decisions by publication status between 1991 and 2017 and observing that “mean word count of unpublished opinions has remained around 1,000 words” during that time).

<sup>220</sup> This was the stated goal from the early days of non-publication. A 1968 memorandum from the Chief Judge of the Fourth Circuit explained that unpublished decisions would be “succinct[]” but “always adequately[] state[] the facts, the contentions, and the reasons for the conclusion,” even when the appeal was “frivolous.” *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091, 1095 (4th Cir. 1972) (attaching memorandum).

somewhere around 1,000 words. That some courts fall well below that floor provides a reasonable basis to conclude that the reasons they offer some litigants are meaningfully thinner than those offered to others, in other circuits.

We should be especially concerned that the triage system's results appear to impose uneven burdens on the system's most vulnerable (and most frequent) litigants. The risk for dignitary harm is great—especially when these litigants may lack other resources for recourse against governmental abuses.<sup>221</sup> Consider the message decisions like those from the Fourth Circuit in Appendix A send. Imagine being on the receiving end of a decision stamped “not precedential” or “not intended for publication” or “summary” that contains a scant 200 words. To be sure, one can say a lot with a few words. Perhaps less is more should be the norm, but it's not.<sup>222</sup> To the contrary, modern courts appear to view the amount of ink spilled as positively correlated with a case's importance.<sup>223</sup> And where litigants have no other touchpoints with a court, it's difficult not to rely on the written decision as the only measure of judicial engagement with the arguments on appeal. If you received this hypothetical 200-word decision, what assurance would you have—having had no other interaction with the court that issued it—that the court *really* read your briefs and considered your arguments?

Even for those unmoved by litigant dignity or equality concerns, the disparities discussed threaten the uniform development of the law. The risk of systemic nonpublication, coupled with demonstrably shorter unpublished decisions in

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<sup>221</sup> See Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL L. STUD. 79, 79 (2004) (“The only universal accountability mechanism is the inmate lawsuit seeking damages or some kind of remedial action for injury inflicted by official misconduct.”).

<sup>222</sup> See Gluck, *et al.*, *supra* note 2, at 71-72 & fig.17 (observing that published decisions have become longer since a rule-change permitted citation to unpublished decisions and hypothesizing that “courts may be issuing more time-saving unpublished opinions because of the greater time they have chosen to spend on drafting published opinions”); see also Meg Penrose, *Enough Said: A Proposal for Shortening Supreme Court Opinions*, 18 SCRIBES J. L. WRITING 49, 52-56 (2019) (cataloguing and critiquing the verbose Roberts Court).

<sup>223</sup> See Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 17, 2010, <https://www.nytimes.com/2010/11/18/us/18rulings.html> (comparing decision in *Brown v. Board of Education*, which had fewer than 4,000 words with the 2007 decision in *Parents Involved v. Seattle*, another school desegregation case, reached 47,000 words; observing that median length of decisions in 1950s was around 2,000 and by 2010 it was 4,751).

some circuits, may undermine even-handed law development.<sup>224</sup> Even though unpublished decisions do not formally bind courts, they are a valuable source of persuasive authority that impact the development of law. Elsewhere, I’ve identified helpful unpublished decisions that are missing from commercial databases<sup>225</sup>—a problem that this study only underscores, given the pervasive problem of missing decisions for unrepresented appellants discussed in Part II. Unpublished decisions can make “important contributions to common law,”<sup>226</sup> and recent work confirms that at least some unpublished decisions are cited frequently.<sup>227</sup> There’s reason, then, to care about what unpublished decisions look like, how reasoned they are, and how they might be used differentially across the circuits.

These concerns are especially great in the context of unrepresented appeals, which predominately involve prisoner claims.<sup>228</sup> Not only are these decisions harder to find, but the reasoning may well be thinner and less useful—to future courts, to constitutional actors, and to the prisoners themselves. The consequence of this under-development for civil rights law is especially great, where, as Alan Trammell has observed, “litigation rests on the premise that law indeed becomes settled . . . [, and that] [c]itizens may rely on the eminently reasonable assumption that officials will abide by settled law, and they may seek compensation when officials fail to do so.”<sup>229</sup> Systematic under-

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<sup>224</sup> See Gluck, *et al.*, *supra* note 2, at 95 (“[I]f courts issue non-precedential opinions more frequently in certain subject areas than others, the law could develop in a lop-sided manner.”).

<sup>225</sup> McAlister, *Missing Decisions*, *supra* note 12, at 1149-51 (discussing *Jones v. Gelb*, a missing decision from First Circuit, and arguing that some missing decisions are significant and worth finding and using).

<sup>226</sup> Denise M. Keele, Robert W. Malmsheimer, Donald W. Floyed & Lianjun Zhang, *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 218 (2009).

<sup>227</sup> To be sure, unpublished decisions are cited far less frequently than published counterparts, especially by courts, but it’s undoubtedly also the case that “some unpublished opinions are sufficiently reasoned to be useful to litigants and courts.” Gluck, *et al.*, *supra* note 2, at 87; *see id.* at 85-86 (observing a ratio of “approximately thirty citations to a published opinion for every citation to an unpublished opinion” but also finding that litigants cited to unpublished decisions in their briefs nearly 70% of the time in at least some circuits with high nonpublication rates).

<sup>228</sup> See McAlister, “*Downright Indifference*,” *supra* note 14, at 556 (demonstrating that 47% of all unrepresented appeals involve prisoner claims and another 18% —most of which are also prisoner claims—involve original proceedings).

<sup>229</sup> Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 119 (2019); *see also* Trammell, *supra* note 9, at 989 (recognizing that “precedents create affirmative legal obligations for state officials, even if those officials were not parties to the precedent-making lawsuits”).

publishing and under-reasoning in certain areas of the law, and in certain courts, threatens to undermine the very development of “settled law” on which our civil rights enforcement regime rests.<sup>230</sup>

It may also produce inefficiencies for the courts themselves. Better legal development, and greater access to those decisions, will help litigants know in advance that some arguments may be losers and other arguments are more likely to be winners. Even ventilating meritless arguments may serve to aid in legal development, as the public and Congress learn what issues are emerging or recurring.<sup>231</sup> In the long run, issuing more reasoned decisions for more claims imposes little harm (at least where caseload volumes are manageable), and offers substantial benefit in law development, transparency, equality, and litigant dignity.

## B. What to Do

Now for the difficult part: what to do. Not all appeals—even those within the second tier—may be equal. That much may be true.<sup>232</sup> It’s equally true that judicial resources are finite. Working within existing constraints, then, Levy is right that some form of case management is both rational and needed.<sup>233</sup> But how do we decide when there’s been *too* much triage? And if we think there has been too much, how much should there be? These are hard, difficult questions, and I don’t purport to have all the answers. But they are essential questions to ask, especially in the face of lessening docket pressures.<sup>234</sup> If a triage system’s primary boon is efficiency and preservation of scarce judicial resources, how should we recalibrate that scheme when resources (judicial time) are seemingly more plentiful?<sup>235</sup>

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<sup>230</sup> For a thorough discussion of the concept of “settled law,” especially in the context of federal civil rights litigation, see G. Alexander Nunn & Alan M. Trammell, *Settled Law*, 107 VA. L. REV. 57 (2021).

<sup>231</sup> See Reinert, *supra* note 102, at 1226-30 (discussing benefits of meritless litigation).

<sup>232</sup> See, e.g., Martin, *supra* note 32, at 183, 191 (arguing that “not all cases are of equal merit”).

<sup>233</sup> See *supra* notes 53-61 (discussing Levy’s appraisal of case-management or triage regimes).

<sup>234</sup> See McAlister, “Downright Indifference,” *supra* note 14, at 552-54 (demonstrating that caseload volume has decreased since 2005 and showing lack of correlation between overall caseload and use of unpublished decisions).

<sup>235</sup> One could also ask this question in the context of the possibility of adding more judges to the federal appellate courts, too. See McAlister, *Rebuilding*, *supra* note 3, at 1216-18 (discussing why adding judges may address systemic deficits in distribution of judicial attention to marginalized litigants).

Reforms must begin with transparency.<sup>236</sup> Congress should task each circuit court to issue periodic reports that explain, in detail, their triage regimes (or any changes thereto) and identify and defend the values that animate it. In that process, courts should incorporate dissenting voices from within the court, survey results on litigant experience (including from unrepresented appellants), and invite and engage with the views of district court judges who follow circuit precedent. These courts should be asked to explain, anew, decisions to send appeals to staff attorneys by default, especially as caseload volumes have fallen and judicial attention has become more plentiful.

To aid in that process, and to provide more systemic information to inform the cost-benefit calculus of triage regimes, Congress should require the courts to report detailed statistics annually about the results of their triage schemes, including the percentage of cases handled primarily by judicial staff versus those handled in chambers. This information should be sufficiently granular to identify average word length, percentage of publication, and percentage of oral argument by representation status and nature of suit. Courts should be required to post these annual reports on their websites and report such data to the Administrative Office, which should evaluate and publicly report on inter-circuit disparities.

These transparency reforms may have the positive effect of prompting the courts to revisit their own procedures in the process. That'd be good, for sure. Courts were the ones to innovate the federal appellate triage system when it seemed most needed; they may be well positioned to innovate it again, as the need for triage recedes and the regime's costs become more apparent. Ultimately, I believe the triage system could be reformed in ways that better account for individual litigant need—that is, the value that litigants might assign to process itself. Matthew Lawrence's work discusses this possibility in the context of triaging overwhelmed administrative review processes for Medicare coverage determinations.<sup>237</sup> He proposes a unique triage regime that might ration procedure based on "the inherent value of participation to particular claimants," which may shift procedural attention to frustrated beneficiaries instead of the providers who frequently appeal.<sup>238</sup> A framework like that—or one that provides greater attention to disfavored appellants based

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<sup>236</sup> Reforms also should include a mandate that courts provide free access to all merits terminations on their websites. *See* McAlister, *Missing*, *supra* note 12, at 1160-62 (making that recommendation).

<sup>237</sup> *See* Lawrence, *supra* note 36, at 83.

<sup>238</sup> *Id.* at 84.

on a random lottery like the one Daniel Epps and William Ortman have proposed for Supreme Court review<sup>239</sup>—may have net benefits for law development, error detection, and procedural justice. The point is that the triage regime could be recalibrated to give judicial attention where it might matter most—not only to the development of the law or the detection of error but also to the litigants themselves.<sup>240</sup>

But the size of the disparities across the circuits suggest that circuit habits may be too entrenched to expect the courts to solve these problems on their own—no matter what innovations they might prefer. One way to address decisional disparities that impose uneven burdens on marginalized litigants would be to mandate a reason-giving decisional floor by statute.<sup>241</sup> Although some might view that solution to be something of a sledgehammer, it may be the kind of systemic jolt needed to unsettle entrenched habits. Congress could require all federal appellate decisions terminating an appeal or original proceeding on the merits to (1) identify the issues on appeal, (2) identify and explain relevant law, and (3) apply that law to key facts.<sup>242</sup> Only when a court makes a specific and detailed finding of frivolousness might it be relieved of the burden to explain its result, but these frivolous appeals should be identified as such and they should be tracked and reported by the Administrative Office.

I have previously discussed the tradeoffs of a reason-giving norm in the context of unpublished decisions and concluded that the pros outweigh the cons.<sup>243</sup> The goal in mandating such a reform would be to bring uniformity to the practice of unpublished decisions, thus ensuring that reason-giving is consistent throughout the federal appellate courts, even when some courts choose to issue more (or fewer) unpublished

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<sup>239</sup> Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018).

<sup>240</sup> To be clear, I believe that law development and error correction should continue to have a significant role to play in designing any triage regime; I'm suggesting that another value—the importance of judicial attention and process to the litigant himself—be an additional consideration in how courts allocate attention.

<sup>241</sup> Such requirement would likely pass constitutional muster—especially given the plenary authority Congress has over the lower federal courts. U.S. Const. art. III, § 1; *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); cf. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 207-215 (2020) (arguing that requiring the Supreme Court to issue only per curiam decisions and eliminating separate opinions is constitutional).

<sup>242</sup> See McAlister, “*Downright Indifference*,” *supra* note 14, at 591 (arguing for a similar reason-giving norm in unpublished decisions).

<sup>243</sup> *Id.* at 583-93 (discussing and defending a reason-giving norm for federal appellate courts).

decisions. The development of the law—even as a source of persuasive authority, which all unpublished decisions are—should not suffer as a result of court preferences. Such a mandate may create more “junk” precedent—that is, more of what Brian Soucek has described as “copy-paste” precedent, where courts repeatedly regurgitate inaccurate descriptions of the law in unpublished decisions.<sup>244</sup> Perhaps perversely, generating *more* such precedent might make it easier to detect the development of errant law of the sort that copy-paste precedent produces. But another requirement might also stymie this risk: requiring the appellate courts to cite to, rely upon, and quote only published authority in their decisions;<sup>245</sup> and, where no published decision is on point, that may be a sign that precedential treatment is necessary.

There’s another benefit of such a reason-giving mandate. It might help develop a more robust legal basis to distinguish between meritless-ness and frivolity. Doing so might provide further guidance to litigants on the difference between the two, and it may help reduce frivolous appeals by putting all on notice that a particular argument is a certain loser. But distinguishing between meritless and frivolous appeals would also help identify and root out systemic biases. If, for example, one circuit claims it has a substantially greater volume of frivolous appeals than another, that might be cause for suspicion—it may be a sign of bias against certain appellants. Courts should be forced to make clear their view: if they’re giving short shrift to some appeals because they are frivolous, they should be tasked with explaining on the record why an appeal is not worth their time. Where, however, an appeal is not demonstrably frivolous, the least we should expect is reasoned decisionmaking—that is, an explanation of what the appeal is about and why the party appealing has lost. That kind of basic reason-giving requirement will benefit all and help eliminate bottom-rung appeals.

#### CONCLUSION

The federal appellate regime produces measurable, observable inequities in how it distributes procedure and judicial attention. Those disparities affect vulnerable and marginalized litigants

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<sup>244</sup> See Soucek, *supra* note 53, at 165-171 (discussing the hazards of copying inaccurate descriptions of the law from one nonprecedential decision to another); see also Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. Rev. 1619, 1622 (2020) (discussing similar phenomenon in district court opinions).

<sup>245</sup> This is similar to Soucek’s prescription. See Soucek, *supra* note 53, at 170 (“Courts should refrain from releasing unpublished opinion when the governing legal principle either is not, or cannot, be quoted directly from a precedential opinion.”).

more than other more resourced appellants, even when both bring “easy” appeals. These disparities, moreover, are uneven across the circuits. In some circuits reason-giving appears, on average, to be very poor; in others, it’s far more robust. Little explains these differences, and their persistence may jeopardize law development in civil rights, habeas, and immigration appeals—areas where unpublished decisions are used frequently. The presence of these inter-circuit disparities, alone, suggests that bias infects the federal appellate triage regime—at least in some circuits where disfavor towards this class of claimants may be greater.

In an ideal world, courts would revise triage regimes on their own; they might develop and implement reason-giving norms to provide quality, reasoned decisions to all litigants. Some courts appear to have done just that, if these data accurately reflect persistent trends. But others lag well behind their peers. Although reason-giving atrophy was to be expected as courts shifted to an unpublication norm, this study demonstrates that some courts have gone too far in eroding core decisional values. It’s time to eliminate bottom-rung appeals, and if the courts won’t do it on their own, then Congress should.

APPENDIX A

The following was coded as not identifying the cause of action; not identifying the issues on appeal; not containing independent reasoning; and resting entirely on the district court's decision:

Althea Marie Hughes appeals the district court's order dismissing her civil action for failure to state a claim for relief, pursuant to 28 U.S.C. § 1915 (e)(2)(B)(ii) (2012). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Hughes v. Bank of Am.*, No. 3:16-cv-00672-HEH, 2017 U.S. Dist. LEXIS 85236 (E.D. Va. Feb. 21, 2017). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.<sup>1</sup>

The following was coded as identifying the cause of action; not identifying the issues on appeal; not containing independent reasoning; and resting entirely on the district court's decision:

George Riley Altman, a federal prisoner, appeals the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2241 (2012) petition. We have reviewed the record and find no reversible error. Accordingly, although we grant leave to proceed in forma pauperis, we affirm for the reasons stated by the district court. *Altman v. Hollenbaek*, No. 5:15-hc-02256-D (E.D.N.C. Jan. 30, 2017). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.<sup>2</sup>

The following was coded as not identifying the criminal offense; identifying the issues on appeal; containing independent reasoning (here, lack of jurisdiction because appellant challenges

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<sup>1</sup> *Hughes v. Bank of Am.*, 691 F. App'x 92 (4th Cir. 2017).

<sup>2</sup> *Altman v. Hollenbaek*, 691 F. App'x 98 (4th Cir. 2017).

only a discretionary sentencing decision); and not resting entirely on the district court's decision:

Chandra Padgett seeks to appeal the district court's order granting the Government's motion in her criminal case. Our review of the district court's order is governed by 18 U.S.C. § 3742 (a) (2012). *United States v. Davis*, 679 F.3d 190, 193 (4th Cir. 2012). While the statute gives us "jurisdiction to hear challenges to the lawfulness of the method used by the district court in making its sentencing decision," we lack "jurisdiction to review any part of a discretionary sentencing decision." *Id.* at 194. Because the sole issue Padgett raises on appeal challenges the district court's discretionary sentencing decision, we dismiss this appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.<sup>3</sup>

The following was coded as identifying the cause of action; not identifying the issues on appeal; not offering independent reasoning; and not resting exclusively on the district court's decision:

Robert Lee Pernell, Jr., seeks to appeal the district court's order dismissing as untimely his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253 (c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); see *Miller El v. Cockrell*, 537 U.S. 322, 336-38, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When the district court denies relief on

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<sup>3</sup> *United States v. Padgett*, 691 F. App'x 93 (4th Cir. 2017).

procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Pernell has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.<sup>4</sup>

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<sup>4</sup> *United States v. Pernell*, 691 F. App'x 709 (4<sup>th</sup> Cir. 2017).

## APPENDIX B

The following Table compares the dataset's publication and oral argument rates to the available one-year and five-year mean statistics for the same decisional features. It demonstrates that the sample comports with the overall trends for the same period.

**Table 1.B: Overall Profile of Dataset Compared to Publication and Oral Argument Statistics**

<u>Fed. Cir. Ct.</u>	<u>Matched Pairs</u>	<u>Matched Merits Terms.</u>	<u>Merits Decided after OA</u>	<u>% of Merits Terms. Decided after OA</u>	<u>5-yr Mean Rate of OA (SD)<sup>1</sup></u>	<u>2017 Rate of OA<sup>2</sup></u>	<u>Unpub. Merits Terms.</u>	<u>% of Merits Terms. Unpub.</u>	<u>5-yr Mean Rate of Unpub. Dec. (SD)<sup>3</sup></u>	<u>2017 Rate of Unpub. Dec.</u>
D.C.	328	253	134	53.0%	47.1% (2.6)	51.6%	137	54.2%	60.0% (4.3)	52.8%
First	242	207	117	56.5%	25.5% (2.6)	27.2%	48	23.2%	66.7% (3.6)	63.6%
Second	838	786	404	51.4%	33.4% (1.6)	32.4%	707	89.9%	90.0% (1.3)	91.7%
Third	765	679	107	15.8%	11.6% (1.7)	13.9%	603	88.8%	90.7% (1.5)	89.1%
Fourth	1688	1520	225	14.8%	9.2% (2.2)	10.5%	1373	90.3%	93.7% (1.6)	93.4%
Fifth	1706	1613	418	25.9%	19.4% (2.9)	16.4%	1385	85.9%	91.3% (3.2)	91.0%
Sixth	927	821	231	28.1%	13.8% (1.3)	12.0%	694	84.5%	90.0% (2.2)	92.6%
Seventh	605	528	291	55.1%	37.2% (4.2)	37.5%	249	47.2%	65.9% (2.3)	65.2%
Eighth	733	686	187	27.3%	16.7% (1.1)	15.5%	405	59.0%	77.0% (2.1)	78.2%
Ninth	2563	2420	755	31.2%	21.4% (1.8)	20.6%	2195	90.7%	93.0% (0.4)	93.3%
Tenth	573	513	141	27.5%	26.2% (3.1)	27.9%	407	79.3%	81.3% (2.5)	78.5%
Eleventh	1136	1039	194	18.7%	10.2% (1.5)	10.4%	937	90.2%	93.3% (1.2)	93.9%
TOTAL	12104	11065	3204	29.0%	22.6% (11.6)	18.8%	9140	82.6%	82.6% (12.2)	88.2%

<sup>1</sup> These means were generated using Table B-10 in *Judicial Business* for each year between 2015 and 2020. See also McAlister, *Rebuilding*, *supra* note 3, at 1177 tbl.4 (using same). “SD” refers to the standard deviation for each mean.

<sup>2</sup> JUDICIAL BUSINESS 2017 tbl.B-10.

<sup>3</sup> These means were generated using Table B-12 in *Judicial Business* for each year between 2015 and 2020. See also McAlister, *Rebuilding*, *supra* note 3, at 1176 tbl.3 (using same). “SD” refers to the standard deviation for each mean.