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Invisible Adjudication in the U.S. Courts of Appeals

MICHAEL KAGAN, REBECCA GILL & FATMA MAROUF*

Nonprecedent decisions are the norm in federal appellate courts and are seen by judges as a practical necessity given the size of their dockets. Yet this system has always been plagued by doubts. If only some decisions are designated to be precedents, questions arise about whether courts might be acting arbitrarily in other cases. Such doubts have been overcome in part because nominally unpublished decisions are available through standard legal research databases. This creates the appearance of transparency, mitigating concerns that courts may be acting arbitrarily. But what if this appearance is an illusion? This Article reports empirical data drawn from a study of immigration appeals showing that many—and in a few circuits, most—decisions by the federal courts of appeals are in fact unavailable and essentially invisible to the public. This Article reviews the reasons why nonpublication is a practical, constitutional, and philosophical challenge for judges. It argues that the existence of widespread invisible adjudication calls for a rethinking of the way courts operate, the way practitioners advise clients, and the way scholars study the legal system.

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INTRODUCTION

Whenever a lawyer searches for federal appellate cases, Westlaw and Lexis offer two kinds of results: reported decisions and unreported decisions. These labels are strange. If a case was “unreported” or “unpublished,” it would not appear on a search engine and might emerge into the public eye only through a leak. We know that unreported and unpublished are antiquated terms for nonprecedent. But this implicit understanding points to a deeper question. Although the appellate opinion is the centerpiece of American law and the primary text for American legal education, it “is now the exception rather than the rule.”¹ Nearly 90% of decisions in federal courts of appeals are now designated “unpublished.” The rates vary considerably by circuit, however, with the most extreme circuit publishing less than 4%.² Does the existence of unpublished or nonprecedent decision making threaten basic assumptions about how our courts operate?

In fact, from roughly 2000 to 2006, the propriety of nonprecedent decisions generated a fierce debate. The Court of Appeals for the Eighth Circuit held, briefly, that its own practice of issuing nonprecedent decisions was unconstitutional. The objection was simple: When a court says that a decision is not a precedent, the court seems to be saying that the court might be acting outside the law, or at least in some manner that it would not want to be bound to repeat. Many scholars intervened in the debate, often expanding on the constitutional objections. Two other circuits took on the issue, handing down strong opinions defending the practice of nonprecedent decisions, thereby producing a circuit

1. Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 762 (2004).

2. See U.S. COURT ADMIN., TABLE B-12—U.S. COURTS OF APPEALS JUDICIAL BUSINESS (2016), http://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2016.pdf [<https://perma.cc/XY82-J7HU>] (noting the Fourth Circuit reported an unpublished rate of 96.3% between September 30, 2015 and 2016). The Fourth Circuit has apparently had the lowest publication rate for some time. See Anika C. Stucky, *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 OKLA. L. REV. 403, 404 (2006) (noting the Fourth Circuit’s publication rate is the lowest of federal courts of appeals at 8.2%, and the First Circuit’s is the highest at 42.8%).

split. The Court of Appeals for the Ninth Circuit held that lawyers could be sanctioned for mentioning unpublished decisions in their briefs. A Supreme Court showdown seemed likely. Congressional hearings were held.

The controversy was diffused, if not resolved, by revisions to the Federal Rules of Appellate Procedure in 2006. Since the new rules went into effect in 2007, lawyers (in federal court, at least) have been allowed to talk about unreported decisions. But this change did not clarify what, if any, weight should be given to these decisions. It did, however, seem to instill a kind of transparency that enabled courts to continue a practice they have found indispensable as they cope with burgeoning dockets. Some judges have pointed out that unpublished opinions are available as a safeguard against arbitrary behavior by courts. Although it remains unclear why some appellate decisions are precedents while others are not (or at least are of less precedential value), that we can see both kinds when we do basic research offers some comfort that courts are less likely to act arbitrarily because they are acting in the open.

But what if this transparency is a myth? That *some* unpublished decisions appear on search results creates an illusion that *all* such decisions are available. Our research indicates that there are, in fact, many high stakes cases decided on the merits that are invisible through standard legal research in at least one high stakes area of federal appellate litigation: deportation proceedings.

For several years, we have been conducting empirical research on immigration adjudication in the federal courts of appeals.³ These appeals are typically the last judicial recourse for immigrants subject to orders of removal by the Board of Immigration Appeals, part of the Executive Office for Immigration Review within the Department of Justice. Because we were initially interested in preliminary procedural questions that arise in these cases and in how different circuit courts manage their caseloads, we did not use Westlaw or Lexis. Instead, we mined data from PACER, the federal courts' electronic docket management system. PACER is a system set up for practitioners to file documents with the court, but not for research purposes. It includes the full universe of immigration petitions filed with the courts of appeals, many of which are rapidly dismissed on purely procedural grounds, for instance if the petitioner failed to pay a filing fee or failed to submit a brief. We never expected these cases to be in Westlaw or Lexis.

However, we were surprised to find that many cases that PACER showed had been decided on substantive grounds did not appear when we looked for them in Westlaw or Lexis. As we report in this Article, Westlaw includes almost none of them. Lexis is better, but it still is missing large numbers of these cases, including nearly half of the decisions in the Ninth Circuit, which is the largest

3. See generally Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014); Michael Kagan, Fatma Marouf & Rebecca Gill, *Buying Time? False Assumptions About Abusive Appeals*, 63 CATH. U. L. REV. 679 (2014).

circuit and has the most immigration cases. However, at least for the immigration cases in our sample, PACER does not allow us to read the decision in many instances because the document is locked in the database, accessible only to the parties to that individual matter. What this means is that we can see that the case exists and that it was decided, but we often cannot see the content of the decision because many such documents are locked. Moreover, even for unlocked decisions, a litigant searching for a similar fact pattern or legal question would not be able to find them, because PACER does not have a text-based search feature.

Our data indicate that there is a wide body of invisible immigration decision making occurring in the circuit courts, producing decisions that are truly unpublished, not merely designated as nonprecedents. Although caution is required before generalizing across all areas of federal litigation, the widespread phenomenon of unsearchable, truly unavailable decisions in immigration cases raises significant jurisprudential concerns even if it is somewhat unique. Immigration appeals now take up an extremely large portion of federal courts of appeals' dockets.⁴ They have inherently high stakes, and they concern one of the most controversial subjects in our legal and political system.

In this Article, we report our findings and identify questions posed by widespread invisible adjudication in the federal appellate courts. We trace the practical origins and evolution of unpublished or nonprecedent decision making. We explore the early philosophical debates about the nature of the common law that laid the groundwork both for our current system of selective precedent, and the objections to it. We review the circuit split that emerged about whether this system is constitutional.

Our primary purpose is to highlight a problem and identify questions that require consideration by the legal community. The invisibility of a great deal of federal appellate litigation on a subject of considerable public interest should reignite the debate about unpublished decisions. Rather than remain in the state of ambiguous détente that has prevailed since 2006, the courts should provide clear answers about whether it is proper to consider only some appellate decisions precedent. Even if selective precedent is acceptable, is it proper to make only some decisions available to the public? Finally, if selective transparency is acceptable, who should decide which decisions are published and which decisions remain invisible?

The existence of a wide body of invisible appellate adjudication should lead legal scholars to scrutinize their methodologies. More research should be done to discover the extent of invisible decision making in federal and state courts. Legal scholars need to be clear about the limitations they are imposing on their research if they only look at cases available through standard research tools.⁵ If

4. See Marouf, Kagan & Gill, *supra* note 3, at 339.

5. See Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROC. 325, 330 (2001) (comparing researching law by only

scholars are interested in the impact of law on society at large, or in the general behavior of courts, it may make little sense to look only at the selective sample of decisions that are available on Westlaw or Lexis, much less only at those that are designated as precedents. Empirical legal researchers have long understood this, but even in this field, prominent studies have often relied on Westlaw and Lexis to collect their data.⁶ This methodology may require reassessment.

Practitioners need to be aware of the existence of invisible adjudication to give their clients accurate advice. Traditional legal research and analysis may be sufficient to inform a client about how her case might be decided according to legal doctrine as established in precedent decisions. But such traditional techniques leave open the possibility that actual judicial behavior might be different in important ways in most cases, which are not designated as precedents. Without being able to see a court's decisions in similar cases, a lawyer will be less able to clearly answer a client who asks: "Am I likely to win?" The existence of invisible adjudication should inject more doubt into lawyers' confidence that they really know how courts are going to behave in future cases. This doubt is not healthy for our legal system, which depends on transparency and the expectation of consistency.

In Part I, we establish some baseline terminology about unpublished decisions. In Part II, we give an overview of practical, real world challenges that led to the increasing importance of unpublished decision making. We report the findings of our empirical research in Part III. In Part IV, we address the constitutional controversy that the practice of nonprecedent decisions has generated. Part V roots this controversy in the history of common law jurisprudential philosophy.

I. TERMINOLOGY: UNPUBLISHED DECISIONS AND INVISIBLE ADJUDICATION

In both judicial and scholarly discussions, the terminology of publication and precedent are often used synonymously. This can obscure courts' policies and practices and can confuse efforts to address concerns that have been raised about them. Although courts sometimes use the term "published" (or "unpublished"), this nomenclature is of limited use to describe the public availability of judicial decisions, and it obscures important questions about what should be considered a precedent in an American court.

Despite the meaning conveyed by the labels "unpublished" and "unreported,"⁷ some circuits began releasing texts of unpublished decisions to West-

looking at published decisions to a "'drunkard's search'—the drunk looks for money not where it is dropped, but under the street light").

6. See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 405 (2007).

7. "Unpublished" is often used colloquially by lawyers. Westlaw, by contrast, gives a search option for "reported" or "unreported" cases.

law and Lexis in the 1980s.⁸ In 2001, West Publishing began publishing its Federal Appendix, so that there is now a semi-official reporter for nonprecedent but nevertheless visible decisions.⁹ By 2005, texts containing unpublished decisions from all federal circuits were available on Westlaw and Lexis.¹⁰ This development blurred the line between published and unpublished decisions.¹¹ But it may also have created a false impression that *all* federal appellate decisions are actually publicly available and searchable in standard legal research databases.¹² That has never been the case.

A decade ago, David C. Vladeck and Mitu Gulati observed that there are three types of decisions in the courts of appeals: merits decisions that are published, merits decisions that are unpublished, and nonmerits decisions in which cases are resolved on purely procedural grounds.¹³ The last category—the nonmerits decisions—has long been a “black box” about which little is revealed, in that the public record of the decision is often limited to a one-line docket entry.¹⁴

Overall, the federal courts have a system of selective publication and selective precedent, but precedent and publication are independent of one another. Only some decisions are published, and only some published decisions are precedents. We are adopting the adjective “visible” to describe decisions that are available and searchable on Westlaw and Lexis. In a literal sense, these decisions are being published electronically and often in bound form. But the legacy of calling nonprecedent decisions unpublished has obscured this literal meaning, and thus calls for a new terminology. In this Article, we adopt Vladeck and Gulati’s taxonomy, with additions. There are four relevant categories of decision, not just three. As they noted, there are published merits decisions, and there are unpublished merits decisions. However, nominally unpublished merits cases come in two varieties: those that are available on standard research databases and those that are not. These merits decisions are much like the procedural decisions that have long been in a black box.

8. See Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 205 (2006).

9. See *id.* at 207.

10. *Id.* at 206–07.

11. *Id.* at 207.

12. See, e.g., *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 30 (2002) (statement of J. Alex Kozinski), http://commdocs.house.gov/committees/judiciary/hju80454.000/hju80454_0.htm [<https://perma.cc/CQJ4-Y6J2>] [hereinafter Kozinski Testimony] (“Today, of course, all dispositive rulings, whether designated for inclusion in an official reporter or not, are widely available online through Westlaw and Lexis, as well as in hard copy in West’s Federal Appendix.”); David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685, 688 (2009) (“Though still labeled ‘unpublished opinions,’ these opinions are published, not only online but also in printed volumes . . .”).

13. See David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668–69 (2005).

14. *Id.*

The taxonomy of appellate decisions that we propose is as follows:

1. Precedent decisions
2. Nonprecedent, *visible* decisions
3. Nonprecedent, *invisible* decisions
4. Nonmerits decisions (invisible)

To be clear, in some sense, a document on PACER may be available to the public and thus arguably could be considered visible. However, PACER is a different tool than Lexis or Westlaw.¹⁵ PACER contains a wealth of data, but much of it is sealed. Even the case information that is theoretically available is difficult to access. We previously studied the impact of nonmerits decisions on immigration appeals, focusing on how long it takes different courts to resolve cases that are decided on the merits versus those that are not.¹⁶ By analyzing PACER, it is possible to measure the duration of these cases, because the dates of filing are listed.¹⁷ But it is not possible to check whether a decision to dismiss a petition is correct by reading a published decision and critiquing its reasoning on the merits.

Lexis and Westlaw are designed to be research tools for both practitioners and scholars. By contrast, PACER's primary purpose is as a filing and docket management system for the courts. It is designed to let parties to litigation file motions and briefs in their own cases, not to let people research other people's cases. As a result, PACER's user interface is cumbersome for research purposes.¹⁸ Most importantly, there is no document-level search function whereby one can look for certain legal or factual issues in docketed cases.¹⁹ In our research, with some finesse, we were able to use PACER to identify all the immigration appeals in each circuit court. But it is not possible with PACER to identify, say, asylum cases involving LGBTQ applicants, or cancellation of removal cases that involve caring for an older relative. It is thus not an effective tool to find factually or legally similar cases that may be pertinent as a potential precedent in a pending case. In this way, judicial decisions that cannot be searched for by relevant factual or legal criteria might as well be invisible for practicing lawyers, as well as for judges trying to use past cases to guide their analysis of a new one. In short, PACER allows us to prove that many otherwise invisible decisions by courts exist. But PACER is also, inadvertently, an ideal means of hiding these decisions in plain sight.

15. All three tools have the significant disadvantage of a pay wall, which creates a monetary barrier to public access to legal information.

16. See generally Kagan, Marouf & Gill, *supra* note 3.

17. *Id.* at 695.

18. See Brian Carver, *What Is the "PACER Problem"?*, FREE LAW PROJECT (Mar. 20, 2015), <https://free.law/2015/03/20/what-is-the-pacer-problem> [<https://perma.cc/N46Q-W3KJ>].

19. *Id.*

Lexis and Westlaw are increasingly duplicating data available on PACER. This means that some of the *docket* reports that one can find for PACER can now also be seen on Lexis and Westlaw. This seems to be a service of convenience for subscribers to these commercial research tools; if they know a case number or case name, they can look at the docket for the case. But they cannot see more information than they could on PACER. The full decisions are not available to view, nor are they searchable. Thus, this improvement in the commercial research databases does not actually address the visibility problem that we highlight here.

Our focus on invisible decisions by appellate courts corresponds to an important recent study of district court decisions by Elizabeth Y. McCuskey.²⁰ She explains that district courts issue lengthy, detailed decisions that “often contain reasoning in greater length, depth, and intricacy than their visible counterparts.”²¹ However, she writes, these “[s]ubmerged precedent[s]” are “reserved solely for those who know [they] exist[.]”²² McCuskey uses the term precedent more loosely than we do, so as to include any “written decision supported by reasoned elaboration.”²³ We concur that such decisions *could* functionally serve as precedents, if judges want them to. However, as we explain in Part IV, judges are divided about whether it is appropriate to treat all reasoned decisions as precedents. This ambiguity is an even greater concern with appellate courts than with district courts, because refining legal rules and developing case law to guide future disputes is normally assumed to be a central function of the appellate judiciary.

Our four-part taxonomy could be subject to further caveats and exceptions. One of the most controversial exceptions concerns precedent decisions that are deliberately hidden from the public. For the most part, precedent decisions are by necessity visible and published. It is hard for a decision to be used as a precedent by practitioners if it is not available to them, explaining why the term “published” came to mean precedential. But we have learned recently that there are secret precedents in the realm of national security cases, produced by a federal court under the Foreign Intelligence Surveillance Act. We discuss this phenomenon in brief in Part II, but the serious implications and questions that it raises is not our focus. Rather, the phenomenon of secret precedents highlights precedent and publication as two independent concepts.

20. See generally Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515 (2016).

21. *Id.* at 516.

22. *Id.*

23. *Id.* at 519.

II. PRACTICAL DIMENSIONS

A. EVOLUTION OF AN AMBIGUOUS SYSTEM

In the 2015–2016 fiscal year, 88.7% of decisions by the federal courts of appeals were designated “unpublished.”²⁴ The rates vary considerably by circuit, with the most extreme circuit publishing less than 4%.²⁵ The D.C. Circuit is more prone to publishing its decisions than any other, yet 61.8% of its decisions are unpublished.²⁶ Only four federal circuits currently publish more than 20% of their decisions.²⁷

In this section we summarize how this came to be and explain the rules governing how courts designate only a small number of decisions as precedents. The main explanation is simple practicality. The courts are busy, and it would be difficult and expensive to produce fully developed written decisions in every case. As Judge Alex Kozinski, formerly of the Ninth Circuit, told Congress, “While an unpublished disposition can often be prepared in only a few hours, a[] [published] opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising.”²⁸ It should be noted, however, that this explanation for nonpublication concedes an uncomfortable reality in our court system. Namely, judges will not devote the same effort to every case and will sometimes produce less thorough work.

In fact, publication of legal decisions has a long but inconsistent history.²⁹ In old English courts, some cases that were considered especially important were collected in *Year Books*, but lawyers were also permitted to cite unreported cases by vouching for the existence of the decision.³⁰ In the late nineteenth and early twentieth centuries, some appellate courts may have been able to publish

24. See U.S. COURT ADMIN., *supra* note 2. The rate of unpublished decisions by the federal courts of appeals has been high for some time. See Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 622 (2009) (more than three-quarters in 2009); Williams, *supra* note 1, at 763 (more than 80% in 2004); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 69, 72 (2001) (more than 80% in 2001); see also Beth Zeitlin Shaw, *Please Ignore This Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1024–30 (2004) (detailing statistics on the growth of unpublished Federal Circuit decisions).

25. See U.S. COURT ADMIN., *supra* note 2 (noting the Fourth Circuit reported an unpublished rate of 96.3%). The Fourth Circuit has apparently had the lowest publication rate for some time. See Stucky, *supra* note 2, at 404 (noting the Fourth Circuit’s publication rate is the lowest of federal courts of appeals at 8.2%, and the First Circuit’s is the highest at 42.8%).

26. See U.S. COURT ADMIN., *supra* note 2.

27. *Id.*

28. Kozinski Testimony, *supra* note 12, at 32. A former Chief Judge of the Federal Circuit also remarked, “First, you can’t publish everything. Everybody seems now finally to realize that. You could if you wanted to wait six years for your decision, six years.” See Shaw, *supra* note 24, at 1013 (quoting *Seventh Ann. Jud. Conf. of the U.S. Ct. of Appeals for the Fed. Cir.*, 128 F.R.D. 409, 420 (1989) (statement of former C.J. Howard T. Markey)).

29. See generally Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695, 700–08 (2001).

30. See *id.* at 701–02.

all of their merits decisions as bound reporters developed; these reporters now form the backbone of law libraries.³¹ But it is not clear that there was ever a period when all cases in all appellate courts were published. If there was, it did not survive past the middle of the twentieth century.

A steady increase in the courts' workload was the engine that fueled the growth of the modern phenomenon of invisible adjudication, because it led federal appellate courts to increasingly rely on selective publication and selective precedent to manage their dockets.³² In 1964, the Judicial Conference of the United States recommended that only opinions that had "general precedential value" should be published.³³ In the 1970s, the Judicial Conference of the United States called for the circuit courts of appeals to develop "opinion publication plans."³⁴

As Norman R. Williams wrote, "[t]he published written opinion—the hallmark of American appellate justice—is now the exception rather than the rule."³⁵ Williams aptly observed that the existence of unpublished decisions creates a system of superior and inferior decisions, in addition to the well-known hierarchy of courts.³⁶ Obvious puzzles result from this, such as discerning what makes for a more persuasive precedent: an unpublished decision by an appellate court or a published decision by a district court? What about the relative weight of an unpublished decision within the same circuit versus a published decision by another circuit? The answers to these questions are not clear. However, court rules governing unpublished cases deal with three related but nevertheless separate questions.³⁷ First, should courts be allowed in the first place to select only some of their decisions for publication (or to be considered precedents)?³⁸ Second, should litigants be allowed to cite nonprecedent (unpublished) cases in their arguments, when such decisions are, in fact, available?³⁹ Third, can an unpublished case, if it is known to the parties and to the court, be considered a precedent of any kind?⁴⁰ To these three questions, we would add a fourth: Is it proper for courts to issue decisions that are not made available to the public at all, absent a compelling reason why the cases need to remain confidential?

For a time, the lower courts' approaches to these questions generated a brewing crisis. The trend in the early 2000s was for courts to ban parties from

31. See Cleveland, *supra* note 12, at 696.

32. See 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, 760–63 (1995).

33. *Id.* at 761.

34. Williams, *supra* note 1, at 770.

35. *Id.* at 762.

36. See *id.* at 774.

37. See *id.* at 768–69.

38. See *id.* at 768.

39. See *id.*

40. See *id.* at 768–69.

citing nominally unpublished cases, even though many such decisions were increasingly available on standard legal research databases.⁴¹ If parties are not allowed to cite a decision, courts need not wrestle with the question of whether that decision has any relevance in a new case. But this, of course, requires litigants and judges to treat factually similar decisions by the same court as a kind of elephant in the room—something that is probably quite pertinent, but that cannot be discussed. Competent lawyers, judges, and judicial clerks working on a pending case would know that an otherwise analogous case had already been decided, but they would not be allowed to talk about it. They would also have some difficulty discerning whether the prior decision is predictive of a future one.

By 2004, the nonpublication system was the subject of serious controversy, resulting in congressional hearings and at least a brief circuit split. The Eighth Circuit decided, initially, that refusing to consider an unpublished decision as a precedent would violate the Vesting Clause in Article III of the Constitution, under which “[t]he judicial Power of the United States[] shall be vested” in the Supreme Court and the inferior federal courts established by Congress.⁴² An Eighth Circuit panel reasoned that the power to decide the law inherently carries precedential authority.⁴³ In other words, the court could not constitutionally issue nonprecedent decisions. However, one year later, the Court of Appeals for the Ninth Circuit found that precedent was not meant to be a rigid concept in the Constitution.⁴⁴ The Eighth Circuit later vacated its decision, as we will discuss in more detail in Part IV.⁴⁵

This controversy was diffused by the issuance of a new rule.⁴⁶ In 2006, the Supreme Court amended the Federal Rules of Appellate Procedure.⁴⁷ Under the new Rule 32.1, which applies to cases beginning in 2007, “A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been[] designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedent,’ ‘not precedent,’ or the like.”⁴⁸

The new rule does not clarify if unpublished opinions have precedential value or if it is even proper for courts to designate certain opinions as nonprecedents.⁴⁹ It is now permissible to tell courts about unpublished cases, but it is not clear if courts must follow them as precedents or give their analysis or holding any weight. Ambiguities like this introduce a significant degree of

41. *See id.* at 764–65.

42. *Id.* at 781; *see also* U.S. CONST. art. III.

43. Williams, *supra* note 1, at 781.

44. *Id.* at 785–86.

45. *See Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc).

46. *See* Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 23 (2005).

47. Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 *B.C. L. REV.* 705, 725 (2006).

48. *See id.* at 725 & n.98.

49. *See id.* at 706.

unpredictability. Litigants have little guidance about how a judge will regard a previous decision that is visible but that was not designated as a precedent by the court. Attorneys are left to guess or rely on anecdotal experience with individual judges to decide how much to stress nonprecedent decisions in their briefs. And attorneys (as well as scholars) are forced to rely on incomplete data about past decisions to predict how the courts might behave in future cases.

Another problem with the current system is that decisions are inconsistently available through standard research tools.⁵⁰ This means that litigants may have unequal access to potent legal authority.⁵¹ Consider that in an administrative law setting, the Department of Justice could theoretically have access to every case through its internal systems because it serves as the government's law firm in all of them. Private parties would not have this access and thus could be disadvantaged if unpublished decisions start to have more influence in litigation. Nevertheless, this new system has survived despite its unresolved ambiguities.

B. SELECTING PRECEDENTS

Although the categorization is ambiguous, a hierarchy remains between published and unpublished cases, which means it is important to know how courts decide which cases to designate as “published” or as precedents. For example, the rule in the Ninth Circuit—the largest federal appellate circuit—establishes three categories of decisions: an Opinion (which is a “written, reasoned disposition” intended for publication), a Memorandum (which is similar, but “not intended for publication”), and an Order (which is “any other disposition”).⁵²

The circuit's rules state that a decision should be published as an Opinion if it meets one of seven alternative criteria:

1. Establishes, alters, modifies or clarifies a rule of federal law, or
2. Calls attention to a rule of law that appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or
5. Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

50. See generally Solomon, *supra* note 8, at 203–16.

51. See *id.* at 203, 207.

52. 9TH CIR. R. 36.1.

6. Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
7. Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.⁵³

Other circuits use somewhat different formulations, but with a similar thrust. For example, the D.C. Circuit's rule does not include the Ninth Circuit's "establishes, alters, modifies or clarifies a rule," but instead includes "a case of first impression."⁵⁴ Other circuits have decided to not try to define exactly when a decision should be published or designated as a precedent. For example, the Eleventh Circuit's policy provides, "Opinions that the panel believes to have no precedential value are not published."⁵⁵ The First Circuit has a similar rule, but also prescribes that for any decision "with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication."⁵⁶ This procedural rule seems based on the assumption that any case with a split decision is likely to involve a more difficult issue.

In the circuits with more detailed rules, some of the criteria are straightforward and can be applied mechanically, but the most important raise weighty philosophical problems, as we will explore more in Part V. Chief among these is determining when a case raises a novel issue of law and distinguishing cases that merely apply an established rule versus those that may in fact modify the rule. Even in circuits that do not attempt to prescribe when a decision should be published, these philosophical questions would seem equally relevant.

Beyond the criteria for publication that courts include in their rules, some empirical studies suggest that other factors have an impact. The personality of judges appears to make a difference, so that certain judges are more likely to publish than others.⁵⁷ Empirical research on why this may be is limited, though suggestive. For instance, a study of labor law cases found that the gender of judges did not seem to correlate with publication rates, meaning men and women seem equally inclined to seek to have their opinions published.⁵⁸ But that study found that judicial panels including "more graduates of elite law schools were significantly more likely to publish their opinions, after controlling for other factors."⁵⁹ Some studies have questioned whether nonpublication

53. 9TH CIR. R. 36.2.

54. D.C. CIR. R. 36(c)(2)(A).

55. 11TH CIR. R. 36, I.O.P. 6.

56. 1ST CIR. R. 36(b)(2)(C).

57. See Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 312–13 (1990); see also Merritt & Brudney, *supra* note 24, at 95–97.

58. Merritt & Brudney, *supra* note 24, at 97.

59. *Id.* at 95–97.

is more likely if the court rules for one type of party rather than another, but the evidence is mixed.⁶⁰ In immigration cases, at least those involving an asylum application, judges appear more likely to publish their decisions when they rule in favor of granting asylum.⁶¹ But in labor law cases involving the National Labor Relations Board, publication did not correlate with the court being more likely to rule for the employer or for the union.⁶²

III. OUR FINDINGS: INVISIBLE ADJUDICATION IN IMMIGRATION CASES

There are eleven circuit courts of appeals that regularly decide immigration cases.⁶³ In a previous study, we developed a database of 1646 immigration cases filed between April 2009 and 2012 from each of these circuits.⁶⁴ These cases were drawn from the PACER docketing system and thus are unfiltered by the court or by research database.⁶⁵ The sample therefore includes the full gamut of immigration appeals to the circuit courts—known as petitions for review. Many of these cases end on purely procedural grounds, such as failure to pay a fee or failure to file a brief.⁶⁶ Others end voluntarily, when the petitioner asks to withdraw the case, or the petitioner and the Department of Justice mutually agree to a remand.⁶⁷ In these circumstances, there is no judicially issued opinion on the case. Thus, for purposes of the present analysis, we focused on a narrower subset of cases that the courts ultimately decided, either on the merits or on jurisdictional grounds.⁶⁸ With these limitations, we had a sample of cases from each of the circuits, as listed in Figure 1.

This sampling allows us to clearly see differences between the circuits. However, it does not directly allow us to report a national average because some circuits hear many more immigration cases than others, and our sample does not

60. See Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 63–64 (2016) (finding, in a survey of 800 qualified immunity cases, some evidence of strategic use of publication by judges when they reach certain constitutional results).

61. See David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 820 (2005).

62. See Merritt & Brudney, *supra* note 24, at 99 tbl.VIII.

63. The D.C. Circuit and the Federal Circuit do not normally have jurisdiction of immigration cases.

64. Cases were collected and added to our dataset separately for each circuit. We first collected 100 random cases per circuit. Marouf, Kagan & Gill, *supra* note 3, at 362. For some circuits, we expanded the random sample because we were seeking a larger sample size of petitioners who had requested a stay of removal, which was the subject of our original study. *Id.* However, both the original and supplemental samples were randomly selected. For a complete description of the methodology used to develop the sample, see *id.* at 362–63. The date range was determined based on the original focus of that study, which was the impact of the Supreme Court's decision in *Nken v. Holder*, 556 U.S. 418 (2009). See *id.* at 362.

65. Marouf, Kagan & Gill, *supra* note 3, at 362.

66. *Id.*

67. *Id.*

68. PACER dockets do not always give access to the judgment, but they do indicate generally whether a denial was based on jurisdictional or procedural grounds.

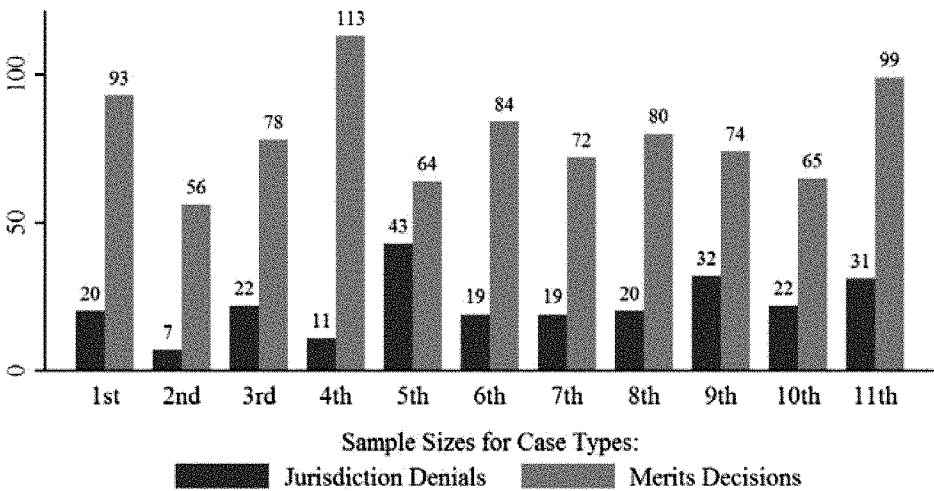


Figure 1.

represent them proportionately.⁶⁹ We kept denials based on jurisdiction separate in our analysis, because they might be different from merits decisions in terms of what it would mean to produce a reasoned decision, and courts or research databases might treat them differently regarding publication and visibility. This does not mean we would never expect reasoned decisions in these cases, though. Depending on the situation, jurisdiction might seem clear-cut and nearly mechanical, but it can also lead to ambiguous legal questions in certain situations.

We next examined whether Westlaw and Lexis databases include a listing of the merits cases from our PACER-derived dataset. In other words, we examined whether a researcher relying solely on these research tools could discover that the case exists, regardless of whether she could access a decision to read. The answer was yes, albeit with a *significant* caveat.

The caveat is that Figure 2 only indicates that the docket was listed. A docket can be listed, however, without the actual decision being accessible. For most circuits, Westlaw and Lexis have a feature that includes the same docket records that are available on PACER. As our data show, this was not the case for the Second Circuit. But it means that for the other ten circuits, a researcher could theoretically find the case—but only if the researcher knew how to look for it. We confirmed that the case was listed by entering the docket number, which we already knew from having found the case in PACER. However, much like PACER, this feature is not useful for normal legal research, because it

69. The Ninth Circuit hears the most—as much as 47% of all immigration appeals. See Kagan, Marouf & Gill, *supra* note 3, at 690 n.60 (citing U.S. COURTS FOR THE NINTH CIRCUIT, 2011 ANNUAL REPORT 58 (2011), https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2011.pdf [<https://perma.cc/2FMU-SUFH>]). The Second Circuit received the second most. *Id.* at 705. The method we used to collect our sample prevents us from producing a national average. See *supra* note 64.

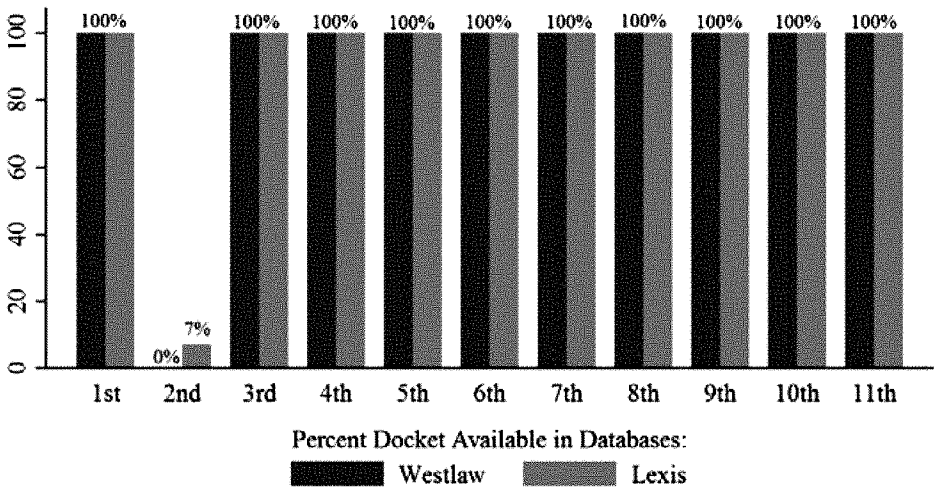


Figure 2.

does not allow a text-based search for cases dealing with particular facts or legal issues.

Our primary interest was in whether the actual judicial decision is available to a researcher. We entered each case in our database into Westlaw and Lexis using the unique docket number to find out. The results are depicted here in Figures 3 and 4:

The first and most obvious observation to make about this data is that Lexis has made significant strides toward including otherwise unpublished decisions. Westlaw, by contrast, includes almost none. It is not clear that a user of Westlaw would know this, however, which presents a problem to which we return in the conclusion.

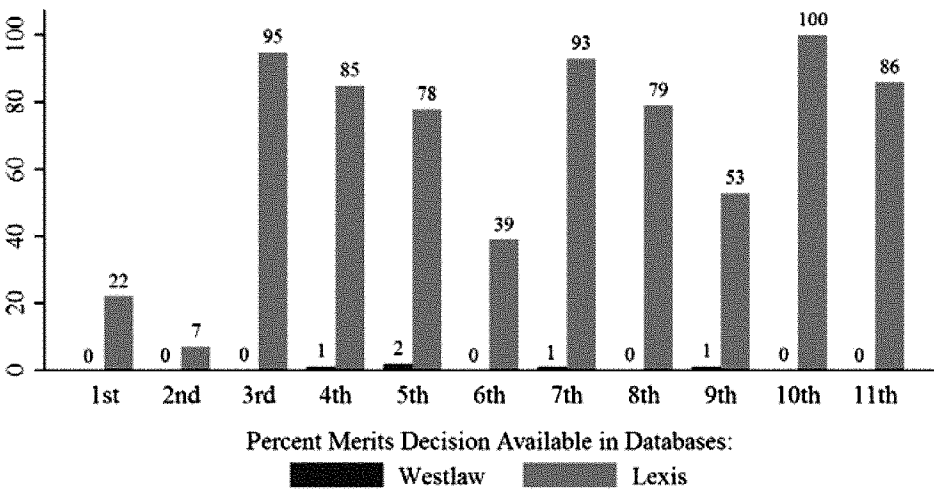


Figure 3.

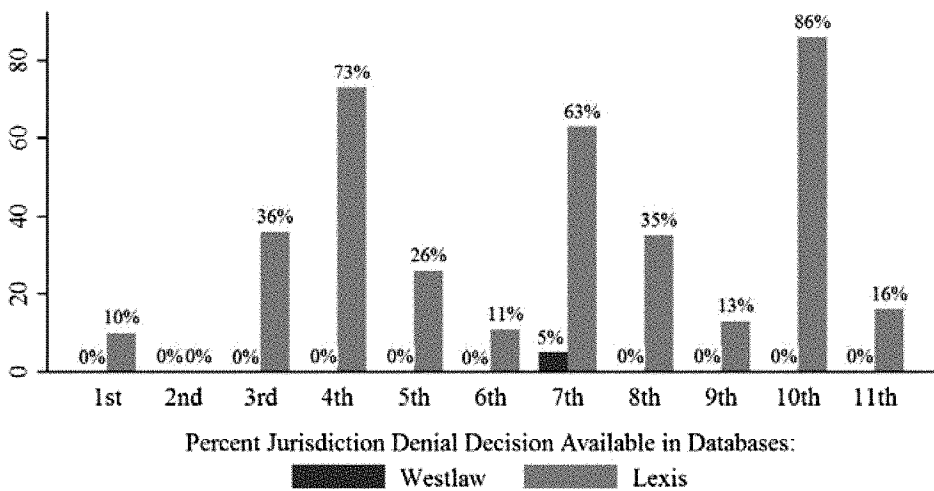


Figure 4.

Even looking solely at Lexis, there are many immigration appeals that are decided on the merits but that are still unavailable to the public, to practicing lawyers, and to researchers. The Ninth Circuit alone regularly receives nearly 3,000 immigration appeals per year.⁷⁰ Thus, if even one third were not included—and that appears to be the case—there are hundreds of decisions that are essentially invisible. More specifically, these decisions are unsearchable.

Before going further, we should acknowledge that what is true for immigration cases might not be true for all cases. Certain aspects of immigration adjudication might make invisible adjudication more common than in other federal litigation. One reason to suspect this may be the case is the sheer number of cases. Another reason why immigration appeals may be different is procedural. Removal cases are administrative; they start in Immigration Court and are first appealed to the Board of Immigration Appeals (BIA), both of which sit within the Department of Justice.⁷¹ Only after a final order of removal is issued by the BIA may a petition for review be filed to a circuit court of appeals.⁷² This means that, for the federal judiciary, immigration cases skip the usual first instance courts—the district courts. In theory, this need not change the role of the court of appeals. The court of appeals will review findings of fact by administrative tribunals by a deferential standard.⁷³ But it is still possible that some courts of appeals may have relatively less confidence in the system of

70. See Kagan, Marouf & Gill, *supra* note 3, at 690 n.60 (citing U.S. COURTS FOR THE NINTH CIRCUIT, *supra* note 69).

71. See generally 8 C.F.R. § 1003.1 (2017) (setting out the composition and functions of the Board of Immigration Appeals).

72. 8 U.S.C. § 1252 (2012).

73. See *Immigration & Naturalization Serv. v. Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992) (using the substantial evidence standard in federal court review of factual questions in an asylum case).

administrative immigration adjudication than they do in federal district courts. They might therefore feel that they need to resolve basic questions that would normally not be brought to a federal appellate court, because the appellate court is the first Article III federal court to consider the case. This is merely a theoretical possibility; we do not know, and with available data cannot know, that this is happening.

IV. THE CONSTITUTIONAL DIMENSION

As we have seen already in Part II, the reasons why the courts adopted a system of selective precedent are intensely practical. But this practice carries significant constitutional concerns. The original states in the United States endorsed a general right of public access to courts.⁷⁴ Invisible adjudication seems to depart from that tradition. More specific constitutional objections relate to two different issues, however, although both relate to the question of transparency. One concerns the possibility that there is a body of invisible law administered by the federal courts that cannot be readily accessed by the public. This worry has recently attracted attention in connection with the Foreign Intelligence Surveillance Act (FISA) court. Because the FISA court issues precedent decisions, it seems to be creating a body of secret law that challenges central assumptions of Anglo-American legal philosophy. A different kind of constitutional concern arises with the more routine practice of courts determining only a minority of their decisions to be precedent. This raises concern that the courts, freed from constraining themselves in future cases, might be acting arbitrarily and might not be acting in a judicial manner as prescribed by the Constitution. In this context, transparency is a safeguard against arbitrariness. But if many nonprecedent decisions are invisible to the public, then the constitutional concern may be heightened.

A. COMPARISON TO THE FISA COURT

The existence of widespread invisible adjudication evokes comparisons to secret adjudication, a concern that has attracted recent concern in relation to the FISA court.⁷⁵ The FISA example illustrates how visibility of a decision and its status as a precedent are independent questions. However, as we will briefly explain, the FISA court has raised unique constitutional concerns that we will not attempt to address.

As in the immigration cases we study, the FISA court involves federal judges making high stakes decisions on issues of public concern, with the decisions being inaccessible and hidden from lawyers who do not work for certain federal

74. See Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 L. & ETHICS HUM. RTS. 1, 7–12 (2011).

75. See Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES (July 6, 2013), <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?mcubz=3> [<https://nyti.ms/2k2Kb55>].

agencies. But there are some differences. One is the motivation for invisibility. FISA decisions are deliberately made secret because they involve national security. Unpublished immigration decisions are invisible as a matter of convenience, resulting from large appellate dockets clogging the system. They are invisible, to some extent, as an unintended consequence of the ad hoc way in which our system of publication has evolved.

Another important difference concerns *stare decisis*. In immigration cases, and in normal litigation, a case would remain unpublished, and potentially invisible, unless it has been designated as a precedent by the court. But the FISA court issues precedent decisions that are nevertheless secret.⁷⁶ This is a challenge to core assumptions that we usually make about law being published and transparent so that all can know in advance about the rules that govern society.⁷⁷ As we will see in Part V, early philosophers of Anglo-American law, especially Jeremy Bentham, argued that establishing and protecting public expectations is a central purpose of law. The concept of “publicity” was especially central to Bentham’s recommendation for making courts and government function better.⁷⁸ Secret law, by definition, cannot accomplish this.⁷⁹

From the standpoint of informing the public about rules of law, it would be an improvement for the FISA court to not allow any of its secret decisions to set precedent, thus making them more like regular unpublished opinions. This depends on the assumption that only precedent-setting lawmaking decisions are of interest to the public—a contestable premise. As others have written, lack of publication also reduces incentives for judges to write well-reasoned decisions that can withstand public scrutiny.⁸⁰ *Stare decisis* is not just a means of making law and letting the public know what the law is; it is a means of promoting judicial stability and restraint by holding judges accountable through the expectation of consistency, making arbitrary actions that depart from precedent visible to all.⁸¹

B. CONSTITUTIONAL DEBATE ABOUT THE NORMAL SYSTEM OF NONPUBLICATION

As we have already seen, the practice of designating only some appellate decisions to be published precedent developed in response to the practical realities of burgeoning court dockets. But what is convenient is not necessarily constitutional. Although courts have continued the practice, they have been

76. See *id.*; Jack Boeglin & Julius Taranto, Comment, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L.J. 2189, 2189 (2015).

77. See Boeglin & Taranto, *supra* note 76, at 2189 (“[A]n overlooked yet fundamental problem with the FISA courts’ work is that judge-made law can be generated only through *stare decisis*, a doctrine that we argue is not justified when applied to secret opinions of the type the FISA courts produce.” (footnotes omitted)).

78. See Resnik, *supra* note 74, at 4–5.

79. See Boeglin & Taranto, *supra* note 76, at 2196 (arguing that law should be standardized and knowable, echoing arguments made by Bentham).

80. See *id.* at 2194.

81. *Id.* at 2196.

unable to entirely shed the constitutional doubt that hangs over it. That many nonprecedent decisions are invisible using standard research tools is likely to increase these doubts.

The most visible spark for the constitutional critique of nonprecedent was the Eighth Circuit's decision in *Anastasoff v. United States*.⁸² In 2000, Faye Anastasoff brought a tax dispute with the IRS to the Court of Appeals for the Eighth Circuit.⁸³ The primary legal question was about the mailbox rule.⁸⁴ Ms. Anastasoff mailed a refund claim two days before the deadline; it arrived at the IRS one day after the deadline.⁸⁵ The question presented was whether she was late under applicable statutory provisions.⁸⁶ Ms. Anastasoff argued that the mailbox rule should apply, which would mean she could get her refund.⁸⁷ This was an unresolved question for the Eighth Circuit if one looked only at its designated precedent decisions. But in reality, this was not the first time the Eighth Circuit court had confronted this precise question about the mailbox rule in tax law. Eight years earlier, another taxpayer made a similar claim in *Christie v. United States* and lost.⁸⁸ But *Christie* was a per curiam decision that had been designated unpublished, which under the court's rules at the time meant that it could not be used as a precedent.⁸⁹ Naturally, Ms. Anastasoff wanted to make sure that *Christie* remained a nonprecedent.⁹⁰ The IRS, by contrast, urged the court to follow *Christie* as a precedent. Thus, a case about a tedious procedural question in tax law turned into a battle over how modern American appellate courts work.

The Eighth Circuit ruled for the IRS and issued a bombshell decision:

Although it is our only case directly in point, Ms. Anastasoff contends that we are not bound by *Christie* because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the "judicial."⁹¹

To support this decision, Judge Richard Arnold conducted a lengthy analysis of the history of judicial precedent at the time of the framing.⁹² The crux of his argument focused on two key premises. First, "inherent in every judicial

82. 223 F.3d 898 (8th Cir. 2000).

83. *Id.* at 899.

84. *See id.* The mailbox rule states that a person has met an IRS filing deadline so long as the document has been placed in the mail on a certain date. *See* 26 U.S.C. § 7502 (2012).

85. *Anastasoff*, 223 F.3d at 899.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.*

91. *Id.*

92. *See id.* at 900–04.

decision is a declaration and interpretation of a general principle or rule of law.”⁹³ The second premise was that there could be no room for making one-off decisions.⁹⁴ Quoting Blackstone’s *Commentaries*, Judge Arnold wrote that rules of law had to be “permanent” because “a judge is ‘sworn to determine, not according to his own judgments, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old.’”⁹⁵ To designate a decision nonprecedent “would allow us to avoid the precedential effect of our prior decisions.”⁹⁶ Because a decision that sets no precedent could not be considered a decision of law, it went beyond the “judicial” power established by Article III of the Constitution.⁹⁷

Anastasoff was a shock, and much was written about it.⁹⁸ It threatened a fundamental feature of modern court administration and might have radically changed how the federal appellate courts work. But it was also effectively a decision against the court’s own interests, in the sense that the court invalidates its own rule and appears to make its own work harder. Courts have an inherent conflict of interest when considering whether their own rules are constitutional. That is especially so when the rule that is challenged seems integral to the way judges want to organize their work. To tell a judicial panel that every decision must be a precedent may be the functional equivalent of telling judges, “You need to work much, much harder.” This made the *Anastasoff* decision even more remarkable.

The revolution did not last long, however. Not surprisingly, given the magnitude of the holding, *Anastasoff* sought a rehearing by an en banc panel.⁹⁹ Perhaps sensing that more was at stake than the mailbox rule, the IRS decided to simply pay Ms. *Anastasoff* her refund and asked the court to vacate the decision as moot.¹⁰⁰ The en banc court agreed.¹⁰¹ As a result, there is no binding decision from a federal court of appeals holding that our system of unpublished decisions is unconstitutional. And yet, Judge Arnold’s analysis was not reversed on the merits.¹⁰² Perhaps fittingly, it now stands itself as an ambiguous legal precedent.

93. *Id.* at 899.

94. *See id.* at 901.

95. *Id.* (alteration in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

96. *Id.* at 900.

97. *Id.*

98. *See, e.g.,* Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003); Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741 (2001); William J. Miller, *Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 DRAKE L. REV. 181 (2001); Steven A. Fredley, Note, *Anastasoff v. United States: Nonprecedential Precedent, Judicial Power, and Due Process: A Case for Maintaining the Status Quo*, 10 GEO. MASON L. REV. 127 (2001).

99. *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc).

100. *See id.*

101. *Id.* at 1056.

102. In 2003, a different Eighth Circuit judge referred to it in a dissenting opinion, indicating that the constitutional argument still had merit. *See United States v. Yirkovsky*, 338 F.3d 936, 945 n.3 (8th

From 2004 to 2006, Congress held hearings on unpublished decision rules and the Supreme Court ultimately revised the Federal Rules of Appellate Procedure, and *Anastasoff* became the springboard for law review articles arguing against unpublished opinions.¹⁰³ The articles expanded the constitutional objections. Not only was the notion of a nonprecedent decision a violation of the vesting clause in Article III, it also might violate procedural due process.¹⁰⁴ Yet, despite the enthusiasm of some scholars, two circuits had already directly rejected Judge Arnold's decision in *Anastasoff*. The most prominent was a lengthy opinion by the Ninth Circuit's Judge Kozinski in *Hart v. Massanari* in 2001.¹⁰⁵ Judge Kozinski became a leading proponent of unpublished decisions, later giving testimony to Congress that we have quoted from in this Article.¹⁰⁶ If *Anastasoff* represented one extreme side of this debate, *Hart* represents the opposite extreme. The Ninth Circuit did not just affirm a refusal to consider unpublished cases as precedents; it held that an attorney could be sanctioned for having cited a case that was easily accessible on Westlaw and Lexis.¹⁰⁷

Judge Kozinski offered several rebuttals to Judge Arnold.¹⁰⁸ Of interest here is the connection Judge Kozinski saw between systems of publication and precedent. He argued that precedent at the time of the framing was actually a more flexible concept than it is today.¹⁰⁹ The lynchpin of this argument is that, until at least the nineteenth century, English judges declared the law but could not make the law.¹¹⁰ Echoing Blackstone, Judge Kozinski argued a single decision should not be rigidly binding because a single judge in a single case could be wrong.¹¹¹ In Judge Kozinski's view, at the framing of the Constitution, individual cases were less important than the combined force of many examples of past practice—but judges still retained the authority to discard examples with

Cir. 2003) (Heaney, J., dissenting) (expressing doubt about whether the circuit's unpublished decision rule was constitutional).

103. See, e.g., Weisgerber, *supra* note 24; Wade, *supra* note 29; Dragich, *supra* note 32.

104. See generally Wade, *supra* note 29. Moreover, the pre-2006 rules that prohibited litigants from even citing unpublished decisions might violate the First Amendment.

105. See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

106. See Kozinski Testimony, *supra* note 12; see also *supra* note 28 and accompanying text.

107. *Hart*, 266 F.3d at 1159 n.2 (noting that the Ninth Circuit rule went farther than the Eighth Circuit rule because the Ninth Circuit prohibited citation); *Id.* at 1180 (declining to impose sanctions, although they would be constitutional, because the *Anastasoff* decision had produced doubt about the rule).

108. As a matter of constitutional law, he questioned whether the vesting of judicial power in federal courts in Article III was a limitation on judicial power. *Id.* at 1161. This attacked an essential premise of *Anastasoff*, but it is beyond the scope of this Article.

109. See *id.* at 1163; see also Sinclair, *supra* note 98, at 703 (“[T]he constitutionality and wisdom of no-citation rules depend on one’s conception of stare decisis. Its operation and grounds are not the same now as in the founding period . . .”).

110. See *Hart*, 266 F.3d at 1165.

111. *Id.*

which they disagreed.¹¹² As Judge Kozinski and his Ninth Circuit colleagues saw it, our modern system of rigid precedent forces courts to be more careful about what they consider to be a precedent. He wrote, “Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed.”¹¹³

What is interesting in Judge Kozinski’s analysis is that he seems to not rely on the criteria that are stressed in his own court’s rules, which we have quoted above in Part II. He does not focus on whether the merits of the case raise unique issues or have the potential to change or clarify the law. Instead, he focuses on the amount of effort judges can devote to the decision, because he is first and foremost concerned that the judges might make a mistake. Judge Kozinski seems to be arguing that, because the cases are hard, a precedent should only be set when a court is able to consider an issue with the care that it deserves.¹¹⁴ The first panel to consider an issue might not get it right, even though the first case decided on a question of law would be likely to establish a new rule of law. By analogy, Judge Kozinski argues that circuit courts’ distinction between precedent and nonprecedent decisions serves a similar purpose to the Supreme Court’s practice of only granting cert to a number of cases that is small enough to allow it to produce fully considered opinions.¹¹⁵ But, as we have already noted, Judge Kozinski seems to also be admitting—implicitly, at least—that judges might not always be able to devote the attention to a case that is required, and might make significant errors in the process. This is why he does not want all his court’s decisions to be available for use as precedents.

In 2002, the Federal Circuit followed the Ninth Circuit’s lead in *Symbol Technologies, Inc. v. Lemelson Medical*, a patent case raising the question of whether the equitable doctrine of prosecution laches could bar patent enforcement.¹¹⁶ The Federal Circuit had previously rejected the laches doctrine in two unpublished patent cases.¹¹⁷ Like Judge Kozinski, the Federal Circuit argued that, at the time of the framing, the system of common law precedent did not require every case to be reported.¹¹⁸ They noted that Sir Francis Bacon had advised King James I to omit from case reports decisions that were “merely iteration and repetition.”¹¹⁹ But as in the Ninth Circuit decision, this reasoning

112. *Id.* (“Common law judges looked to earlier cases only as examples of policy or practice, and a single case was generally not binding authority. Eighteenth-century judges did not feel bound to follow most decisions that might lead to inconvenient results, and judges would even blame reporters for cases they disliked.”).

113. *Id.* at 1172.

114. *See id.* at 1177 (noting that courts only have the resources to craft precedent decisions in some of the cases that come before them).

115. *Id.*

116. 277 F.3d 1361, 1363, 1367 (Fed. Cir. 2002).

117. *Id.* at 1365.

118. *Id.* at 1367.

119. *Id.*

blurs the distinction between unpublished and nonprecedent decisions.¹²⁰ Moreover, it is one thing to say that cases that merely reiterate established rules can be considered nonprecedents. But that does not explain—and the Federal Circuit made no effort to explain—why it designated as nonprecedent its only on-point decisions on the laches doctrine in the patent context. These were not reiterations of a rule. That is why so much depended on whether they could be treated as precedents.

The constitutional doubts have never entirely receded. In 2015, Justice Thomas (joined by Justice Scalia) expressed concern that lower courts had designated some decisions as unpublished when they should have been published.¹²¹ A recent study of 800 qualified immunity cases in the federal courts by Aaron L. Nielson and Christopher J. Walker adds empirical weight to Justice Thomas's concern.¹²² The gist of this concern is that allowing judges to designate their decisions as nonprecedents invites judicial mischief.

The two circuit decisions rejecting *Anastasoff* were published before the revision of the rules allowing citation to nominally unpublished decisions. This adds to the lingering ambiguity. In the Ninth Circuit's *Hart* decision, the holding was that a lawyer could be sanctioned for doing something that is now explicitly allowed. Judge Arnold's critique of nonprecedent decision making still pops up periodically, especially when litigants find that the nonprecedent status of a past decision hurts their cause. For example, in 2007, the Court of Appeals for the Tenth Circuit avoided ruling directly on an *Anastasoff*-like challenge to a state court's nonprecedent rule by dismissing a suit on standing grounds.¹²³

In 2016, Judge Costa on the Fifth Circuit appeared to endorse *Anastasoff* in a dissent.¹²⁴ The case at hand concerned whether a Georgia "aggravated assault" conviction was for a "crime of violence" as defined in federal immigration and sentencing law, a legal question that has generated a great deal of litigation in recent years. A series of unpublished decisions by the court had found that Georgia's "aggravated assault" was, indeed, a crime of violence.¹²⁵ The two-judge majority of the court found that these cases were not precedential but "may be considered persuasive."¹²⁶ It then proceeded to offer several pages of

120. *Id.* at 1368 (referring to "unpublished, or . . . nonprecedential decisions").

121. *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) ("True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review. The Court of Appeals had full briefing and argument on Austin's claim of judicial vindictiveness. It analyzed the claim in a 39-page opinion written over a dissent. By any standard—and certainly by the Fourth Circuit's own—this decision should have been published." (internal citations omitted)).

122. See Nielson & Walker, *supra* note 60, at 63 (finding empirical evidence of strategic behavior by judges to not publish certain kinds of constitutional decisions, possibly to take advantage of the composition of judicial panels in particular cases).

123. See *Smith v. Mullarkey*, 484 F.3d 1282, 1286 (10th Cir. 2007).

124. See *United States v. Torres-Jaime*, 821 F.3d 577, 586 & n.1 (5th Cir. 2016) (Costa, J., dissenting).

125. *Id.* at 582 (listing unpublished decisions).

126. *Id.*

detailed textual analysis of the unpublished cases, much as a court would have done in deciding whether to apply a rule from a precedential, published decision.¹²⁷ This extensive examination of cases that nominally were not binding precedents formed a backdrop for Judge Costa's dissent, which explained, "The strong interest in uniform application of the law means that we should usually follow unpublished decisions. But the difference between published and unpublished decisions must mean something. Otherwise, we should just 'publish' everything and give all opinions the weight of binding authority."¹²⁸

The point of this, it would seem, is that giving judges discretion to decide whether nonprecedent decisions should nevertheless guide future cases introduces a new source of apparent arbitrariness to the process. We might take this one step further by noting that judges have two opportunities to exercise arbitrary discretion—first in deciding whether to designate a decision as a precedent, and second in deciding whether to follow a supposedly nonprecedent decision despite its designation.

Judge Costa made an additional point that distinguished the case at hand from *Anastasoff*. In response to Judge Arnold's contention that nonprecedent decision making invites inconsistent decision making, Judge Costa took a different approach:

This case does not require fleshing out the full contours of when the desire for consistency that should ordinarily lead us to follow unpublished decisions should give way to the interest in getting the law right. For it involves a situation in which a departure from nonprecedential authority should not be controversial: when a key legal premise of those unpublished decisions is revealed to be demonstrably false. That is the case here with respect to our prior, unpublished rulings which incorrectly assumed that the Georgia assault statute requires intentionally causing apprehension of violent injury.¹²⁹

Judge Costa's revisiting of the *Anastasoff* debates is interesting in that it comes after the Federal Rules of Appellate Procedure revisions. Unlike the Ninth Circuit and Federal Circuit panels, he considered unpublished opinions at a time when it was clear that litigants may cite them. The majority opinion from which he dissented illustrates the ambiguities of this new era. Unpublished decisions can no longer be ignored. Lawyers can no longer be sanctioned for talking about them, which means that judges may be tempted to analyze them in considerable depth. What, then, is the point of calling them unpublished or of designating them nonprecedents?

In response to these questions, Judge Costa argued that judges should just try to get the law right instead of following precedent rigidly. Rather than argue over whether a past decision can be considered a precedent, judges should

127. See *id.* at 582–85.

128. *Id.* at 586 (Costa, J., dissenting).

129. *Id.* (Costa, J., dissenting).

instead ask if the past cases were correctly decided. When judges want to cite extensively to a past decision, it is probably because they find its analysis compelling, and that really should be the point.

An illustration of this approach may be seen in a series of decisions in the Ninth Circuit concerning civil rights claims by homeless people who filed an Eighth Amendment challenge to a local criminal law banning sitting or sleeping on the street.¹³⁰ In a 2006 decision, *Jones v. City of Los Angeles*, the court found that homeless people had standing to sue and that their constitutional rights had been violated.¹³¹ The court designated its decision as a precedent, and it was published in the official reporter.¹³² However, the parties later settled the matter and jointly asked the court to withdraw its opinion, which it did.¹³³ This left the original decision in a state analogous to visible but nonprecedent decisions. The Ninth Circuit has noted, but not resolved, the lingering ambiguity about whether *Jones* should be considered in future cases.¹³⁴

Despite the ambiguity of *Jones*'s precedential standing, in 2009, a district court in the Ninth Circuit considering another civil rights suit by homeless people faced the dilemma of deciding whether to consider the original *Jones* decision.¹³⁵ The district court concluded that, because it had been vacated, "though the *Jones* opinion is informative, it is not binding."¹³⁶ The court then analyzed *Jones* at length, concluding that it was "highly persuasive" on the question of standing¹³⁷ but "tenuous at best" on the substantive Eighth Amendment question.¹³⁸ It is entirely possible that had the district court considered *Jones* to be binding, it would have reached a different holding. That the court did not consider *Jones* binding, however, did not stop it from considering the case at length, and it arguably allowed for a better ultimate result.

As we will see in Part V, this approach is in line with what Blackstone argued should be the role of the judge. Precedent is evidence of the law, not the law itself. There are certain decisions that remain technically valid as precedents, but which are widely understood *not* to represent law.¹³⁹ The *Korematsu* decision is a prominent example of this anticanon, in that it has not been overruled but its holding is widely regarded as a tragic error by the Court.¹⁴⁰ But although another writer might see this a good reason not to insist on

130. We are grateful to Prof. Anne Traum for bringing these decisions to our attention.

131. 444 F.3d 1118, 1131, 1138 (9th Cir. 2006).

132. *See id.* at 1138.

133. *See Jones v. City of Los Angeles*, 505 F.3d 1006, 1006 (9th Cir. 2007).

134. *See Bell v. City of Boise*, 709 F.3d 890, 895 (9th Cir. 2013).

135. *See Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1225–31 (E.D. Cal. 2009).

136. *Id.* at 1225.

137. *Id.* at 1226.

138. *Id.* at 1231.

139. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386–87 (2011) (defining the anticanon as "the set of legal materials so wrongly decided that their errors . . . we would not willingly let die"); Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RRS. J. 327, 329 (2009) (defining an anticanonical text).

140. Greene, *supra* note 139, at 387.

publishing every decision, Judge Costa saw it as a reason to minimize the difference between published and unpublished cases. All past decisions might inform decision making in a present case, just as any past decision might be discarded as a precedent if it turns out to have been wrongly decided. But this would require a weaker adherence to precedent that we often take for granted.

Even assuming the propriety of the present system, it remains unclear how courts are deciding which of their decisions should be designated precedential. This is a lingering problem signaled by *Anastasoff*, *Hart*, and the more recent Fifth Circuit case. In each of these cases, litigants confronted a situation in which the only on-point decisions were designated nonprecedents. The decisions addressed unresolved questions and had value in guiding future adjudications. They were not mere reiterations of a well-established rule. So why, then, were they not designated as precedents in the first place? It may be that judges sometimes test out their reasoning on novel issues through unpublished decisions, intending to later issue a precedent decision after their reasoning has been applied in several cases or fact patterns. Although this may be a perfectly valid judicial approach, it does not appear that courts are reliably using the kind of criteria explicated by federal circuit courts of appeals, recounted in Part II above.¹⁴¹ As we will see in Part V, this question touches on longstanding debates in legal philosophy, especially whether “hard” and “easy” cases can meaningfully be separated.

In this ambiguous constitutional context, the existence of invisible adjudication may be quite destabilizing. The core critique of nonprecedent is that courts will be tempted to behave arbitrarily. Because not every decision sets a precedent for the future, it is easier, in theory, for courts to make one-off decisions. But transparency may mitigate against this risk.¹⁴² Although decisions may not be binding, if judges become nakedly inconsistent in their decision making, they can be publicly critiqued. Because nonprecedent decisions can now be cited, litigants can warn judges in advance that an adverse decision will appear to be arbitrary. Transparency may conceivably restrain judges from straying too far and may mitigate constitutional doubts enough to allow the system to continue. But if it turns out—as our data suggest—that this transparency is a myth, and if we add to this suspicion that judges sometimes choose to publish or not publish a decision for improper reasons, then the danger of judicial arbitrariness seems considerably more acute.

V. PHILOSOPHICAL DIMENSIONS

The rationales that judges have used to justify our prevailing system of selective precedent depends on the premise that many or most cases in the appellate court are simple. They would offer no new understanding of the law,

141. See *supra* Section II.B.

142. Cf. Kozinski Testimony, *supra* note 12 (arguing that there is no sign of court deviance from established rules and that decisions are available to the public).

and to designate them as precedents would force judges to write them more carefully but would not really improve the legal system. The constitutional objections to this system are rooted in a belief that by ignoring so many decisions, something important is lost, either for the public (in the form of information about the law), or for the courts themselves. To understand these philosophical underpinnings, we must explore eighteenth century disagreements between William Blackstone and Jeremy Bentham, which informed twentieth century debates between legal positivists and realists. To bring these philosophical questions into more concrete focus, we will use them to contextualize an analogy to sports. More specifically, Chief Justice John Roberts's famous assertion that a judge is similar to an umpire calling balls and strikes in baseball. We will argue that the baseball analogy illustrates why invisible adjudication is problematic. But first, Bentham and Blackstone.

A. BENTHAM AND BLACKSTONE

The premise that judges can decide cases without setting a precedent for the future—without disseminating their reasoning and sometimes without even writing down an explanation for the decision—highlights longstanding problems within Anglo-American legal theory. The nut of the problem can be traced to the differences between Bentham and Blackstone's legal thinking. Had Bentham been more influential in American law, it would be difficult to see a place for unpublished decisions today. That unpublished decisions are routine owes a great deal to Blackstone gaining the upper hand in this country. Yet Bentham's views continue to exert some influence, and they articulate foundational philosophical commitments that feed ongoing ambivalence about invisible adjudication.

Bentham favored codification of law, preferring legislation over the common law approach.¹⁴³ He wrote at a time when statutes were far less prominent in resolving routine legal disputes than they are today, and so, in a sense, the legal world has moved in his direction to a significant extent.¹⁴⁴ On the other side, Blackstone famously defended the incremental approach of the common law, which frustrated Bentham's ambitions for more rapid legal reform.¹⁴⁵ Not surprising for a critic of the common law, Bentham distrusted lawyers and judges, and he wanted to limit the powers of the latter.¹⁴⁶ But, for present purposes, Bentham's most important argument about the role of judges concerned the predictability of the law, regardless of whether the law was judge-made or codified by a legislature. Stemming from his utilitarian orientation, Bentham argued that the object of law should be to protect individual expecta-

143. See Dean Alfange, Jr., *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 70–71 (1969).

144. See Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 582, 594–95 (1976).

145. See *id.* at 593–95.

146. See Alfange, *supra* note 143, at 58, 70–71 (explaining even when legislation proved unclear, Bentham preferred to refer questions to the legislature rather than rely on judges to interpret).

tions, which required that law be both cognizable and accessible.¹⁴⁷ His advocacy of publicity throughout government and law was a primary reason for his skepticism of the common law, because the case method made it difficult for the public to easily discern settled rules.¹⁴⁸ Where judicial interpretation could not be avoided, Bentham advocated strict adherence to *stare decisis* as a check on judges and as a means to protect expectations about what the law is.¹⁴⁹ By contrast, Blackstone was comfortable with judges occasionally making exceptions and creating legal fictions to avoid an inequitable outcome that would result from strict application of existing rules in a particular case.¹⁵⁰

The Blackstone–Bentham disagreement can be understood in part as a disagreement about whether politicians or judges are the greater threat. Blackstone inherited his faith in judges from Sir Edward Coke, who is often credited with establishing the concept of precedent that we still use today. Working a few decades before Blackstone, Coke promoted precedent as a means to restrain the King from hearing and deciding legal cases on his own.¹⁵¹ Coke believed that precedent restrained arbitrary action, but that it also required a decision maker who was well-versed in the accumulated body of common law.¹⁵² By this two-pronged argument, Coke used the concept of precedent both to limit arbitrary decision making, while also shifting power from the King to the Judiciary, where expertise in the common law resided.¹⁵³ For him, the virtue of the common law was that it is complicated and thus required experts. Bentham disliked it for essentially the same reason.

Differences in how much trust various thinkers were willing to place in lawyers and judges has a great deal to do with how they might think about nonpublication of judicial decisions. To understand the legitimacy of judges deciding not to publicize their decision in ostensibly minor cases, it is essential to understand what role such cases play in formation of the law. Blackstone and Bentham offered different answers to this question. For Blackstone, common law judges should be bound to rules, not to precedents.¹⁵⁴ Precedent decisions are the best evidence of the law, but judges may also make mistakes about the law.¹⁵⁵ This understanding sanctifies the law in a theoretical sense, because the law is always the correct rule, but judges may get the law wrong. Blackstone places a premium on the capacity for lawyers and judges to reason, discern the correct rule, and detect errors. A Blackstonian approach makes adjudication inherently unpredictable, and this offends Bentham’s belief that the public

147. *Id.* at 65.

148. *See* Resnik, *supra* note 74, at 19–24.

149. *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 192–93 (1989).

150. *See* Posner, *supra* note 144, at 583–86.

151. *See* Stucky, *supra* note 2, at 413.

152. *See id.*

153. *See id.*

154. POSTEMA, *supra* note 149, at 194.

155. *Id.*

should have reliable expectations about how courts will behave.¹⁵⁶ Bentham also knew that courts could get things wrong, but he thought that judges should follow past precedents without exceptions so that results would at least be predictable.¹⁵⁷

From this summary, we can already see how the system of distinguishing published and unpublished cases fits easily with Blackstone's views, but not so much with Bentham's. Because Blackstone believed that judicial decisions are merely evidence of the law, it makes sense that judges would be able to say that certain cases are stronger evidence than others. Moreover, because Blackstone trusted judges to adjust rules over time and to make exceptions when necessary, he would seem to have little difficulty with choosing to publicize their reasoning only some of the time. Much as we saw in Judge Kozinski's defense of nonpublication, Blackstone wanted the courts to eventually get things right more than he wanted them to be consistent.

Bentham's insistence on protecting public expectations would point in a different direction. A person who wants to know how a court would treat her problem does not only want to know how the court handles its significant cases. In fact, in a system where most cases are treated as minor, a potential litigant would want to know as much as possible about what she can expect in such minor cases. Chances are that her case will be a minor one as well. The benefits of reporting these cases so the public knows what the courts are doing are thus considerable, especially if one does not trust judges to apply rules consistently. This general argument features prominently in contemporary critiques of unpublished decisions in the federal courts.¹⁵⁸

Although the United States adopted the common law and turned more toward Blackstone to develop its legal system, ideas that Bentham would have favored also took root in America. As Judith Resnik explained, there has long been an assumption that courts, as a default rule, are open.¹⁵⁹ However, there is ambiguity about whether this means merely that the court's procedures and hearings are open to the public, or if it also means facilitating the dissemination of information about the court's activities.¹⁶⁰ Decisions of federal appellate courts illustrate this ambiguity. Federal appellate cases may be visible to the public in a literal sense, in that they will be listed on publicly available court dockets. But their decisions (and reasoning) are often invisible and not available for dissemination.

156. *See id.* at 195.

157. *Id.* at 195–97.

158. *See, e.g.,* Dragich, *supra* note 32, at 760 (arguing selective publication “impede[s] the development of a coherent body of decisional law, frustrate[s] lawyers and judges in performing their daily tasks, and threaten[s] the legitimacy of the federal courts”).

159. *See* Resnik, *supra* note 74, at 4.

160. *Id.* at 13–15.

B. POSITIVISTS AND REALISTS

The differences between Bentham and Blackstone about the role of precedent foreshadowed a twentieth century debate in legal philosophy about the distinction between so-called easy and hard cases. This question emerged through a series of books and articles known as the Hart–Dworkin debate. The positivists, Hart being the most prominent, insist that it is possible to distinguish “hard” cases from the broader pool of matters that come before the courts.¹⁶¹ The practice of choosing to publish only some decisions depends on this premise; the criteria that courts use to decide whether to make a decision a precedent closely map the concept of a “hard” case.¹⁶² By contrast, Dworkin’s disciple, Andrei Marmor, famously declared that “there are no easy cases.”¹⁶³

The terms here are a bit misleading. An “easy” case is one that falls squarely within the core of a rule and does not require interpretation or refinement of the rule.¹⁶⁴ That does not really mean that the case is easy, in the sense that there can still be a high risk of error or a substantial degree of public controversy. Even when a case presents a problem on which a settled rule offers a clear answer, it may be practically difficult for lawyers and judges to untangle the factual complexity of the situation. The O.J. Simpson murder trial was a hard case for the lawyers and the trial court, but it was easy in the sense that it did not raise new doctrinal questions in criminal law.

The system of publishing only some decisions as precedents makes perfect sense if we accept the easy/hard distinction. In this view, hard cases refine the law and tell us something new about it. Easy cases do not. In an easy case, a court should focus on just getting the decision right. It need not labor to produce a fully reasoned opinion because the case is not going to set a valuable precedent. This effort is better spent on a hard case. It also makes sense that legal scholarship and legal education would focus primarily on the hard cases—that is, published cases. If the goal is to understand legal rules and doctrine, these are the cases that can teach us something. So long as we are comfortable with the positivist premise that easy and hard cases can be separated, the practice of not publishing all decisions and considering only a minority of decisions to be precedents may not seem objectionable.

However, the scenario that led to the Eighth Circuit’s decision in *Anastasoff* adds some weight to the critique that the easy/hard distinction is not workable in practice. In that case, the Eighth Circuit had previously issued an unpublished opinion that answered a question about the mailbox rule for which there was seemingly no other legal authority.¹⁶⁵ This suggests that the original, unpub-

161. See Andrei Marmor, *No Easy Cases?*, 3 CAN. J. L. & JURIS., July 1990, at 61, 62–63 (1990).

162. See, e.g., FED. R. APP. P. 32.1 (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, or other written dispositions that have been . . . designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like . . .”).

163. See Marmor, *supra* note 161, at 61.

164. See ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 97 (2d ed., 2005).

165. See Williams, *supra* note 1, at 779.

lished decision was a hard case; it involved an unresolved question of law, and thus it should not have been classified as an unpublished decision in the first place. It should not be surprising that this factual scenario made a panel of appellate judges uneasy with the rule that unpublished cases set no precedent and could not be cited. The mere fact that this question became so decisive in a tax case suggests that judges are not able to reliably decide which cases should be published and which should not.

The debate about easy and hard cases closely maps a similar disagreement between legal realism and formalism. Legal realism was associated with “rule-skepticism,” a viewpoint that rejected the usefulness of legal rules as a means of predicting the behavior of courts.¹⁶⁶ This skepticism of doctrinal rules leads to a focus instead on actual judicial decisions, aiming to predict future decisions instead of attempting to discern legal rules.¹⁶⁷ An extreme version of this “decision theory” or “prediction theory” would be Jerome Frank’s statement that “[a]ll . . . decisions are law. The fact that courts render these decisions makes them law.”¹⁶⁸ If this is true, we can immediately see that it is essential for courts to make all of their decisions available to the public; if law is really just the decisions judges make, we need to see all decisions if we are to completely understand the law.

A purist version of prediction theory is problematic because it has little or no room to acknowledge that a judge could be wrong.¹⁶⁹ Moreover, it leaves no place for legal authorities like statutes, regulations, and constitutions, which are not decisions, but mere statements of rules.¹⁷⁰ For these and other reasons, the positivist viewpoint has had the upper hand. Brian Leiter has declared the Hart–Dworkin debate over, with Hart the winner and Dworkin irrelevant.¹⁷¹ This may be a significant reason why we have accepted that not all judicial decisions are published; we accept that rules of law matter more than individual cases. However, even if we agree that the positivists get the better of this argument, some of the doubts raised by Dworkin and (earlier) Bentham may yet give us cause for worry.

C. THE BALLS AND STRIKES ANALOGY

It is possible to accept the supremacy of rules and still care about judges’ actual decisions. This means that we can accept that judges get the law wrong, and we can accept that some decisions are better exemplars of the law than others, but we might still resist allowing judges to self-select only certain

166. Michael Steven Green, *Legal Realism As Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917–18 (2005).

167. *Id.* at 1927.

168. *Id.* at 1930 (alteration in original).

169. *Id.*

170. *Id.*

171. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 270 (1997).

decisions for dissemination. To illustrate why this is, we can look at an analogy to baseball. Chief Justice John Roberts famously invoked this analogy during his confirmation hearings. He said, “I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it’s my job to call balls and strikes and not to pitch or bat.”¹⁷²

The problem with this statement, as any baseball fan knows, is that every umpire has a slightly different strike zone. Moreover, an umpire’s ball and strike calls are unreviewable.¹⁷³

At first glance, the balls and strikes analogy seems to set up a classic realist proposition: Perhaps the rule defining the strike zone is irrelevant and only the umpires and their decisions matter.¹⁷⁴ But that would go too far. A rule about the batter’s height and stance over home plate has paramount influence on what counts as a strike.¹⁷⁵ This is why most pitches would be called the same way by almost every umpire almost every time. As Michael Steven Green explained a decade before Roberts made his balls and strikes allusion, the best way to think of this problem is to acknowledge that rules matter—and so do the individual decisions applying the rule.¹⁷⁶ The rule anchors the individual decisions, which are made by umpires who are trying to apply the rule in good faith.¹⁷⁷ It is because of the rule that it is possible and perfectly reasonable to conclude that an umpire is applying the rule incorrectly.¹⁷⁸ No hitter or pitcher, and no baseball fan, needs to concede that a strike is whatever the umpire says it is. As Green explained, “The rule sets up a broad standard of *reasonableness* beyond which the umpire’s rulings will be invalid.”¹⁷⁹ Umpires, like judges, can get it wrong. But that does not mean that individual decisions are irrelevant. This is why we need to see every decision.

This understanding of balls and strikes in baseball is like recent scholarship observing the way that legal doctrine anchors and constrains judicial analysis, even if one assumes that rules are indeterminate and individual judges differ.¹⁸⁰

172. Roberts: ‘My Job Is to Call Balls and Strikes and Not to Pitch or Bat,’ CNN.COM (Sept. 12, 2005, 4:58 PM), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html> [<http://perma.cc/34HK-48DE>].

173. Green, *supra* note 166, at 1991–92.

174. *Id.* at 1992.

175. See MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 150 (2017) (“The STRIKE ZONE is that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap. The Strike Zone shall be determined from the batter’s stance as the batter is prepared to swing at a pitched ball.”).

176. See Green, *supra* note 166, 1992–93.

177. *Id.*

178. *Id.*

179. *Id.* at 1993.

180. See Shyamkrishna Balganesh, Foreword, *The Constraint of Legal Doctrine*, 161 U. PA. L. REV. 1843, 1847–50 (2015) (discussing multiple ways doctrine constrains decisions); see also Leiter, *supra* note 171, at 280–81 (arguing judicial decisions are not, in fact, unfettered).

Extending this logic, pitchers and hitters need to understand both the rule as stated and the tendencies of the individual umpire, which they will learn through experience. The game can tolerate reasonable variations between different umpires so long as the umpires are consistent and evenhanded with both teams. But the players need to be able to see all the umpire's individual decisions about whether each pitch is a ball or strike so that they can make better predictions, allowing them to decide with greater accuracy whether to swing at borderline pitches. It would be a problem if the umpire could somehow tell players only to look at his best decisions because a hitter needs to be able to predict the umpire's routine decisions just as much. In this way, the existence of governing rules does not obviate the need to know and analyze each individual decision.

The positivist position that easy cases can be distinguished from hard ones is a necessary theoretical foundation for our present judicial system. But it may neither fully justify nor fully describe what courts are doing, and thus it does not eliminate our need to see their decisions. First, the theoretical premise that easy and hard cases are meaningfully different potentially explains why courts designate only some of their final merits decisions as precedents. But courts make many preliminary decisions in cases that are nearly always left unexplained.

This was an important theme of our studies on how the federal courts of appeals resolve requests for stays of removal in immigration cases.¹⁸¹ Like requests for preliminary injunctions, such requests require courts to decide whether a petition is likely to succeed on the merits, which is a highly substantive legal question—and not an inherently easy one. We found that the courts are quite inaccurate in their predictions about how cases will be resolved on the merits.¹⁸² But courts are also divided doctrinally about how to apply the preliminary injunction standard, in that the few published decisions reveal a circuit split about what the preliminary injunction standard should actually mean.¹⁸³ Circuit courts attempt to address this question by issuing one or two published decisions on stays of removal, so as to articulate a standard, but then revert to deciding future stay requests through unreported, often unexplained, rulings.¹⁸⁴

This question would benefit from incremental refinement of the law through the process Blackstone outlined. But it is not clear that this happens effectively because it is rare for such preliminary decisions to be published; in fact, it is the norm for them to be entirely unreported.¹⁸⁵ It seems likely that there are many hard decisions about whether to grant a stay of removal at the beginning of an immigration appeal, but these decisions are normally invisible. It is understandable why courts would not want to devote extensive effort to articulating their

181. *See generally* Marouf, Kagan & Gill, *supra* note 3.

182. *See id.* at 382.

183. *See id.* at 349–56.

184. *Id.* at 356, 361.

185. *See id.* at 361.

rationales in preliminary decision making in routine cases. Although the efficiency gains are clear, the philosophical justification is not. Nothing about the theory of easy and hard cases suggests that just because a case is preliminary in a procedural sense it is necessarily easy in a substantive sense.¹⁸⁶

Second, even if easy and hard cases are theoretically distinct, we still must trust actual judges to make the distinction accurately. As we have seen, an important feature of Bentham's thinking was a pervasive distrust of judges. Judges could conceivably err in two ways. They might intentionally abuse the system by consciously departing from settled rules of law while shielding their arbitrary action by making the decision unpublished. There is some empirical evidence that this occurs in certain contexts.¹⁸⁷ Or judges might be inclined to make certain decisions unpublished because it is simply convenient in the context of limited resources.

When a case presents a genuinely hard question of law, an overworked judge might nevertheless decide the case with an unpublished decision simply because it removes the burden of producing a well-reasoned decision that will hold up as a precedent for the future. This might also be a means for a divided judicial panel to resolve a difficult case; as an alternative to publishing a 2–1 decision with a strong dissenting opinion, a panel could opt to decide a case unanimously but without designating the decision as a precedent.¹⁸⁸ Judge Kozinski told Congress that this is common, stating, “Sometimes, differences can’t be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of an unpublished disposition is given relatively little scrutiny in other chambers; dissents and concurrences are rare.”¹⁸⁹ Such compromises are plausible given evidence that judges minimize the use of dissents and promote collegiality (or at least the appearance of collegiality) on the bench.¹⁹⁰

Even if we are comfortable with nonprecedent decisions in the abstract, we might yet want judges to be transparent about these decisions. Judges are unlikely to ever state publicly that they are using unpublished opinions for anything other than the reasons listed in court rules. But that may not be enough to justify complete confidence that deviations from these rules do not happen. Confidence in the judiciary requires confidence that judges are not actually deviating from established rules of law in what are supposed to be easy, clear-cut cases. Yet this transparency is hard to achieve under the current

186. Many important and closely divided Supreme Court cases are technically decided at the preliminary injunction stage. *See, e.g.*, *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona v. United States*, 567 U.S. 387 (2012).

187. *See* Nielson & Walker, *supra* note 60, at 56.

188. *See* Kozinski Testimony, *supra* note 12, at 34 (arguing that if all cases were citable, judges would feel greater pressure to dissent).

189. *Id.* at 32.

190. *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* 255–303 (2013); *see also* Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 130 (2011).

system. When courts decide not to publish a decision, they effectively ensure that the decision is much less likely to be subject to public scrutiny. This is especially so if the decision is not included in significant legal databases. This omission, in turn, is especially likely if the court issues no written decision at all and more so still if the decision is on a preliminary question. The most invisible decisions may be those for which transparency is most important to the maintenance of confidence in the judiciary.

CONCLUSION

If scholars focus only on proper understanding of rules—and thus only on the hard, precedent cases—they only study a fraction of what is going on in the legal system. To legal scholars who work on traditional doctrinal analysis, courts' designations of published and unpublished decisions act like directional signals: Study this decision, not that decision. Judges can use these signals strategically to reach certain ends.¹⁹¹ Scholars may not even always be fully conscious of this choice because it is implemented through research databases. If scholars want to investigate anything other than formal legal doctrine, this practice is a problem. For instance, the cultural study of the law focuses on law as "a social practice."¹⁹² If one starts with the question "[h]ow do people experience and interpret law in the context of their daily lives?"¹⁹³ then it matters little whether a case's legal questions are easy or hard.

Our contemporary concerns about selective precedent emerge from deeper philosophical concerns which suggest that the existence of invisible adjudication could unsettle an unsteady *détente* in a centuries-old debate. The apparent availability of unpublished decisions on standard legal research tools helps to diffuse misgivings about courts' insistence on designating only some decisions as precedents. Transparency achieved through availability of unpublished decisions could accomplish two things. First, anyone who wants to know how courts will behave in ostensibly easy cases could see what the courts are doing. This transparency would address Bentham's interest in encouraging publicity and meeting public expectations about how the courts will behave. Moreover, because unpublished decisions can now be cited, a party who can show that she is disadvantaged by a court's refusal to publish certain decisions could raise the issue openly to the court. Transparency is thus a critical glue holding together a judicial practice that might otherwise be harder to defend. But if, as our data show, there is in fact a great deal of adjudication on the merits that never appears in Westlaw or Lexis, this transparency would appear to be just a façade.

191. See Nielson & Walker, *supra* note 60, at 92–95 (describing the phenomenon of strategic nonpublication).

192. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 36 (1999).

193. See PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 33 (1998).

And if that is the case, doubts about the legitimacy of the system could grow once again.

A straightforward solution involves the research databases themselves.¹⁹⁴ We recommend that commercial legal databases endeavor to include the full universe of decisions in their databases, at least for appellate courts. Our data indicate Lexis currently includes more otherwise unpublished circuit court decisions than does Westlaw. This may be a competitive advantage for Lexis, but it is a problem for legal practice because some firms subscribe to only one service, and lawyers may be unaware of the comparative limitations of each product. Moreover, even Lexis is incomplete. When a database includes only some decisions in a particular category, it is difficult to escape questions of selection bias, which would taint any implications drawn from research based on the database.

Another problem concerns transparency in research databases. Outside the Second Circuit,¹⁹⁵ both Westlaw and Lexis seem to have a complete listing of appellate dockets, but they include only a fraction of the actual decisions in these cases. These dockets are essentially unsearchable; they appear only if one knows where to look for them. Much like the PACER system from which they come, they seem to be available only to a researcher who already knows the docket number or party name. But the database should be able at least to tell a researcher that a certain number of decisions exist but are unavailable. Right now, Westlaw and Lexis give researchers the misleading option to show nonreported decisions in search results, which can create the false impression that the database includes all such decisions. It would be more informative for the database to tell a user that a percentage of decisions—and perhaps what percentage of decisions—is unavailable and not included in search results. Unfortunately, we have not seen either Westlaw or Lexis warn users that their search results may be quite incomplete. Admitting that their products are not comprehensive may be against their business interests.

Scholars can also address these gaps. One way is through empirical legal scholarship, which aims to understand judicial behavior quantitatively. This research consciously and deliberately avoids drawing conclusions from a single case. Such research can be an important contemporary way to address Bentham's concern about public expectations of the legal system. By empirically researching the full universe of judicial decisions, we can better predict how the judiciary is likely to decide cases based on quantifiable factors. But, of course, such research will only be as good as the databases they analyze. Nonprecedent decisions are not particularly problematic if they are accessible. But invisible cases are a serious challenge.

194. For useful suggestions on improving research databases, see McCuskey, *supra* note 20, at 563–74.

195. We recommend that the Second Circuit work with legal research services to correct this problem.

Finally, practitioners need to be aware that they may be unable to access a vast body of invisible case law. These cases might not tell them much about the legal rules they need to apply, outside the context of the FISA court. But they would tell lawyers a great deal about the judges before they appeal. They would offer a much wider body of data from which to answer a question nearly every client asks in litigation: How likely am I to win? In the absence of this data, lawyers cannot really know how closely the judges follow precedent or whether the cases the court chooses to publish are in some ways atypical. Practitioners thus need to be more cautious about what they think they know about the behavior of the courts, and they should push the courts to be more transparent.

For our legal system, the widespread existence of invisible adjudication could unsettle the fragile compromises that have allowed unpublished decision making to continue until now. If the nonpublication system is far less transparent than it appears, it means we must trust judges even more than previously thought. This is a concern for two key reasons. First, some legal thinkers are reluctant to trust judges much to begin with. Second, the argument for distinguishing precedent and nonprecedent cases acknowledges a significant potential for judicial error. This acknowledgement of the risk of error is key to Blackstone's approach to precedent. It is also central to both Judge Kozinski's and Judge Costa's arguments—even though they reach opposite conclusions about the propriety of nonpublication. If judges are prone to making mistakes, it is even more important for others to be able to see what judges are doing.¹⁹⁶

It is sometimes possible to ignore these problems. After all, lawyers and judges are trained to focus only on designated, published, precedential decisions. But we now know that this focus excludes a great deal—88.7% of the decisions made by the federal circuit courts, to be precise. To ignore so much case law certainly distorts our picture about what happens in our court system, as well as the role that the law plays in American life. It would be problematic if this were merely a sort of willful blindness by lawyers and judges. But our data show the problem is deeper. Some of these judicial activities are invisible, even when people try to look for them.

196. *Cf.* Nielson & Walker, *supra* note 60, at 119 (calling for judges to give reasons for not publishing opinions).