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Invisible Adjudication in the U.S. Courts of Appeals

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DRAFT – SUBJECT TO REVISION

**INVISIBLE ADJUDICATION IN THE U.S. COURTS OF
APPEALS**

By Michael Kagan, Rebecca Gill and Fatma Marouf*

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Non-precedent decisions are the norm in federal appellate courts, and are seen by judges as a practical necessity given the size of their dockets. Yet the 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 Such doubts have been overcome in part because nominally unpublished decisions are available through standard legal research databases.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. The Article reviews the reasons why non-publication is a practical, constitutional and philosophical challenge for judges. It argues that the existence of widespread invisible adjudication calls for a re-thinking of the way courts operate and the way scholars study them.

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I. Introduction

Whenever a lawyer searches for federal appellate cases, Westlaw and LEXIS offer two kinds of results: reported decisions and unreported decisions. On their face, these labels are strange. If a case was actually unreported or actually unpublished, it would not appear on a search engine, and might emerge into the public eye only through a leak. We know, of course, that “unreported” or “unpublished” are really antiquated terms for non-precedential. 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the primary text for American legal education, it “is now the exception rather than the rule.”¹ Does the existence of “unpublished” or non-precedential decision-making threaten basic assumptions about how our courts operate?

In fact, from roughly 2000 to 2006, the propriety of non-precedential decisions generated a fierce debate. One federal circuit court of appeals held, briefly, that its own practice of issuing non-precedent decisions was unconstitutional. The objection was simple: When a court says that a decision is not a precedent, the court seems to be saying is that the court might be acting outside the law, or at least inconsistently from established rules of law. Many scholars intervened in the debate, many of them expanding on the constitutional objections. Two other circuits took on the issue, issuing strong opinions defending the practice of non-precedential decisions, producing a circuit split.² The Court of Appeals for the Ninth Circuit held that lawyers could be sanctioned for mentioning unpublished decisions in their briefs.³ 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. Once the new rules went into effect in 2007, lawyers (in federal court, at

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

² See discussion, *infra*, at Part V.

³ See discussion, *infra*, at Part V; discussion at text corresponding to notes 82-91.

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least) are now allowed to talk about “unreported” decisions. This did not clarify what if any precedential value should be given to these decisions. But it seemed 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 to the fact that unpublished opinions are actually available as a safeguard against arbitrary behavior by courts.⁴ While it remains unclear why some appellate decisions are precedents while others are not (or at least of less precedential value) the fact 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? What if the fact that some unpublished decisions appear on search results creates an illusion that all such decisions are available? What if there are in fact many high stakes cases decided on the merits that are invisible through standard legal research tools? What if much appellate adjudication in the United States is, in reality, invisible?

We have discovered that this appears to be the case in at least one high stakes area of federal appellate litigation: petitions to review orders of removal issued against immigrants by the Department of Justice. For several years, we have been conducting empirical research on immigration adjudication.⁵ Because we were initially interested in preliminary procedural questions that arise in these cases and in how different circuit courts manage their case loads, we did not use Westlaw or LEXIS. Instead, we mined data from PACER, the federal courts’ electronic docket management system, a system set up for practitioners to file documents with the court but not for research purposes. PACER 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.

⁴ See discussion, *infra*, at note 104.

⁵ See 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 and Rebecca Gill, *Buying Time? False Assumptions About Abusive Appeals*, 63 CATH. U. L. REV. 679 (2014).

However, we were surprised to find that many cases that PACER showed had been decided on substantive grounds also 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 still is missing large numbers, including nearly half of the decisions in the largest circuit with the most immigration cases.⁶ However, PACER does not allow us to actually read the decision in many instances because the document – the court’s decision – 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. In other words, 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 non-precedents.

In this essay, we report our findings and explore the implications of widespread invisible adjudication in the federal appellate courts. We trace the practical origins and evolution of unpublished or non-precedential 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.

With this background, we wish to promote two main assertions. The first assertion relates to the way our courts operate. The fact that a great deal of federal appellate litigation on a subject of considerable public interest is hidden from public view should reignite the debate about unpublished decisions. Rather than remain in the state of constructive ambiguity that has prevailed since 2006, the courts should provide clear answers about whether it is proper to consider only some appellate decisions precedent,

⁶ See discussion, *infra*, at Part IV.

and even if selective precedent is acceptable, is it proper to make only some decisions available to the public? If selective transparency is acceptable, who should decide which decisions are published and which decisions remain invisible?

The second assertion is directed at legal scholars. 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. If 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.⁷ This methodology may require re-assessment.

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

II. Terminology: Unpublished Decisions and Invisible Adjudication

Before going any further, we need to clarify what we are talking about. In both judicial and scholarly discussions, the terminology of publication and precedent are often used synonymously. This can obscure courts' policies and practices, and

⁷ 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).

can confuse efforts to address concerns that have been raised about them.

Despite the labels “unpublished” and “unreported,”⁸ some circuits began releasing texts of unpublished decisions to Westlaw and Lexis in the 1980s.⁹ In 2001, West Publishing began publishing its Federal Appendix, so that there is now a semi-official reporter for nominally unpublished decisions.¹⁰ By 2005, texts of unpublished decisions from all federal circuits were available on Westlaw and Lexis.¹¹ This development blurred the line between published and unpublished decisions.¹² 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.¹³ 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 non-merits decisions in which cases are resolved on purely procedural grounds.¹⁴ The last category – the non-merits 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.¹⁵

Overall, the federal courts have a system of selective publication, and selective precedent, but precedent and publication are independent variables. Only some decisions are published, and only some published decisions are precedents. But, unfortunately, the term “published decision” is widely used to

⁸ “Unpublished” is often used colloquially by lawyers. Westlaw, by contrast, gives a search option for “Reported” or “Unreported” cases.

⁹ Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems and Legal Malpractice?* 26 MISS. C. L. REV. 185, 206 (2006-2007).

¹⁰ See Solomon, *supra* n. 9, at 207.

¹¹ See Solomon, *supra* n. 9, at 206.

¹² Solomon, *supra* n. 9, at 207.

¹³ See, e.g., Hearing on Unpublished Judicial Opinions Before the House Subcommittee on Courts, the Internet and Intellectual Property, 107th Congress (Statement of J. Alex Kozinski) (“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”) (July 27, 2002); 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.”).

¹⁴ David C. Vladeck and Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667 (2005).

¹⁵ Vladeck and Gulati, *supra* n. 14, at 1668.

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describe precedent decisions, which makes things quite confusing. In this essay, we adopt Vladeck and Gulati's taxonomy, with additions. There 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 actually come in two varieties: those that are actually 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.

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

1. Precedent decisions
2. Non-precedent, visible decisions
3. Non-precedent, invisible decisions
4. Non-merits decisions (invisible)

We are adopting the adjective “visible” to describe decision that are available and searchable on Westlaw and LEXIS. In a literal sense, these decisions are being published, electronically an often in bound form. But the legacy of calling non-precedent decisions “unpublished” has obscured this literal meaning, and thus calls for a new terminology.

To be clear, in some sense, a document on PACER is available to the public. However, PACER is a very different tool than LEXIS or Westlaw.¹⁶ PACER contains a wealth of data, but much of it is sealed, and even the information that is theoretically available is difficult to access. We previously studied the impact of non-merits 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.¹⁷ By analyzing PACER it is possible to measure the duration of these cases, since the dates of filing are listed.¹⁸ But it is not possible to check whether a decision

¹⁶ All three tools have the significant disadvantage of a pay wall, which creates a monetary barrier to public access to legal information.

¹⁷ See Michael Kagan, Fatma Marouf and Rebecca Gill, *Buying Time? False Assumptions About Abusive Appeals*, 63 CATH. U. L. REV. 679 (2014).

¹⁸ *Id.*

to dismiss a petition is correct in the way that one can read and critique a published decision 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 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. PACER's user interface is cumbersome for research purposes.¹⁹ Most important, there is no document-level search function whereby one can look for certain legal or factual issues in docketed cases.²⁰ In our research, with some finesse, we were able to use PACER to identify all of the immigration appeals in each circuit court. But it is not possible with PACER to identify cases, 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 in this way 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 decision in plain sight.

Our four-part taxonomy could be subject to further caveats and exceptions. One of the most controversial concerns precedent decisions. 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. This is why the term "published" came to mean precedential. But we have learned recently that there are actually 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 III, but the serious implications and questions that it raises is not our main focus. Rather, the

¹⁹ See The Free Law Project, What is the PACER problem? (2015), <https://free.law/2015/03/20/what-is-the-pacerproblem/>).

²⁰ *Id.*

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phenomenon of secret precedents highlights the fact that precedent and publication are actually two independent variables.

Another caveat is that LEXIS and WESTLAW are increasingly duplicating data that is available on PACER. What this means is 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 actually see more information than they could on PACER. Decisions are not available, and are not searchable.

III. Practical Dimensions

The Emergence of Constructive Ambiguity

The main reason why so many decisions are not published is simple practicality. The courts are busy, and it would be difficult and expensive. In fact, publication of legal decisions has a long but inconsistent history.²¹ In old English courts, some cases that were considered especially important were collected in Yearbooks, but lawyers were also permitted to cite reported cases by vouching for the existence of the decision.²² In the latter 19th and early 20th Centuries, some appellate courts may have been able to publish all of their merits decisions as bound reporters developed; these reporters now form the backbone of law libraries.²³ But it is not clear that there was ever a period when all cases in all appellate courts were published, and if there was, it did not survive past mid-century.

Since World War II, the federal courts' dockets have grown steadily busier. The increase in the courts' workload was the engine leading to the growth of the modern phenomenon of invisible adjudication because it led federal appellate courts to

²¹ For a useful summary, see Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibited Citation to Unpublished Judicial Decisions*, 42 D.C. L. REV. 695, 700-707 (2001).

²² See Wade, *supra* n. 21, at 702.

²³ See David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685, 696 (2009).

increasingly rely on selective publication and selective precedent to manage their dockets.²⁴ In 1964, the Judicial Conference of the United States recommended that only opinions that had “general precedential value” should be published.²⁵ In the 1970s, the Judicial Conference of the United States called for the circuit courts of appeals to develop “opinion publication plans.”²⁶

The connection between busier dockets and lower publication rates is a simple function of judicial efficiency. Judge Alex Kozinski of the Ninth Circuit told Congress, “While an unpublished disposition can often be prepared in only a few hours, an opinion [published] generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising.”²⁷ Most literature reports that at least three quarters of federal court of appeals merits decisions are now designated “unpublished.”²⁸ The rates vary considerably by circuit, however, with the most extreme circuit publishing less than 10 percent.²⁹ However, all circuits appear to leave the majority of their decisions nominally unpublished.³⁰ As Norman R. Williams wrote, “The published written opinion, the hallmark of American appellate justice, is now the exception rather than the rule.”³¹

As Williams wrote, the existence of unpublished decisions creates a system of superior and inferior decisions, in addition to the well-known hierarchy of courts.³² Obvious puzzles result from this, such as: What makes for a more persuasive precedent, an

²⁴ See generally Martyha J. Dragich, *Will the Federal Courts of Appeals Perish if they Publish?* 44 AM U. L. REV. 757 (1995).

²⁵ See Dragich, *supra* n. 24, at 761.

²⁶ Williams, *supra* n. 31, at 770.

²⁷ Hearing on Unpublished Judicial Opinions Before the House Subcommittee on Courts, the Internet and Intellectual Property, 107th Cong. (Statement of Judge Alex Kozinski) (June 27, 2002).

²⁸ Williams, *supra* n. 1, at 763 (80 percent); Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L. J. 621 (2009) (more than three quarters); Deborah Jones Merritt and James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 72 (2001) (more than 80 percent unpublished). 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, 1024-1030 (2004) (detailed statistics on the growth of unpublished Federal Circuit decisions).

²⁹ Anika C. Stucky, *Building Law, Not Libraries: the Value of Unpublished Opinions and the Effects on Precedent*, 59 OKLA. L. REV. 403, 404 (2006) (reporting 8.2 percent publication rate in the Fourth Circuit, the lowest, and 42.8 percent in the First Circuit, the highest).

³⁰ Stucky, *supra* n. 29, at 404.

³¹ Norman R. Williams, *The Failings of Originalism: The Federal Courts and Power of Precedent*, 37 U.C. DAVIS L. REV. 761 (2004).

³² Williams, *supra* n. 31, at 774.

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unpublished decision by an appellate court, or a published decision by a district court? Court rules governing unpublished cases deal with three related but nevertheless separate questions.³³ First, should courts be allowed in the first place to select only some of their decisions to be published?³⁴ Second, should litigants be allowed to cite non-precedent (unpublished) cases in their arguments, when such decisions are in fact available.³⁵ Third, can an unpublished case, if it is known to the parties and to the court, be considered a precedent of any kind?³⁶ 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 needs to remain confidential?

For awhile, the lower courts' approaches to these questions generated a brewing crisis. The trend, through 2005, was for courts to ban parties from citing nominally unpublished cases, even though many such decisions were increasingly available on standard legal research databases.³⁷ 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 spoken of. 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.

By 2004-2005, the non-publication system was the subject of serious controversy, resulting in congressional hearings and at least a momentary 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 “The judicial power of the United States, shall be vested” in the Supreme Court and the inferior

³³ Williams, *supra* n. 31, at 768.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Williams, *supra* n. 31, at 765.

federal courts established by Congress.³⁸ An Eighth Circuit panel reasoned that the power to decide the law inherently carries precedential authority.³⁹ In other words, the Court of Appeals could not constitutionally issue non-precedent 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.⁴⁰ The Eighth Circuit later vacated its decision, as we will discuss in more detail in Part V.⁴¹

This controversy was diffused by the issuance of a new rule.⁴² In 2006, the Supreme Court amended the Federal Rules of Appellate Procedure. Under the new Rule 32.1, which took effect 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-precedential,’ ‘not precedent,’ or the like.” 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 non-precedents.⁴³

Another problem with the current system is the fact that decisions are inconsistently available through standard research tools. This means that litigants may have unequal access to potent legal authority.⁴⁴ Consider that in administrative law setting, the Department of Justice could theoretically have access to every case through its internal systems, since 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 through constructive ambiguity. It is now permissible to tell courts about unpublished cases, but it is not clear if courts must follow them as precedents. This introduces a significant

³⁸ U.S. Const. Art. III.

³⁹ Williams, *supra* n. 31, at 781.

⁴⁰ Williams, *supra* n. 31, at 785.

⁴¹ 235 F.3d 1054 (8th Cir 2000) en banc.

⁴² See Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23 (2005) (explaining reasons for the revision of the rule).

⁴³ See Scott E. Grant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705 (2006).

⁴⁴ See Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems and Legal Malpractice?* 26 MISS. C. L. REV. 185, 203 (2006-2007).

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degree of unpredictability into the system. Litigants have little guidance about whether a previous, nominally unpublished decision will be predictive of future decisions. Attorneys are left to guess or rely on anecdotal experience with individual judges to decide how much to stress unpublished 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.

Selecting Precedents

While much remains 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.” For example, the rule in the largest federal appellate circuit establishes three categories of decisions: Opinions (which is a “written, reasoned disposition” intended for publication), Memoranda (which are similar, but “not intended for publication”) and Orders, which are “any other disposition.”⁴⁵ 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

⁴⁵ Federal Rules of Appellate Procedure (FRAP), Ninth Circuit Rules, R. 36.1.

agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

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.⁴⁶

Only the last three of these criteria are straightforward in their application. The first four are inherently ambiguous, and raise weighty philosophical problems, as we will explore more in Part VI.

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 participate in publication than others.⁴⁷ 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 to publication rates, meaning that men and women seem equally inclined to seek to have their opinions published.⁴⁸ 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.”⁴⁹ Some studies have wondered whether non-publication might be more likely if the court rules for one type of party rather than another, but the evidence seems mixed. In immigration cases, at least those involving an asylum application, judges appear more likely to publish their decision if they rule in

⁴⁶ *Id.*, R. 36.3

⁴⁷ See Donald Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 312-313 (1990); Merritt and Brudney, *supra* n. 28, at 95-97.

⁴⁸ Merritt and Brudney, *supra* n. 28, at 97.

⁴⁹ Merritt and Brudney, *supra* n. 28, at 95.

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favor of granting asylum.⁵⁰ 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.⁵¹

IV. Our Findings: Invisible Adjudication in Immigration Cases

There are eleven circuit courts of appeals that regularly decide immigration cases.⁵² In a previous study, we developed a database of 1646 randomly selected immigration cases filed between April 2009 and 2012 from each of these circuits.⁵³ These cases were drawn from the PACER docketing system, and thus are unfiltered by the court or by research database. The sample thus 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. Others end voluntarily, when the petitioner asks to withdraw the case, or the petitioner and the Department of Justice mutually agree to a remand. In these circumstances there naturally 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.⁵⁴ With these limitations, we had a sample of cases from each of the circuits, as listed in Figure 1.

⁵⁰ David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005).

⁵¹ Merritt and Brudney, *supra* n. 28, at 99.

⁵² The D.C. Circuit and the Federal Circuit do not normally have jurisdiction of immigration cases.

⁵³ Fatma Marouf, Michael Kagan, Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L. J. 337 (2014). 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).

⁵⁴ PACER dockets do not always give access to the judgment, but they do indicate generally whether the denial was based on jurisdiction or on procedural grounds.

FIGURE 1: Sample Sizes

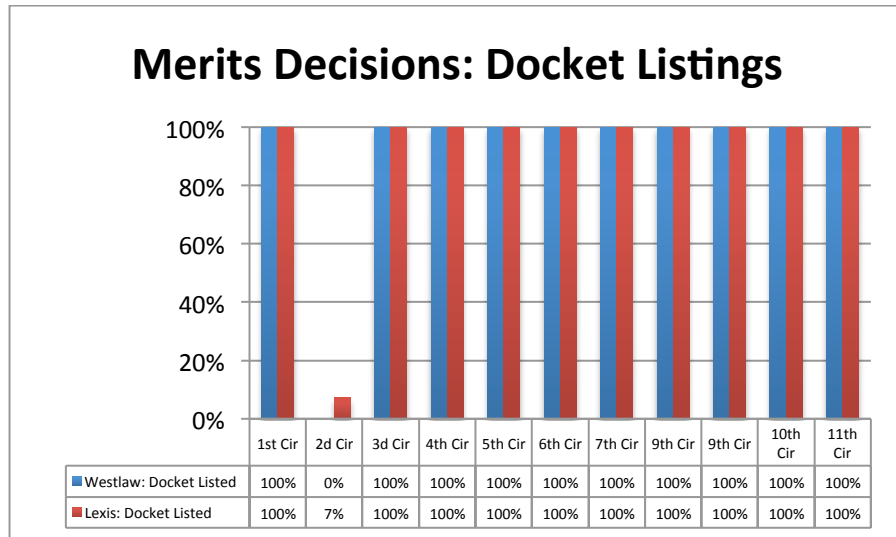
	<u>1st</u> <u>Cir</u>	<u>2d</u> <u>Cir</u>	<u>3d</u> <u>Cir</u>	<u>4th</u> <u>Cir</u>	<u>5th</u> <u>Cir</u>	<u>6th</u> <u>Cir</u>	<u>7th</u> <u>Cir</u>	<u>9th</u> <u>Cir</u>	<u>9th</u> <u>Cir</u>	<u>10th</u> <u>Cir</u>	<u>11th</u> <u>Cir</u>
Merits Decisions (grants and denials)	93	56	78	113	64	84	72	80	74	65	99
Jurisdiction Denials	20	7	22	11	43	19	19	20	32	22	31

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 represent them proportionately.⁵⁵ We kept denials based on jurisdiction separate in our analysis because they might seem ambiguous with regards to the merits of judges producing a reasoned decision. Depending on the situation, jurisdiction might seem clear-cut and nearly mechanical, but it can also lead to ambiguous legal questions.

We next examined whether Westlaw and LexisNexis databases include a listing of the cases. 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 actually access a decision to read. The answer was, generally, yes, albeit with a significant caveat.

⁵⁵ The Ninth Circuit hears the most – as much as 47 percent of all immigration appeals. *See* Kagan, Marouf, Gill, *supra* n. 17 at 690 FN 60. The Second Circuit received the second most. *Id.* at 705.

FIGURE 2



For most circuits, Westlaw and Lexis have a feature that includes the same docket records that are available on PACER. Obviously, 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 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 previously. However, much like PACER, this feature is not useful for normal legal research because it 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:

FIGURE 3

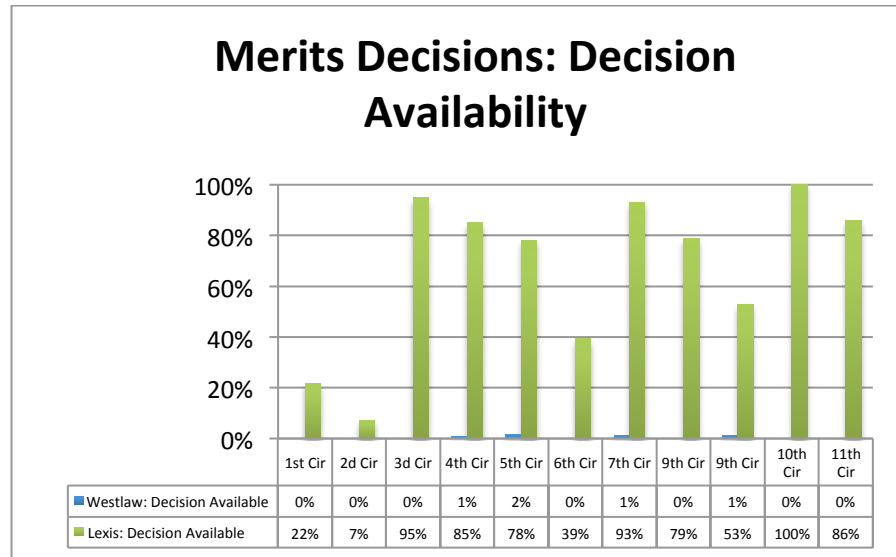
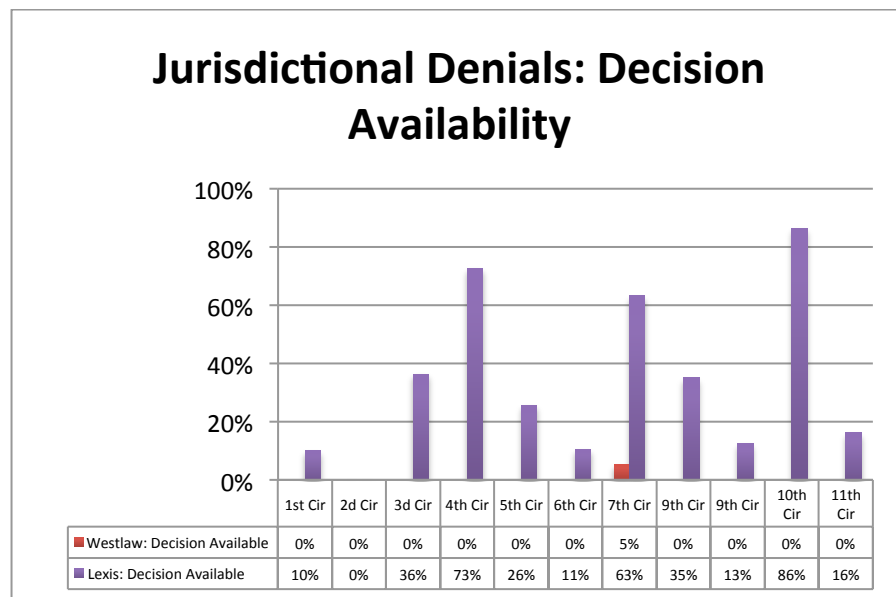


FIGURE 4



The first and most obvious observation to make about this data is that LexisNexis has made significant strides toward

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including otherwise unpublished decisions. Westlaw, by contrast, includes almost now. It is not clear that a user of Westlaw would know this however, which presents a problem that we return to in our Conclusion.

Even looking solely at Lexis, there are large numbers of immigration appeals that are decided on the merits and which are unavailable to the public, to practicing lawyers, and to researchers. The Ninth Circuit alone regularly receives nearly 3000 immigration appeals a year.⁵⁶ Thus, if even a 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, it should be clear 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 with immigration cases than 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ But it is still possible that the courts of appeals have relatively less confidence in the system of 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 court, since the appellate court is actually the

⁵⁶ See Kagan, Marouf, Gill, *supra* n. 17 at 690 FN 60.

⁵⁷ See generally, 8 C.F.R. § 1003 (setting out the composition and functions of the Board of Immigration Appeals).

⁵⁸ 8 U.S.C. § 1252.

⁵⁹ See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 484 (1992) (using the substantial evidence standard in federal court review of factual questions in an asylum case).

first Article III federal court to consider the case. This is merely a theoretical possibility; we do not know that this is actually happening.

While it is difficult to generalize across all areas of federal litigation, the widespread phenomenon of unsearchable, truly unavailable decisions in immigration cases alone raises significant jurisprudential concerns. Immigration appeals now take up an extremely large portion of Courts of Appeals dockets.⁶⁰ They are inherently high stakes, and they concern one of the most controversial subjects in our legal and political system.

V. The Constitutional Dimension

The existence of widespread invisible adjudication evokes comparisons to secret adjudication, a concern that has attracted recent concern in relation to the Federal Intelligence Surveillance Act (FISA) court.⁶¹ 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 agencies, and from the general public. But there are some differences. One is the motivation of 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.

Another important difference concerns *stare decisis*. In immigration cases, and in normal litigation, a case would become unpublished, and potentially invisible, only if it has been designation as a non-precedent by the court. But the FISA court issues precedent decisions that are nevertheless secret.⁶² This is a challenge to core assumptions that we usually make about law being published and transparent, so that all can know in advance

⁶⁰ See Marouf, Kagan, Gill, *supra* n 53, at 339.

⁶¹ See Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, THE NEW YORK TIMES (July 6, 2013).

⁶² Lichtblau, *supra* n. 61. See also Jack Booglin and Julius Taranto, *Comment: Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L.J. 2189 (2015).

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about the rules that govern society.⁶³ As we will see in Part VI, early philosophers of Anglo-American law, especially Jeremy Bentham, argued that establishing and protecting public expectations is a central purpose of law. Secret law by definition cannot accomplish this.⁶⁴ In this respect, 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. But this depends on the assumption that only precedent-setting, law-making decisions are of interest to the public. That is a contestable premise. The lack of public knowledge about FISA decisions is only one problem. As others have written, lack of publication also reduces incentives for judges to write well-reasoned decision that can withstand public scrutiny.⁶⁵ *Stare decisis* is not just a means of making law; it is a means of promoting judicial stability and restraint by holding judges accountable, making arbitrary actions that depart from precedent visible to all.⁶⁶

The practice designating only some appellate decisions to be published precedent developed in response to the practical realities of burgeoning court dockets. But what is clearly convenient is not necessarily constitutional. While courts have continued the practice, they have been unable to entirely shed the constitutional doubt that hangs over it. The fact that many non-precedential decisions are actually invisible using standard research tools is likely to increase these doubts.

The most visible spark for the constitutional critique of non-precedent was the Eighth Circuit's decision in *Anastasoff v. United States*. In 2000, Faye Anastasoff brought a tax dispute with the IRS to the Court of Appeals for the Eighth Circuit.⁶⁷ The primary legal question was about the mailbox rule. Ms. Anastasoff mailed a refund claim two days before the deadline; it arrived at the IRS one day after the deadline. The question presented was

⁶³ See Booglin and Taranto, *supra* n. 62, at 2189 (“the fundamental problem with the FDISA court’s 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 decisions.”).

⁶⁴ See Booglin and Taranto, *supra* n. 62, at 2196 (arguing that law should be standard and knowable, echoing arguments made by Bentham).

⁶⁵ Booglin and Taranto, *supra* n. 62, at 2194.

⁶⁶ Booglin and Taranto, *supra* n. 62, at 2196.

⁶⁷ *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000).

whether she was late under applicable statutory provisions.⁶⁸ Ms. Anastasoff argued that the mailbox rule should apply, which would mean she could get her refund. This was an unresolved question for the Court of Appeal – 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, in *Christie v. United States*, made a similar claim, and had lost.⁶⁹ But *Christie* had been 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.⁷⁰ Naturally, Ms. Anastasoff wanted to make sure that *Christie* remained a non-precedent. Thus, a case about a fairly tedious procedural question in tax law turned into a battle over how modern American appellate courts work.

The Court of Appeals 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.”⁷¹

To support this decision, Judge Richard Arnold conducted a lengthy analysis of the history of judicial precedent at the time of the framing. The crux of his argument hung on two key premises. First, “inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law.” In other words, it is false to assume that courts can distinguish cases that should be used as precedents from those that cannot. This is a

⁶⁸ 223 F. 3d at 899.

⁶⁹ 223 F.3d at 899.

⁷⁰ See *Anastasoff v. United States*, 223 F.3d 898, 899

⁷¹ 223 F.3d at 899.

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contention that echoes a debate in legal philosophy about whether there is any real difference between “easy” and “hard” cases, a question we explore further below in Part VI. The second premise was that there could be no room for making one-off decisions.⁷² 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.’”⁷³ To designate a decision non-precedential “would allow us to avoid the precedential effect of our prior decisions.”⁷⁴ Since 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.⁷⁵

Anastasoff was a shock, and much was written about it.⁷⁶ 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 interest. Whenever a litigant challenges a court’s own rules, the court has an inherent conflict of interest. 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 important 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. Perhaps sensing that more was at stake than the mailbox rule, the IRS decided to simply pay Ms. *Anastasoff*

⁷² 223 F.3d at 901.

⁷³ *Id.* (quoting Blackstone).

⁷⁴ 223 F.3d at 900.

⁷⁵ *Id.*

⁷⁶ See, e.g., 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, *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); Douglas E. Cressler and Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 *IND. L. REV.* 741 (2001).

her refund, and asked the court to vacate the decision as moot.⁷⁷ The *en banc* court agreed.⁷⁸ As a result, there is no binding decision from a Court of Appeals holding that our system of unpublished decisions is unconstitutional. And yet, Judge Arnold's analysis was not reversed on the merits either.⁷⁹

In the 2004-2006 period when Congress held hearings on unpublished decision rules and the Supreme Court ultimately revised the FRAP, *Anastasoff* became the spring board for law review articles arguing against unpublished opinions.⁸⁰ The articles expanded the constitutional objections. Not only was the notion of a non-precedential decision a violation of the vesting clause in Article III. It also might violate procedural due process.⁸¹ Yet, despite the enthusiasm of some scholars, two circuits 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 2001.⁸² Judge Kozinski became a leading proponent of unpublished decisions, later giving testimony to Congress that we have quoted from in this Article. If *Anastasoff* represented one extremity 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.⁸³

Judge Kozinski offered a number of rebuttals to Judge Arnold. As a matter of constitutional law, he questioned whether the vesting of judicial power in federal courts in Article III was actually a limitation on judicial power.⁸⁴ This attacked an essential

⁷⁷ *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*).

⁷⁸ *Id.* at 1056.

⁷⁹ In 2003, a different Eighth Circuit judge referred to it in a concurring opinion, indicating that the constitutional argument still had merit. *See United States v. Yirkovsky*, 338 F.3d 936, 945 (8th Cir. 2003) (J. Heaney, dissenting) (expressing doubt about whether the circuit's unpublished decision rule was constitutional).

⁸⁰ *See, e.g.*, Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621 (2009); Dragich, *supra* n. 24; Wade, *supra* n. 21.

⁸¹ *See Wade, supra* n. 21. Moreover, the pre-2006 rules that prohibited litigants from even citing unpublished decisions might violate the First Amendment.

⁸² *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

⁸³ *Id.* at 1159 (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).

⁸⁴ *Id.* at 1161.

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premise of *Anastasoff*, but it is beyond the scope of this Article. Of greater 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.⁸⁵ The lynchpin of this argument is the premise that today we understand a precedent to be binding on later courts, while until at least the 19th Century English judges declared the law, but could not make the law.⁸⁶ Echoing Blackstone, a single decision should not be rigidly binding because a single judge in a single case could be wrong.⁸⁷ 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 which they disagreed.⁸⁸

As Judge Kozinski and his Ninth Circuit colleagues saw it, our modern system of more 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.”⁸⁹ 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 III. 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 are able to devote to the decision, because he is first and foremost concerned that the judges might make a mistake. Judge Kozinski seems concerned that the cases are hard, and thus a precedent should only be set when a court is able to consider an issue with the care that it deserves.⁹⁰ The first panel to consider an issue might not get it right, even though by definition the first case decided on a

⁸⁵ *Id.* at 1163.

⁸⁶ *Id.* at 1165

⁸⁷ *Id.*

⁸⁸ *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.”)

⁸⁹ *Id.* at 1172.

⁹⁰ *See Id.* at 1170-1171, 1177 (noting that courts only have the resources to craft precedent decisions in some of the cases that come before them).

particular 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 non-precedent decisions serves a similar purpose to the Supreme Court's practice of only granting cert to a small number of cases, on which it can produce fully considered opinions.⁹¹

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.⁹² The Federal Circuit had previously rejected the laches doctrine in two unpublished patent cases.⁹³ Like Judge Kosinski of the Ninth Circuit, 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, noting that Sir Francis Bacon had advised King James I to omit from case reports decisions that were "merely iteration and repetition."⁹⁴ But as in the Ninth Circuit decision, this reasoning blurred the distinction between unpublished and non-precedential.⁹⁵ Moreover, it is one thing to say that cases that merely reiterate established rules can be considered non-precedents. But that does not explain – and the Federal Circuit made no effort to explain – why it designated as non-precedential its only on point decisions on the laches doctrine in the patent context. Clearly 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. The two circuit decisions rejecting *Anastasoff* were published from the revision of the new rule allowing citation to nominally unpublished decisions. This adds lingering ambiguity around the questions. 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 non-precedential

⁹¹ *Id.* at 1177.

⁹² *Symbol Technologies, Inc. v. Lemelson Medical*, 277 F.3d 1361, 1363, 1367 (Fed. Cir. 2002).

⁹³ *Id.* at 1365.

⁹⁴ *Id.* at 1367.

⁹⁵ *Id.* at 1368 ("Unpublished, or as this court calls them, nonprecedential decisions ...").

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decision-makings still pops up periodically, especially when litigants find that the non-precedent 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 non-precedent rule by dismissing a suit on standing grounds.⁹⁶

In 2016, Judge Costa on the Fifth Circuit appeared to endorse *Anastasoff* in a dissent.⁹⁷ 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 decision by the court had found that Georgia “aggravated assault” was indeed a crime of violence.⁹⁸ The two-judge majority of the court found that these cases were not precedential, but “may be considered persuasive.”⁹⁹ It then proceeded to offer several pages of detailed textual analysis of the unpublished cases, much as a court would have in deciding whether to apply a rule from a precedential, published decision.¹⁰⁰ This extensive examination of cases that nominally were not binding precedents formed a backdrop for Judge Costa's dissent:

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.¹⁰¹

The point of this, it would seem, is that judges could in practice treat non-precedent decisions the same as they would precedents, the false distinction would do no more than introduce a new source of apparent arbitrariness to the process.

⁹⁶ *Smith v. Mullarkey*, 484 F.3d 1282 (10th Cir 2007).

⁹⁷ *United States v. Torres-Jaime*, 821 F.3d 577, 586 (5th Cir 2016) (J. Costa, dissenting).

⁹⁸ 821 F.3d at 582 (listing unpublished decisions).

⁹⁹ *Id.*

¹⁰⁰ *See Id.* at 582-585.

¹⁰¹ 821 F.3d at 586 (J. Costa, dissenting).

Judge Costa made an additional point. He noted Judge Arnold's contention that non-precedential decision-making invited inconsistent decision-making.¹⁰² To this, 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.¹⁰³

Judge Costa's revisiting of the *Anastasoff* debates is interesting in that it comes after the FRAP 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. And judges may be tempted to analyze them in considerable depth. What then is the point of calling them unpublished?

In response to these questions, Judge Costa argued that judges' should just try to get the law right, not just follow precedent rigidly. Rather than argue over whether a past decision can be considered a precedent, judges should 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. As we will see in Part VI, this is in line with what Blackstone argued should

¹⁰² *Id.*

¹⁰³ *Id.*

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be the role of the judge. Precedent is evidence of the law, not the law itself. But while another writer might see this a good reason to not insist on publishing every decision, Judge Costa saw it as a reason to minimize the difference between published and unpublished cases. All of them might inform decision-making in a present case, and any past decision might be discarded as a precedent if it turns out to have been wrongly decided. But this would of course require a weaker adherence to precedent than we often take for granted.

There is another lingering problem signaled by *Anastasoff*, *Hart* and the more recent Fifth Circuit case. Even assuming the propriety of the present system, are courts doing a poor job of designating which of their decisions should be precedential? In each of these cases, litigants confronted a situation in which the only on point decisions were designated non-precedents. The decisions clearly addressed an unresolved question, 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? As we will see in Part VI, 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 non-precedent is that courts will be tempted to behave arbitrarily. Since 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.¹⁰⁴ While decisions may not be binding, if judges become nakedly inconsistently in their decision-making, they can be publicly critiqued. Since non-precedent 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 suggests – that

¹⁰⁴ Cf. Kozinski, *supra* n. 27 (arguing that there is no sign of court deviance from established rules, and that decisions are available to the public).

this transparency is a myth, the dangers of judicial arbitrariness seems considerably more acute.

VI. Philosophical Dimensions

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 18th Century disagreements between William Blackstone and Jeremy Bentham. Had Bentham been more influential in American law, it would be difficult to see a place for unpublished decisions today. The fact that unpublished decisions are routine owes a great deal to the fact that Blackstone had more influence in this country.

Bentham generally favored codification of law, preferring legislation over the common law approach.¹⁰⁵ For him, legislation would be the preferred route to legal reform. 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.¹⁰⁶ On the other side, Blackstone famously defended the incremental approach of the common law, which frustrated Bentham's ambitions for more rapid legal reform.¹⁰⁷ Not surprising for a critic of the common law, Bentham distrusted lawyers and judges, and wanted to limit the powers of the latter.¹⁰⁸ 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

¹⁰⁵ See Dean Alfange, Jr., *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 70-71 (1969) ("Nothing not in the Code would have force of law.").

¹⁰⁶ See Richard A. Posner, *Blackstone and Bentham*, 19 J. L. & ECON. 569 (1976).

¹⁰⁷ See generally Richard A. Posner, *Blackstone and Bentham*, 19 J. L. & Econ. 569, 593-597 (1976).

¹⁰⁸ See Alfange, *supra* n. 105, at 58, 70-71 (even when legislation proved unclear, Bentham preferred to refer questions back to the legislature rather than rely on judges to interpret).

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protect individual expectations, which required that law be both cognizable and accessible.¹⁰⁹ As a means to protect expectations, Bentham advocated strict adherence to *stare decisis* as a check on judges.¹¹⁰ By contrast, Blackstone was comfortable with judges occasionally making exceptions and creating legal fictions in order to avoid an inequitable outcome that would result from strict application of existing rules in a particular case.¹¹¹

The Blackstone-Bentham disagreement can be understood in part as a disagreement about whether politicians or judges are the greater threat. Blackstone had 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.¹¹² Coke believed that precedent restrained arbitrary action, but also required a decision-maker who was well-versed in the accumulated body of common law.¹¹³ 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.¹¹⁴ 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 are willing to place in lawyers and judges has a great deal to do with how they might think about non-publication 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.¹¹⁵ Precedent decisions are the best evidence of the

¹⁰⁹ See Alfange, *supra* n. 105, at 65.

¹¹⁰ See GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 193 (1989).

¹¹¹ Posner, *supra* n. 106.

¹¹² See Stucky, *supra* n. 29, at 413.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Postema, *supra* n. 110, at 194.

law, but judges may also make mistakes about the law.¹¹⁶ This understanding sanctifies the law in a theoretical sense, since 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, to discern the correct rule and to detect errors. A Blackstonian approach makes adjudication inherently unpredictable, and this offends Bentham's belief that the public should have reliable expectations about how courts would behave.¹¹⁷ 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.¹¹⁸

From this very brief 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. Since 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, since 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 non-publication, Blackstone wanted the courts to eventually get things right more than he wanted them to be consistent. But 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 major 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 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 necessarily apply rules consistently. This

¹¹⁶ *Id.* at 194.

¹¹⁷ *Id.* at 195.

¹¹⁸ *Id.* at 195-197.

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general argument features prominently in contemporary critiques of unpublished decisions in the federal courts.¹¹⁹

The differences between Bentham and Blackstone 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 essays 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.¹²⁰ 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.¹²¹ By contrast, Dworkin’s disciple, Andrei Marmor, famously declared that “there are no easy cases.”¹²²

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.¹²³ 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” case in the sense that it did not raise new doctrinal questions in criminal law. Likewise, many law school exam questions may fall into a category of cases that are challenging to get right, but nevertheless have a clearly right answer.

The system of publishing only some decisions as precedents makes perfect sense if we accept the easy-hard distinction. Hard cases refine the law and tell us something new about it. Easy cases don’t. On an easy case, a court should focus on just getting the decision right. But it need not labor to produce

¹¹⁹ See, e.g. Dragich, *supra* n. 24, at 760 (selective publication “impedes the development of a coherent body of decisional law, frustrates lawyers and judges in performing their daily tasks, and threatens the legitimacy of the federal courts.”).

¹²⁰ See ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 95 (2005).

¹²¹ See text, *supra*, at n. 45

¹²² Andrei Marmor, *No Easy Cases?* 3 CAN. J. L. & JURISPRUDENCE 61 (1990)

¹²³ MARMOR, *supra* n. 120, at 97.

the 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 – i.e., 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 does not seem objectionable.

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 to rules in predicting the behavior of courts.¹²⁴ This skepticism of doctrinal rules of rule leads to a focus instead on actual judicial decisions, and to a desire to predict future decisions in place of an attempt to discern legal rules.¹²⁵ An extreme version of this “decision theory” or “prediction theory” would be Jerome Frank’s statement that “All decisions are law. The fact that courts render these decisions makes them law.”¹²⁶ If this were 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 clearly need to see the decisions if we are to understand anything about law. However, this version of the prediction theory is problematic because it has little or no room to acknowledge that a judge could be wrong.¹²⁷ Moreover, it leaves no place for legal authorities like statutes and constitutions, which are not decisions, but mere statements of rules.¹²⁸ For these and other reasons, Brian Leiter has declared the Hart-Dworkin debate over, with Hart the winner and Dworkin irrelevant.¹²⁹ This may be a significant reason why we have generally accepted that not all judicial decisions are published; we accept that rules of law matter more than individual

¹²⁴ Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917-1918 (2005).

¹²⁵ Green, *supra* note 124, at 1926 et seq.

¹²⁶ *Id.* at 1930.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1926 et seq.

¹²⁹ Leiter, *supra* n. 136, at 154.

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cases. However, even if we agree that the positivists generally get the better of this argument, some of the doubts raised by Dworkin and Bentham may yet give us cause for worry.

But even if rules of law do matter, the prediction theory may still have force in a more nuanced way. Part of the problem with the prediction theory is that it is often expressed in an extreme form that leaves no room for rules to play any role. But it is possible to accept the supremacy of rules and still care about judges' actual decisions. 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.¹³⁰

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.¹³¹ At first glance, this 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.¹³² But that would clearly go too far. 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. The rule anchors the individual decisions, which are made by umpires who are trying to apply the rule in good faith.¹³³ It is thus perfectly reasonable to conclude that a particular umpire is applying the rule wrong.¹³⁴

As Green explained, “The rule sets up a broad standard of *reasonableness* beyond which the umpire's rulings will be invalid.”¹³⁵

¹³⁰ CNN.com, *Roberts: 'My job is to call balls and strikes and not to pitch or bat'* (Sept. 12, 2005), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html>.

¹³¹ Green, *supra* note 124, at 1991.

¹³² *Id.* at 1992.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1992-1993.

This comment about baseball is similar to recent scholarship observing the way that legal doctrine anchors and constrained judicial analysis, if one assumes that rules are indeterminate and the individual judges differ.¹³⁶ Extending this logic, the 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 even handed with both teams. But the players need to be able to see all of 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 better 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 his routine decisions just as much. In this way, the fact that rules govern does not obviate the need to know and to 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 not fully justify what courts are actually doing, and thus 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 a major theme of our studies on how the federal courts of appeal resolve requests for stays of removal in immigration cases.¹³⁷ Like requests for preliminary injunctions, such requests require courts to decide whether a petition is likely to succeed on the merits, which is a high substantive legal question, and not an inherently easy one. We found that the courts are quite inaccurate in their predictions

¹³⁶ See Shyamkrishna Balganesh, *The Constraint of Legal Doctrine*, 161 U. PA. L. REV. 1843, 1847-1850 (2015) (discussing multiple ways doctrine constrains decisions). See also Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 280 (1997) (arguing that judicial decisions are not in fact unfettered).

¹³⁷ See Marouf, Kagan, Gill, *supra* n. 5.

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about how cases will be resolved on the merits.¹³⁸ But courts are also divided doctrinally about how to apply the preliminary injunction standard, in that the very few published decisions reveals a circuit split about what the preliminary injunction standard should actually mean.¹³⁹ The 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. Yet, it certainly seems that this is a question that should benefit from incremental refinement of the law through the process that Blackstone outlined. But it is not clear that this happens effectively because it is rare for such preliminary decisions to be published, and in fact it is the norm for them to be entirely unreported.¹⁴⁰ It seems likely that there are many “hard” decisions about whether to grant a stay of removal at the beginning of an immigration appeals, but these decisions are normally invisible. It is understandable why courts would not want to devote extensive effort to articulating their rationales in preliminary decision-making in a routine case. But while the efficiency is 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 that it is necessarily “easy” in a substantive sense.¹⁴¹

Second, even if easy and hard cases are theoretically distinct, we still have to trust actual judges to make the distinction. 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. Or, more likely, 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 overstretched

¹³⁸ *Id.*

¹³⁹ *Id.* at 349-356.

¹⁴⁰ *Id.* at 359, 361.

¹⁴¹ Many important and closely divided Supreme Court cases are technically decided at the preliminary injunction stage. *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012); *United States v. Texas*, 579 U.S. ____ (2016).

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.¹⁴² The Ninth Circuit's Judge Kozinski told Congress that this is common:

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.¹⁴³

Such compromises are plausible given evidence that judges minimize the use of dissents and value collegiality on the bench.¹⁴⁴

The scenario that led to the Eighth Circuit's decision in *Anastasoff* adds some weight to the critique that easy and hard case distinction is not workable in practice. In that case, the Eighth Circuit had previously issued an unpublished opinion that seemed to answer a question about the mailbox rule for which there was no other legal authority.¹⁴⁵ This suggests that the original, unpublished decision was actually a hard case, involving 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

¹⁴² See Kozinski, *supra* n. 27 (arguing that if all cases were citable, judges would feel they have to make more dissents).

¹⁴³ *Id.*

¹⁴⁴ See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND 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)

¹⁴⁵ Williams, *supra* n. 31, at 779

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became so decisive in a tax case suggests either that all cases have potential value to make law, even if they appear inconsequential at first, or that judges are not able to reliably decide which cases should be published and which should not.

Even if we are comfortable with non-precedential 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 it does 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. When courts decide to not 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 major legal databases, which is especially likely if the court issues no written decision at all, and if the decision is on a preliminary question. The most invisible decisions maybe those for which transparency may be most important to maintain confidence in the judiciary.

This philosophical background suggests that the existence of invisible adjudication could unsettle the unsteady *détente* in this centuries-old debate. The apparent availability of unpublished decisions on standard legal research tools helps to diffuse misgivings about courts' insistent on only designating some decisions on precedents. This apparent transparency accomplishes two things. Anyone who wants to know how courts will behave in minor or "easy" cases can see what the courts are doing. This answers Bentham's concerns about public expectations. Moreover, since unpublished decisions can now be cited, a party who can show that she is disadvantaged by a court's refusal to publish certain decisions can 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 of cases that never appears in Westlaw or Lexis, this transparency would appear to be just a *façade*. And if that is the

case, doubts about the legitimacy of the system could grow once again.

VII. Conclusion: Toward a Study of Invisible Law

A significant doubt about unpublished decisions relates to legal scholarship. 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 actually 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. Scholars may not even always be fully conscious of this choice, because it is implemented through research databases. Obviously, if scholars want to investigate anything other than formal legal doctrine, this is a problem. For instance, the cultural study of the law focuses on “law as a social practice.”¹⁴⁶ If one starts with the question “how do people experience and interpret law in the context of their daily lives?”¹⁴⁷ then it matters little whether the legal questions involved in particular cases are easy or hard.

A straightforward solution involves the research databases themselves. We would recommend that commercial legal databases endeavor to include the full universe of decisions in their databases, at least for appellate courts. Our data indicates LexisNexis currently includes more otherwise unpublished circuit court decisions than does Westlaw. This may be for now a competitive advantage for Lexis, but it is a problem for legal practice because some firms may subscribe to only one 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 research based on the database.

¹⁴⁶ PAUL KAHN, *CULTURAL STUDY OF THE LAW* 37 (2000).

¹⁴⁷ PATRICIA EWICK AND SUSAN S. SILBEY, *THE COMMON PLACE OF THE LAW* 33 (1998).

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Another problem concerns transparency in research databases. Outside the Second Circuit,¹⁴⁸ both Westlaw and Lexis seem to have a complete listing of appellate dockets, but they include only a fraction of the actual decision in these cases. But these dockets 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 or Lexis give researchers the misleading option to show non-reported decisions in search results, which can create the false impression that the database actually includes all such decisions. It would be more informative for the database to tell a user that a percentage of decisions is unavailable and not included in search results.

Scholars can also address these gaps in various ways. One, of course, is empirical legal scholarship, which aims to understand judicial behavior quantitatively 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 become better able to 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 can analyze. Non-precedential decisions are not a particular problem if they are accessible. But invisible cases are a serious challenge.

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 non-publication system is far less transparent than it appears, it means we have to trust judges even more than previously thought. This is a difficult requirement, for two reasons. First, some legal thinkers are reluctant to trust judges much to begin with. Second, the argument for distinguishing precedent and non-precedent cases acknowledges a significant potential for judicial error. This is

¹⁴⁸ We recommend that the Second Circuit work with legal research services to correct this problem.

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key to Blackstone's approach to precedent. And it is central to both Judge Kozinski and Judge Costa's arguments – even though they reach opposite conclusions about the propriety of non-publication. If judges are prone to make mistakes, it would seem to be even more important to be able to see what they are doing.