ON *NOT* MAKING LAW

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I

INTRODUCTION

Consider the following scenario:

A three-judge panel on a federal court of appeals has before it a complex securities law case. Each of the three judges on the panel is a former criminal lawyer. Among the three, the only experience any one of them has with securities law is a single course on the subject that one of them took thirty years ago.

The central issue in the case is both difficult and close. Although there is no useful case law on point, the issue frequently arises both in litigation and in practice. Many cases have involved the issue, but each court has found an alternative basis to decide the case before it, leaving the issue unresolved. Presently, at least two district court cases that raise a similar issue are on appeal in other circuits. If the panel tackles the issue squarely, its decision is likely to affect both the pending litigation in those other cases and the behavior of corporate actors in future transactions.

The judges do not have strong feelings about how the case should come out. Each side has made out a strong case. The judges are, however, concerned about the amount of time and effort that writing an opinion in this case is likely to take. Given the lack of expertise, the judges are each concerned about the errors they might make in an opinion. Errors here are likely to be costly not only because the opinion will be binding precedent in this circuit, but also because the opinion is likely to influence other circuits. Furthermore, the judges on the panel do not relish the prospect of receiving criticism from commentators, from panels in other circuits, and worst of all, possible reversal by either an en banc *panel or the Supreme Court. In sum, writing and publishing an opinion in this case has a high downside and little upside.*

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Given the high downside of writing and publishing an opinion in this case, the panel decides to affirm the district court's decision "without comment." In other words, the panel decides not to make law.

What is an external observer to make of the above scenario? The panel did not explain why it chose not to provide an opinion in this case. One is forced, therefore, to hypothesize about what might have occurred within the black box of the appellate panel's deliberations. As in the movie *Rashamon*, in which each of the witnesses to a crime interprets differently what he or she saw, one can tell the story of what the panel's deliberations might have been from multiple perspectives. At the two ends of the spectrum of perspectives are the following two stories: one of legitimate behavior and the other of illegitimate.

Perspective A: The panel may have determined that some procedural justification allowed it to avoid the difficult substantive law issues raised in the case. For example, the issue may have been waived because it was not asserted properly.

Perspective B: The panel may have decided (perhaps subconsciously and without explicit articulation) that tackling the substantive law issues in the case would take too much time and effort. Furthermore, given their lack of expertise in the area, the judges may have determined that any opinion they might write posed a greater risk of confusing the law than of clarifying it. "Perhaps," they may have thought to themselves, "it would be better to save our time and effort for a case in which we can make good law." As for providing the parties with justice, each side had made out a strong case and an affirmance may have seemed just as fair an outcome as a reversal.

One might ask: Why posit the second story? After all, there are explicit circuit rules that prohibit such behavior. Would judges ever act in this manner? Examining court norms or culture helps to answer these questions, which are raised in our opening hypothetical. This article begins by examining the Third Circuit's extensive use of the without-comment disposition from 1989 to 1996. We ask the question whether, even among rational justice-seeking judges, a norm could develop in which some fraction of the circuit's hardest cases are systematically disposed of without comment. We argue that the nature of incentives and constraints operating on appellate judges makes the development of this norm at least plausible. The data on the Third Circuit's publication practices does nothing to dispel the hypothesis that such a norm might in fact have developed. It is, of course, possible that such a norm never developed—and we have been told in no uncertain terms that such a norm never did and never could have developed—but the problem with the use of the without-comment disposition is that it does nothing to reassure the external observer. The observer is left to guess about what might have happened. The point is that, in the absence of adequate external scrutiny—which dispositions such as the without-comment disposition make nearly impossible—the only force that would prevent such a norm from arising is a strong countervailing norm that such behavior was unacceptable. But how does one know whether such a coun-

tervailing norm exists? The lack of an answer leads to two options: Either severely curtail practices such as the use of the without-comment disposition—practices that may bring efficiency gains—as the Third Circuit has done, or generate enough information about the cultures and norms under which judges operate to assure the public that judges are acting in a legitimate manner.[1]

Having argued that it is important to think about court norms, we describe data on the publication practices of the various circuits. The data suggests that there are radical differences in the norms that exist across these circuits. These divergent norms mean that justice is being administered in significantly different ways across the circuits in what is supposed to be a uniform federal court system.

II

THE "WITHOUT COMMENT" DISPOSITION

There has been a dramatic increase in the federal appellate caseload since the 1960s, estimated at as much as 1000%.[2] The corresponding increase in the number of appellate judges has been less dramatic—from eighty-eight in 1964 to 179 in 1997[3]—leading to the much discussed crisis of volume.[4] There are too many cases and too few judges to decide them—at least in the manner cases once were decided, when oral argument was heard and opinions were written in every case.[5] Constrained by a lack of resources, the circuit courts have turned to shortcuts. These include the denial of oral argument, judicial encouragement to settle or use alternative methods of dispute resolution, the extensive

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1. For a recent example of work that thinks seriously about norms and judicial behavior, see Evan Caminker, *Sincere and Strategic Voting on Multi-Member Courts*, 97 MICH. L. REV. (forthcoming Aug. 1999) (draft on file with authors).

2. *See* Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 25.

3. *See* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 14, tbl.2-3 (1998) [hereinafter STRUCTURAL ALTERNATIVES REPORT].

4. *See, e.g.*, *id.* at 13-17. "Since 1960, circuit judgeships have grown by roughly 160%, but appeals per judgeship have grown by 450%." *Id.* at 14; *see, e.g.*, THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 31 (1994); FEDERAL CTS. STUDY COMM., JUD. CONF. OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990); RICHARD A. POSNER, FEDERAL COURTS: CHALLENGE AND REFORM 132 (1996); Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97 (1994); Jonathan D. Varat, *Determining the Mission and Size of the Federal Judiciary via a Three-Branch Process: The Judges' Debate and a Reform Menu*, 27 CONN. L. REV. 885, 887 (1995).

5. *See* Leonard I. Garth, *Views from the Federal Bench: Past Present & Future*, 47 RUTGERS L. REV. 1361, 1364 (1995) (recollecting that, in the early 1970s, judges on the Third Circuit heard oral argument and wrote opinions in all of their cases); Walter K. Stapleton, *Speech on the Federal Judicial System in the Twenty-First Century*, 14 THIRD CIR. J. 1, 4 (Issue 2, 1997) (describing the per-judge increase in caseload—from approximately 90 in 1970, to above 400 in 1994—and the difficulty in giving cases adequate attention). For automatic appeals in criminal cases, see PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 76-78 (1976), commenting on *Anders v. California*, 386 U.S. 738 (1967), and the reversal of conviction after appointed counsel explained the hopelessness of the client's position.

use of staff attorneys and law clerks in the decisionmaking process, and the use of short-form dispositions in place of published opinions.[6]

The short-form disposition shortcut has two basic versions: first, a terse, not-for-publication opinion; second, a disposition without any comment whatsoever.[7] A common characteristic of these short-form dispositions is that, while rendering a decision on the merits of the case, they do not make law, that is, such dispositions have no precedential value.[8] This approach brings us closer to the code systems of Europe in which case law plays a much less central role. The resource-saving rationale is that, because the dispositions are not precedential, judges can afford to spend less time crafting these opinions.[9] The risk, however, is that judges will be tempted to use nonprecedential short-form dispositions not only in cases that would not have created precedent even if disposed of by a full opinion, but also in cases in which a full opinion would have created precedent; after all, the harder the case, the greater the saving in judicial resources.[10] In addition, since the short-form dispositions have no (or neg-

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6. *See, e.g.*, Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913 (1995); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 37-51; Statement of the Honorable Joseph W. Hatchett Before the Commission on Structural Alternatives for the Federal Courts of Appeals (Mar. 23, 1998) <http://app.comm.uscourts.gov/hearings/atlanta/hatchett.htm> (describing the means used by the Eleventh Circuit to keep up with its workload, which include "hiring a large staff of attorneys, enlisting the services of visiting judges, and hiring more law clerks").

The English system, which diverges considerably from ours, has continued to rely on oral argument much more extensively than we do, although even in England it is decreasing. Furthermore, English judges may be seen to do justice when they render oral opinions from the bench after oral arguments. *See, e.g.*, JACKSON'S MACHINERY OF JUSTICE (J.R. Spencer ed., 1989); P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 277-79 (1987); PATRICK DEVLIN, THE JUDGE (1979); JACK I.H. JACOB, THE FABRIC OF ENGLISH CIVIL JUSTICE 19-20 (1987); JOHN MORISON & PHILIP LEITH, THE BARRISTER'S WORLD AND THE NATURE OF LAW (1992).

7. *See* Baker, *supra* note 6, at 927-30; Dragich, *supra* note 6, at 763.

8. In 1964, the Judicial Conference of the United States formally resolved that publication would be reserved for opinions having "general precedential value." JUDICIAL CONF. OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964). Each circuit thereafter adopted its own rules regarding nonpublication. *See* Dragich, *supra* note 6, at 762 n.17 (describing the different circuit rules governing the propriety of citing unpublished opinions and noting that in a few circuits unpublished dispositions may be cited for certain specified purposes).

We are aware of the debate over what a "precedential" opinion is. In stating that precedential opinions should be published, circuit rules typically draw a sharp distinction between opinions which are precedential and those which are not. In reality, however, the distinction is far from sharp, and one might argue that every decision or even utterance by a court has a modicum of precedential value. It has been pointed out to us, therefore, that the real distinction drawn in the circuit rules between precedential and nonprecedential opinions is the distinction between those opinions having *substantial* precedential value and those that do not. The data in Tables IV-XI, printed in the Appendix to this article (*see* pages 211-23), suggest that different circuits make this judgment differently.

9. For a critique of this rationale, see William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 579-80 (1981).

10. *See generally* Thomas B. Marvell & Carlisle E. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REFORM 415, 441 (1988)

ligible) precedential value, they are subjected to less scrutiny from the external world (particularly commentators, lawyers, and other courts).[11]

In theory, internal circuit rules constrain the use of these short-form dispositions. These dispositions are supposed to be used only in cases in which a published opinion would have no precedential value—only in *easy* cases.[12] The problem arises at the margin, in cases in which it is unclear whether existing precedent *fully* determines the outcome. In such cases, as appellate panels exercise discretion in deciding whether an opinion would have precedential value, room for abuse exists.[13]

Our central observation, however, is that it is short-sighted to focus on the externally stated publication rules of the circuits and the minor expansions in the interpretations of those rules. We hypothesize that in practice these externally stated rules are not being observed. Instead, the behavior of judges is primarily governed by internally generated norms that can be altogether different from the officially stated organizational rules.[14] For us to understand publication practices, therefore, we should focus on the norms governing judicial behavior—that is, look beyond the formal rules on case disposition.[15] Furthermore, to the extent the evolution of these norms across the circuits is a response to the crisis in volume, the norms should converge across circuits to the same group-welfare maximizing point.[16] In practice, however, there is a divergence in norms not easily explained by intercircuit differences in caseloads.

("Deciding cases without opinion greatly increases court output."). *See also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 126 (1985) (noticing that the "unpublished opinion provides a temptation for judges to shove difficult issues under the rug, in cases where a one-liner would be too blatant an evasion of judicial duty").

11. *See* William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1200 (1978).

12. Judges and commentators commonly divide cases into the two broad categories of "easy" and "difficult" for simplification. *See, e.g.*, LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 66 (1997); FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 275 (1994); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 132-33, 157, 161 n.1 (1990); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805-07 (1982).

13. *Cf., e.g.*, BAKER, *supra* note 4, at 125 (noting that "some courts are silently deciding appeals that twenty years ago would have been thought to merit a full opinion"); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275-76 (1996) (discussing how little time judges spend on some cases, particularly those in which no opinion is published).

14. *Cf.* GEORGE C. HOMANS, SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS 97 (rev. ed. 1974) (defining a norm as "a statement specifying how one or more persons are expected to behave in given circumstances, when reward may be expected to follow conformity to the norm and punishment deviance from it."); POSNER, *supra* note 4, at 167 (observing that although publication rules exist, courts often ignore them).

15. Many articles discuss formal publication rules. *See, e.g.*, George C. Pratt, *Summary Orders in the Second Circuit Under Rule 0.23*, 51 BROOK. L. REV. 479, 499-502 (1985); Reynolds & Richman, *supra* note 11; Reynolds & Richman, *supra* note 9; David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977); Kerri L. Klover, Note, *"Order Opinions"—The Public's Perception of Injustice*, 21 WM. MITCHELL L. REV. 1225, 1283-94 (1996).

16. *Cf.* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167 (1991) (putting forward the thesis that norms in closely knit groups evolve toward the point at which they maximize group welfare). Professor Richard Abel has pointed out to us, however, that one com-

Our study's primary lens is the Third Circuit's use of the without-comment disposition, in the Third Circuit's terminology a "JO" (an abbreviation for "Judgment Order"), which was a significant method of disposition when we undertook our study.[17] From 1989 to 1996, the Third Circuit not only used the JO in approximately sixty percent of its cases, but it also may have used the JO in some of its hardest cases.[18] By contrast, the majority of other circuits, while using other short-form dispositions, almost never used the JO form of case disposition.[19] We examined carefully both the evolution of this different norm in the Third Circuit and its implications for the system. Although the extensive use of the JO is limited to a few circuits, other methods of short-form case disposition—such as signed, unpublished opinions or unsigned, unpublished opinions—were used extensively by a few other circuits. Some circuits did not use short-form disposition at all. Significant disparities in case disposition methods and precedent creation thus exist across all circuits. (Since 1996, however, the Third Circuit appears to have sharply curtailed its use of the JO. The percentage of cases disposed of without comment dropped from 62.3% in 1996 to 52.9% in 1997, and to 32.8% in 1998. We have been informed that this percentage has dropped to below five percent in 1999.[20])

A number of academics and judges have examined the implications of the increasing use of short-form dispositions.[21] The disposition without any comment, although almost always condemned, has received minimal attention.[22] The literature apparently assumes that, to the extent that the rules requiring that short-form dispositions be used only in easy cases are not followed, the expanded use of short-form dispositions occurs in cases at the margin—that is, in the less difficult, not highly difficult, cases.[23] There is likely truth to this sugges-

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ing from an anthropological rather than law and economics tradition might expect divergence rather than convergence.

17. We use the terms "without-comment disposition" and "JO" interchangeably. However, it has been suggested that the terminology may not be as precise as we would like. Apparently, the statistics on without-comment dispositions produced by the Administrative Office of the Courts may include dispositions on matters such as NLRB enforcement orders and *pro se* mandamus petitions in which reasoned opinions are unlikely as a matter of course. In addition, on circuits other than the Third Circuit, the JO can sometimes refer to a disposition that does have a minimal statement of reasons, such as with the Supreme Court's recent reversal of an Eleventh Circuit JO disposition. *See* Haddle v. Garrison, 119 S. Ct. 489 (1998).

18. *See infra* tbl. I, printed in the Appendix to this article (*see* page 208).

19. *See id.*

20. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. S-3 (1996-1998). As far as we can tell, the norm shift on the Third Circuit is not a function of a change in caseload, but of a voluntary shift in norms.

21. *See, e.g.*, POSNER, *supra* note 4; Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986); Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405 (1994); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766 (1983).

22. *See, e.g.*, Baker, *supra* note 6, at 927-28; Pratt, *supra* note 15, at 499-502; Robel, *supra* note 6, at 50-51.

23. *See* POSNER, *supra* note 10, at 126. *See also* William Glaberson, *Case Load Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, March 14, 1999, at 1:

tion; as caseload pressures increase, judges will exercise their discretion to move a larger number of marginal cases from the "hard—warrants published opinion" category to the "easy—published opinion unwarranted or perhaps no opinion" category. In circuits in which an extensive use of the JO has become acceptable, however, an alternative norm may have developed—or so we suggest, based on a simple model of judicial incentives and constraints. The risk of rule violation is greatest not in the marginal, less important, cases, but in the hardest or most difficult cases, cases in which an opinion would have far-reaching effects in terms of influence.[24]

We examine several factors that might explain why judges use the JO in their hardest cases, and we analyze these factors within an optimization model. In this model, judges maximize happiness subject to constraints such as the rules governing their behavior and caseload pressures. Although as a formal matter circuit rules constrain judicial behavior, the rules amount to little more than statements of proper judicial behavior. In turn, the real constraints on the publication and case disposition practices of judges are informal.

Part III examines the incentives to use the JO (particularly in the harder cases) and describes the basic data on the patterns of use of this method of disposition. Judicial behavior is largely constrained by a combination both of informal external and of internal monitoring and sanctioning. In particular, there is an absence of external monitoring of the use of the JO; this provides a strong incentive to use the JO not only extensively, but also in the hardest cases. Part IV explores the costs and implications of this norm. Use of the JO in certain harder cases may not necessarily harm either the court's performance of its error-correcting function or the development of precedent. Nevertheless, other possible detrimental effects include the risk that the use of the JO in hard cases

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> Complex civil rights, antitrust, and other cases that appeals judges deem important get the same detailed consideration as always. But some judges and legal scholars say that entire classes of appeals deemed routine, such as petitions from prison inmates and individuals' disability claims under Social Security, get abbreviated attention as staff lawyers sort out cases to recommend for full hearings.

24. Although we focus on the incentives to use the without-comment disposition in the hardest cases, it has been suggested to us that a number of the short-form so-called "reasoned" dispositions used by circuits such as the Ninth (which appear to give reasons in almost all of their cases) are, in effect, unreasoned dispositions. *See* Brief of *Amicus Curiae* in Support for Defendant-Appellant's Petition for Rehearing and Suggestion of *En Banc*, United States v. Brian, 164 F.3d 632 (9th Cir. 1998) (Nos. 97-50285 and CR 75-783-RSWL) (on file with authors) (brief submitted by a group of law professors and lawyers suggesting that the Ninth Circuit is using the equivalent of unexplained dispositions in complex nonfrivolous cases); *see also* Reynolds & Richman, *supra* note 9, at 602 tbl.10 (finding that approximately 34% of the Ninth Circuit's unpublished dispositions failed to meet minimum standards of a reasoned disposition). Nevertheless, we think there is an important distinction between dispositions that provide no reasons and those that provide some reasons, no matter how minimal. Assuming that the most minimal disposition is nothing more than an "affirmed based on the district court's rationale" or "affirmed based on our opinion in case *x*" there is still something that an expert lawyer could work with in constructing an *en banc* or *certiorari* petition. *See, e.g.*, Haddle v. Garrison, 119 S.Ct. 489 (1998) (reversing an Eleventh Circuit judgment order where the Supreme Court was able to discern the case on which the circuit court had decided to affirm).

may create the perception that judges are not paying attention to litigants.[25] Part V builds on the preliminary data on the use of the JO and looks at publication practices across the circuits. The data suggest that there are significant disparities in the publication norms across the circuits.

Finally, Part VI summarizes our observations and examines the need for solutions. Internal norm-based mechanisms may be the optimal form of control for both cost and efficiency for the circuits. Therefore, we hesitate to recommend drastic reforms. Indeed the practice that we focus on most critically, the Third Circuit's extensive use of the JO, appears to have been voluntarily ended by the judges on that circuit. Norm-based governance systems, however, present problems, especially in the presence of externalities. Nevertheless, we are optimistic that providing judges with information about the harms certain norms cause will alter these norms because judges do care about external perceptions of their performance.

III

INCENTIVES TO USE THE JO: CONSTRAINTS AND GOALS

In theory, internal circuit rules prevent the use of the JO in hard cases: In general, rules require a written opinion when an opinion would add to or alter existing precedent.[26] These rules, however, are not rules in a conventional sense. Ordinarily, a rule is a prohibition on certain conduct accompanied by both a formal policing mechanism and a set of sanctions.[27] Neither of these accompanies the rules governing circuit court publication practices. No external body polices publication behavior, and there are no official sanctions attached to failures to comply with the publication rules. Litigants who observe rule violations in their cases have no recourse and gain no benefit from pointing out violations. For example, an alternative system might entitle a litigant who revealed failure to give reasons in a hard case to a rehearing of her case. Such a mechanism does not currently exist. The publication rules are solely expressions of desirable behavior. Adherence to these expressions is assumed.[28] Why might we think that such a system could work? What causes the system to break down?

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25. *See* STRUCTURAL ALTERNATIVES REPORT, *supra* note 3, at 24 (noting that the use of a "less than fully reasoned opinion or cryptic [JO], raises apprehensions as to the degree of attention those appeals actually receive from judges themselves").

26. *See* Richman & Reynolds, *supra* note 13, at 281-82.

27. *See* ELLICKSON, *supra* note 16, at 128-29 (describing the characteristics of a rule); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998) (describing the characteristics of a law).

28. In Ellickson's terminology, these circuit rules are no more than "aspirational statements." ELLICKSON, *supra* note 16, at 129. For discussions of the expressive function of law, see Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1008-14 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

A. Rule Constraints: External Scrutiny and Reputational Sanctions—What Everyone Talks About

Given the restrictions on their ability to earn income from outside activities, judges are likely motivated by more than maximizing their personal wealth.[29] They may seek to consume certain minimal amounts of leisure, but this does not seem to be a driving force for these individuals.[30] Judges do, however, care a great deal about reputation, prestige, esteem, and status. Acquiring reputation can be a goal in and of itself. In addition, judges have institutional reasons for wanting the judiciary to be held in high esteem—the judiciary's effectiveness and power is, in part, a function of the trust the public has in it.[31] Judges may care about power and effectiveness because they gain utility from furthering their ideas or normative views of the world.[32] Alternatively, power and effectiveness are required for judges to do their jobs well, which may provide utility as well.[33] Therefore, judges have both personal and institutional reasons for preserving their reputations for adhering to rules.[34] Being detected violating their own public rules of behavior, in theory, should hurt the reputation of both individual judges and of courts as a whole. After all, how can judges be trusted to apply the law to others' cases if they do not follow their own rules? One might think, therefore, that absent a rule permitting the use of the JO in hard cases, the fear of reputational sanctions would keep judges from using the JO in such cases.

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29. *See* Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 738 (1993); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 4-7 (1993).

30. Richard Posner suggests that a number of those selected to be judges will have already internalized strong work norms at the point of being appointed. *See* Posner, *supra* note 29, at 11-12.

31. The "judicial effectiveness" rationale for constrained decisionmaking by judges is most closely associated with Alexander Bickel, who argued that to preserve its legitimacy and power, the Court had to exercise better judgment (in a political sense) in deciding what cases to accept. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 30-31 (2d ed. 1986) (1962). On Bickel and his jurisprudence, see Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 J. AM. HIST. 125 (1992); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998); Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998). Judge Posner suggests that judges invented the category of "advisory opinion" in order "to reduce their work, as well as to avoid the hassle involved in wrestling with difficult, politically sensitive issues." Posner, *supra* note 29, at 21.

32. *See* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994) (hypothesizing that judges opt for discretion-loaded procedural rules that not only enable them to consume more leisure, but also to reach legal results that further their view of the good). Judge Posner has described the utility judges derive from doing their job well as akin to the pleasure of playing a game: Whether one plays to win or for the pleasure of playing, one plays according to the rules or one is not playing the game. *See* Posner, *supra* note 29, at 30 ("[T]he judge must play by the rules of the judicial game, because the rules constitute the game."). For a recent empirical study of the variables that influence judges, see Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind*, 73 N.Y.U. L. REV. 1377, 1383-84 (1998).

33. One might derive utility from fulfilling one's socially constructed role and identity. *Cf.* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (discussing the influence of social norms and roles on behavior).

34. The likelihood of collective action problems is diminished by the team or group-oriented nature of appellate decisionmaking. *See infra* text accompanying notes 38-51.

As with any sanctioning mechanism, however, the effectiveness of sanctions depends not only on the severity of the sanction, but also on the likelihood of detection. Courts do give reasons for the outcomes they reach even in unpublished opinions. An external observer—a litigant or researcher—can examine these reasons. If the reasons implicate important issues and do not follow from existing precedent, it can be discovered. Detection of rule violations may be difficult and expensive—especially if the opinions are not placed online[35]—but, as the growing literature on the subject of unpublished opinions attests, rule violations can be detected.[36]

Abuses of the rules governing the JO are especially hard to detect, however. In a JO, no reasons are given at all. An outside observer must consider all the possible reasons for the disposition. To find a violation, the observer must conclude that the court could have no set of reasons that are nonprecedential—a nearly impossible task given the range of possible nonprecedential rationales, procedural and substantive, that arguably could have justified an affirmance. To some extent, courts are limited to the arguments raised by the parties, but courts can raise some arguments themselves. In addition, the lengthy briefs in well-argued cases often suggest numerous possible avenues to reach an outcome, at least one of which is likely to be both plausible and nonprecedential. In short, it is difficult even for someone with a high level of knowledge of both the circuit's substantive and procedural law to state conclusively that the use of the JO in a particular case constituted a rule violation. The appellate court's failure to give reasons makes it extremely difficult to assert error. The fact that no law was made also makes it unlikely that either the circuit *en banc* or the Supreme Court will grant review.[37] In sum, the external monitoring mechanism is not sufficient to prevent abuse of the JO, creating a situation of *de facto* nonreviewability.

B. Internal Scrutiny and Social Sanctions: The Constraint With a Bite

An effective internal monitoring mechanism to detect overuse of the JO does exist, however, because appellate judges work together, not as individuals. In general, circuit courts hear and decide cases in panels of three judges.[38] Cir-

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35. *See, e.g.*, Kirt Shuldberg, Note, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 567 (1997).

Some circuits make external scrutiny of unpublished opinions more difficult by not placing them on WESTLAW or LEXIS/NEXIS. Nevertheless, these opinions are matters of public record and with persistence are obtainable from the court.

36. *See, e.g.*, Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 128-30 (1995) (identifying examples of cases in which unpublished dispositions should not have been used); *cf.* Edward A. Adams, *Increased Use of Unpublished Opinions Faulted*, N.Y. L.J., Aug. 2, 1994, at 1, 4 (quoting Judge Wilfred Feinberg to the effect that the JO and summary orders in general could be a means for "sweeping tough decisions under the rug"); Robel, *supra* note 6, at 52.

37. *See* Robel, *supra* note 6, at 52.

38. *Cf.* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 82 (1986) (pointing out that while appellate decisionmaking is essentially a group process, most theories

cuit court judges are generalists, not specialists. Because the judges perform identical tasks, have similar qualifications, and make their decisions in teams with shifting composition, internal cross-monitoring could be effective.[39] The judges on a panel know when a JO is used in an especially hard case: The three judges discuss the reasons (or lack thereof) for the disposition. If the practice of using the JO to avoid deciding hard cases is widespread, all of the judges on the circuit will be aware of it.

An internal monitoring mechanism alone, however, cannot deter improper or deviant behavior. Detection has to be accompanied by sanctions. Within the federal circuits, nonlegal, social-sanctioning, internal mechanisms are effective because the courts are small, closed, "collegial" communities composed of professionals who interact repeatedly.[40] The option of exit is limited, obviating the need for a costly, formal policing system. In a closed community, social isolation and the cost of losing respect can be significant enough to constrain behavior. Judges are also constrained in their social interactions with the outside world: They have only their clerks and one another with whom to discuss their cases. Even if some social interaction with the outside occurs, the outside world understands and cares little about the workings of the circuit courts (especially by comparison to the Supreme Court).

The cost of social isolation by and losing trust with the judge's peers is likely to be high in the circuit court community. Nevertheless, these costs do not fully capture either the importance of nontransactional conflicts of interest[41] or the

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"neither explain the group nature of the process nor take it into account"); Caminker, *supra* note 1 (same).

39. *See, e.g.*, Eugene Kandel & Edward P. Lazear, *Peer Pressure and Partnerships*, 100 J. POL. ECON. 801, 816 (1992) (examining the contexts in which mutual monitoring is likely to be effective). Although law clerks are uniquely suited to monitor their judges, given their lower status in the court hierarchy, their low level of knowledge, and their professional dependence on the judges for job recommendations, they are unlikely to raise more than mild objections to their judges' actions. Clerks' disapproval is likely to have far less influence on the behavior of a judge than criticism from a fellow judge.

40. The ideal court has been described as a "cohesive group of individuals who are familiar with one another's ways of thinking, reacting, persuading, and being persuaded . . . an institution—an incorporeal body of precedent and tradition, of shared experiences and collegial feelings." Statement of the Honorable Edward R. Becker before the Comm. on Structural Alternatives for the Fed. Courts of Appeals (Jan. 26, 1998) <http://app.comm.uscourts.gov/hearings/newyork/0424BEC> (quoting the commission language from the commentary in a prior report). Needless to say, there are some who argue that there is not much collegiality left on today's Courts of Appeals. *See* Statement of Professor William M. Richman Before the Comm. on Structural Alternatives for the Fed. Courts of Appeals (visited Feb. 17, 1998) <http://app.comm.uscourts.gov/hearings/chicago/richman.htm> (noting that "collegiality on the modern circuit court is probably a myth anyway").

The isolated group characteristic of a circuit is altered somewhat in those circuits that make extensive use of visiting judges. *Cf.* Statement of Professor Judith Resnick before the Comm. on Structural Alternatives for the Fed. Courts of Appeals (Apr. 24, 1998) <http://app.comm.uscourts.gov/hearings/newyork/0427RES.htm> (urging that those who study the federal courts of appeals take into account the extensive use of visiting judges on a number of the circuits).

41. David Charny, *Illusions of a Spontaneous Order: "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841, 1845-46 (1996), divides nontransactional conflicts into "common pool" and "external harms" conflicts. In common pools, conflicts arise among participants who all draw from a common resource that may be destroyed unless the participants' behavior is regulated. In an external harms conflict, parties do not routinely deal with each other, but are in a relationship in which, like

importance judges attach to the esteem in which other judges on their circuit hold them.[42] First, although judges often differ in policy preferences or judicial philosophies, they depend on one another for baseline levels of accuracy in citing cases, checking applicable precedent, and not camouflaging their policy preferences in footnotes or elsewhere. If a judge violates existing norms and loses trust, his or her work will be scrutinized more carefully by the others. For example, ambiguous language in an opinion will be viewed with more suspicion—perhaps as representing a hidden agenda—and clarification will be requested. Second, losing trust constrains a judge's ability to compromise and negotiate with other panel members when deciding cases, increasing the cost of decisionmaking. Judges often negotiate over the language to be used in an opinion—especially in circuits in which there is a norm disfavoring dissents—and a loss of trust inhibits these negotiations. Third, as with ostracism in any small group, social sanctions against a judge are manifested in many ways, ranging from being unable to discuss issues and problems in cases with colleagues (who may either have a different perspective or know a particular subject better) to being excluded from social gatherings.

In theory, official circuit rules on the use of the JO and other rules on publication practices are the circuits' expression of proper conduct. After Congress delegated rulemaking authority to the circuits, each circuit formulated its own publication rules. If it is possible to detect deviations from these rules (which permit the use of the JO only in easy cases), sanctions should result. For the repeat offender, negative gossip will be followed by social ostracism.[43] The threat of these internal social sanctions should deter most serious deviations from the official rules even if external scrutiny and sanctions are absent.

The published rules of a circuit, however, may not be amenable to change for a variety of reasons, including fear of external criticism and difficulties in arriving at consensus. The rules may therefore become stuck at what may have become suboptimal points, even if they were once optimal. Norms, in contrast, are flexible and constantly evolving. Circuit rules may have, at one point in the past, represented a group consensus on acceptable behavior. If external scrutiny of internal norms is negligible, however, and alteration of externally stated rules will bring on criticism, a circuit's internal norms may evolve away from

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neighbors, they can occasionally harm each other. *See id*; *see also* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (discussing common pool problems); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996) (discussing external harm problems).

42. On average, judges attach importance to what their colleagues think of them. *Cf.* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL. STUD. 537, 541 (1998) (describing the importance of considering the human quest for status); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355 (1997) (setting forth an "esteem" theory of norms).

43. On the importance of gossip, shaming, and ostracism in enforcing social norms, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 373-89 (1997); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237 (1996).

the externally stated rules.[44] In cost-benefit terms, the lack of external scrutiny means that internal norms will be altered to maximize the welfare of the group without taking costs to others into account (unless the externalities figure into the judges' individual utility functions). In the meantime, the statement of rules visible to external observers remains unchanged.[45]

The contemporary "law and norms" literature is only beginning to ask and answer questions about how norms develop and whether they are efficient.[46] While it is possible, as Professor Ellickson suggests, that norms in closely knit groups develop to maximize group welfare, it is also possible that other factors such as path dependence or unusually powerful subgroups may push norms to suboptimal equilibria.[47] In addition, depending on the extent to which judges on a circuit care about, comprehend, and internalize the external costs and benefits to society of their norms, the norms will move closer to or farther from their societally optimal point.

We make no claim to be adding to the theoretical literature on norms and social sanctions. This fledgling, though fast expanding, literature, however, has helped shape our observations about the publication practices of the circuits. First, the small, closely knit group characteristic of the circuit courts suggests that the absence of a formal external monitoring and sanctioning mechanism for rule violations alone is not problematic. Social sanctions in a closely knit

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44. We distinguish between formal organizational rules (which some commentators treat under the rubric of norms) and informal conventions about acceptable behavior, referring to the latter as norms. For an example of the former, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996). On the distinction, see McAdams, *supra* note 42, at 350-51.

45. Because internal norms can differ from the rules stated externally, individual judges on a circuit may disapprove of the practice of using the JO in hard cases, but nevertheless have to accept it. Objecting to a colleague's desire to use a JO in a hard case may produce sanctions, such as being assigned to write the opinion oneself.

46. On this expanding literature, see Lessig, *supra* note 27; McAdams, *supra* note 42; Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997).

Professor Macaulay had pointed to the importance of informal social sanctions in ordering contractual relationships at least two decades before work along these lines showed up in the law and economics literature. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63-64 (1963). Indeed, as Professor Marvin Harris pointed out to us, one can trace the discussion of how societies function without the statal apparata of legal codes, police, jails, and other such mechanisms to 19th century evolutionists such as Lewis Henry Morgan, Sir Henry Maine, Marx, and Engels. *See, e.g.*, MARVIN HARRIS, CULTURAL ANTHROPOLOGY (4th ed. 1995); MARVIN HARRIS, OUR KIND: WHO WE ARE, WHERE WE CAME FROM AND WHERE WE ARE GOING: THE EVOLUTION OF HUMAN LIFE AND CULTURE (1989).

47. *See generally* Posner, *supra* note 41. On path dependence, see Lucian Bebchuk & Mark Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, *in* CORPORATE GOVERNANCE TODAY: VENTURE CAPITAL, HIERARCHIES & BOUNDARIES, THE BOARD, EMPLOYEES, THE CONTRACTARIAN PARADIGM, EUROPE AND JAPAN 565 (1998). Bebchuck and Roe explain that although economic analysts expect corporate ownership and governance structures to converge efficiently, neither rapid nor complete convergence will necessarily take place in fact: "Corporate governance is not a technology, like, say, inventory control, which if used sub-optimally will lead capital and product markets to punish the recalcitrant." *Id.* The legal system and judicial discretion are even less susceptible to the pressures of the marketplace. *See* Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L REV L. & ECON. 169, 169-70 n.3 (1992).

group whose members repeatedly interact are likely to be highly effective.[48] If these informal nonlegal sanctions work effectively, an expensive, formal enforcement system may be unnecessary.[49]

Nevertheless, we need not and should not leave the system alone—an important role for the external observer and even the government still exists.[50] In addition, if external monitoring is negligible or minimal, we should not be surprised to see internal norms of behavior evolve away from externally stated rules. However, the closely knit structure of a circuit court may mean that deviant behavior is both easily detected and penalized through an informal mechanism, but what the judges consider to be deviant behavior may differ from that identified by the formal rules.

For sources of data on norm-dominated behavior, we have a valuable laboratory: twelve circuit courts, each doing essentially the same work and each a small, closely knit group of self-governing individuals with high levels of information and similar qualifications. No doubt differences between the circuits exist, but in the social sciences, it is rare to find controlled experiments.[51]

C. What Motivates Appellate Judges?

Judges, like everyone else, pursue goals subject to constraints.[52] Important constraints include the burdens of an overwhelming caseload and the circuit rules governing the disposition of those cases, especially the rules governing publication practices. We began this article by hypothesizing a difficult and important case in which a panel chose not to provide reasons for its decision.

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48. Judge Selya, for one, suggests that the primary check on the publication behavior of judges is peer pressure from within the circuit, and not pressure from the outside. *See* Selya, *supra* note 21, at 412.

49. *Cf.* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990) (analyzing nonlegal sanctions in a commercial context).

50. Although the internal monitoring and sanctioning mechanisms of the circuits may be more effective, the presence of at least minimal external monitoring is important to ensure that the judges do not ignore externalities. *Cf.* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996) (examining the interaction of legal and nonlegal sanctions).

51. Law and norms scholars have looked far and wide, to among others, communities of cattlemen in Shasta county, diamond merchants in New York, 18th- and 19th-century whalers and duelers, bee keepers, and Chinese middlemen in Asia. *See* Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Steven N.S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11, 30 (1973); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349 (1981); Warren F. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321 (1984).

52. *Cf.* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 946 (1995) (criticizing Richard Posner and Duncan Kennedy for not adequately considering constraints in their models of judges as free, preference-maximizing actors); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995) (using a model in which "the optimal structure of the judicial system is determined by the extent of a resource constraint . . . the flow of cases into the system, and the difficulty of law-finding").

To the extent the panel had no procedural justification for its failure to write and publish an opinion, this disposition would appear to be a violation of the rules governing nonpublication as well as an extreme departure from the role of an appellate judge, as taught in law schools—to write opinions in hard cases.[53] Violating rules and departing from traditional roles, however, are hardly behavioral patterns expected of federal appellate judges, a group characterized by its inherent institutional conservatism.[54] We have no reason to think that judges on the Third Circuit Court of Appeals, whose use of the JO is our primary focus, are less institutionally conservative than judges on the other circuits.[55] What explains our claim that it is legitimate to ask whether the Third Circuit's judges were disregarding rules and traditional roles? An examination of the incentives to use the JO provides some answers.

The obvious criteria of economic analysis—income, wealth, and job security—are of little use to our exercise. Federal judges have lifetime appointments, and are virtually unthreatened by job loss. Their income is independent of performance; it is not, for example, tied to reversal rates, number of citations, or number of published opinions.[56] In addition, judges are restricted in the income they may earn from outside activities.[57] Although a fraction of appellate judges would possibly like to be elevated to the Supreme Court, the likelihood of elevation is minuscule, and it is unclear if there is anything a judge could do in his judicial behavior to raise his chances.[58] The same would seem to apply for the few positions in government attractive enough to induce a federal judge to resign, such as an ambassadorship or a high cabinet position.[59]

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53. *See, e.g.*, WAYNE V. MCINTOSH & CYNTHIA L. CATES, JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS 4-5 (1997) (describing the importance of the judicial opinion); Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225, 247 (1985); Richman & Reynolds, *supra* note 13, at 278-79; James Boyd White, *What's an Opinion for?*, 62 U. CHI. L. REV. 1363, 1368 (1995) ("The opinion . . . is central to the activities of mind and character of the law as we know and value it."); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (failure to provide reasons is a departure from the conventional appellate ideal and that departure, in and of itself, brings on criticism); A.W. Brian Simpson, *The Judges and the Vigilant State*, 1989 DENNING L.J. 145, 147 (listing the contributions of the judiciary, including "the notion of a fair trial, or access to the law, of openly administered justice, of rational decisions in conformity with professional tradition").

54. That inherent conservatism is perhaps best exemplified by the dominance of *stare decisis*, which emphasizes maintaining the status quo and disfavors innovation.

55. As far as we know, the Third Circuit's judges, unlike judges on some other circuits, are not characterized either by unusual innovation or disinclination to follow precedent.

56. *See* Posner, *supra* note 29, at 4-7.

57. *See* 5 U.S.C. app. 7, §§ 501-505 (1994); Patricia Wald, *Some Real-Life Observations About Judging*, 26 IND. L. REV. 173, 178 (1992) (noting the restrictions on judges earning outside income).

58. *See* Posner, *supra* note 29, at 5. *But cf.* S. Scott Gaille, *Publishing by United States Court of Appeals Judges: Before and After the Bork Hearings*, 26 J. LEGAL STUD. 371, 371-72 (1997) (finding that judges published fewer books and articles in the aftermath of the Bork hearings and suggesting that the reason for this drop in publication was the fear that a publication record was likely to hurt an appellate court judge's chances of elevation).

59. *Cf.* Frederick Schauer, Judicial Incentives and the Design of Legal Institutions 14 (Aug. 31, 1997) (unpublished paper presented at the American Political Science Association, on file with authors).

Indeed, federal judges appear to care little about increasing their income levels, at least not at the cost of their judgeships.[60] For example, although a federal judge's pension almost approximates the salary of an active judge, few judges retire at age sixty-five for a higher paying job in the private sector. Similarly, while judges are often accused of voting on the basis of political and policy preferences,[61] accusations of bribery and corruption on the appellate bench are rare.

We are left, therefore, with one primary variable from economics—leisure—and a set of variables associated more with sociology and anthropology than economics. These other variables include reputation, prestige, status, esteem, the furtherance of political or policy views, and role fulfillment. Conventional economic analysis tends to ignore all these variables, except perhaps reputation, which it treats as a means to achieve wealth maximization.[62] With appellate judges, these secondary variables come to the fore.[63]

Does it serve any purpose to generalize about the factors that motivate federal appellate judges? After all, unlike the economic class of "laborers," for example, the number of appellate judges is small—approximately 180[64]—and each judge is likely motivated by a different combination of the listed factors.[65] For example, one judge might care greatly about furthering a political agenda, whereas another may care only about fairness to the parties.[66] Similarly, some judges may care primarily about their reputation with legal academics while others might care more about their status in the local bar.[67] The importance of these individual differences, however, is dampened by the fact that the behav-

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60. *See* Cass, *supra* note 52, at 970-71.

61. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 23 (1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 1 (1993); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 272-73 (1976) (describing the desire to impose one's normative views on society as a motivating factor for judges).

62. *Cf.* Charny, *supra* note 49, at 412-20 (discussing the acquisition of reputational capital to further commercial relationships); Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 HARV. L. REV. 1085, 1087-88, 1091 (1995) (criticizing Richard McAdams's relation of status maximization to labor market discrimination).

63. *See* BAUM, *supra* note 12, at 42-47; Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1940-41 (1998) (stating that judges are "motivated mainly by nonpecuniary rewards, such as prestige, challenge, and a sense of serving society").

64. *See* J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1163 (1994); *cf.* Resnick, *supra* note 40 (asserting that when one includes senior judges and visiting judges, the true number of appellate judges is at least 266 (who are assisted on occasion by another 323 district judges)).

65. A number of studies have documented a wide variation in judicial goals. *See, e.g.*, BAUM, *supra* note 12, at 24 (citing studies).

66. *Cf.* J. Woodford Howard, Jr., *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916 (1977) (studying the relationship between judges' role conceptions and their voting behavior).

67. *See* BAUM, *supra* note 12, at 54; *cf.* HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 32-33 (1992) (describing research on appellate judges which shows significant differences in the audiences for whom judges see themselves writing); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 132-34 (1990) (describing Cardozo's focus on the academic audience).

ior of judges is subject to highly effective, albeit informal, group constraints. The incentives of judges on a circuit to use the JO, therefore, can be discussed in terms of the incentives of the group.

D. Goal Optimization Subject to Constraints: Too Much Work, Too Little Time—The Caseload Constraint

How might the extensive use of the JO, including its use in hard cases, further the goals of the judges on a circuit?[68] Appellate judges solve their optimization problem under two primary sets of external constraints: first, an unmanageable caseload,[69] and second, rules about the disposition of cases (for example, when publication is required, or when a minimal statement of reasons is sufficient).

The JO's obvious benefit is that it saves more time than the other short-form dispositions because the panel gives no reasons at all for its disposition.[70] Even in an easy case, a JO saves time because drafting a minimal statement of facts, issues raised, and reasons why the claims fail takes a few hours, if not a day or two. Drafting a JO, on the other hand, takes no more than a few minutes to complete.[71]

The real savings in time and resources with a JO is in a hard case. Take, for example, our hypothetical securities case that raised a difficult issue for which there were strong arguments on both sides.[72] On the basis of an initial evaluation of the briefs, the judges could not decide either how the doctrine should be shaped or which side should win. Based on this minimal, initial evaluation—the first reading and evaluation of the briefs—the case was too close to call. Deciding the case and, more importantly, explaining the rationale for the decision, would take a great deal of time and effort by the judges. Avoiding an opinion with a JO would save time and effort. The two other short-form dispositions, the unsigned and signed unpublished opinions, by contrast, both still require some reasons; the panel's problem is precisely that it neither has the reasons nor the time to find the reasons.

The use of the JO in a hard case, therefore, is a tremendous savings of judicial resources. However, judges also care about reputation, status, prestige,

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68. Our model has judges optimizing a number of variables—only one of which is the furtherance of individual policy preferences—subject primarily to workload and rule constraints. The majority of the articles in the literature on judicial behavior, however, focus on why judges *vote* a certain way.

69. In examining the possible incentives to use the JO to solve the caseload problem, we note that the JO is only one of a series of short cuts at the disposal of the judges, including the use of signed, unpublished opinions and unsigned, unpublished opinions. Other short cuts include the denial of oral argument and the extensive use of law clerks and staff attorneys.

70. *See* Marvell & Moody, *supra* note 10.

71. For a JO, only certain basic information about the case, such as the names of the parties, must be entered on a preexisting form. *Cf.* COFFIN, *supra* note 12, at 165 (describing the length of different forms of dispositions on the First Circuit—one of the circuits that rarely uses the without-comment/JO disposition).

72. *Cf.* POSNER, *supra* note 4, at 9 (ranking securities cases as among the hardest).

and fulfilling their judicial roles.[73] The failure to fulfill the function of the appellate judge—which is primarily to correct the errors of the lower courts and contribute to the system of precedent[74]—by using a JO should hurt reputation, status and prestige. Expectations, both internal and external, of "proper" judicial behavior should constrain the judges from relinquishing their traditional roles. Using a JO in only a fraction of the hardest cases, however, may not violate either aspect of the appellate judge's role.

By statute, parties to suits in federal district court have a right to an appeal.[75] Unlike the Supreme Court, the court of appeals does not have the power to deny review to a properly submitted claim of errors.[76] On its face, affirmance by a JO appears to be a violation of the right to appeal granted in the statute.[77] In the words of Professors Richman and Reynolds, "the circuit courts have become *certiorari* courts."[78] A closer examination, however, reveals that issuing a JO is not the same as denying *certiorari*.[79]

When parties appeal, they do so based on the assertion that the district court erred, and that the outcome of the case would have been different but for that error. No appeal lies on the basis that the reasons the lower court gave were inadequate, incomplete, or improperly articulated. The appellant must assert that the district court's reasons were incorrect and warrant a reversal. An appellate panel's use of a JO (which is almost always an affirmance[80]) in an easy case when existing precedent called for a reversal would be tantamount to

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73. *See, e.g.*, BAUM, *supra* note 12, at 28-29; Cass, *supra* note 52, at 983.

74. *But see* Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1082 (1994) ("[D]ispensing justice retail by correcting the errors of lower courts is not the chief business of our appellate courts, much less that of the Supreme Court itself."). An extensive literature in political science describes judges as optimizing policy goals subject to the normative constraint of being expected to follow precedent. *Cf.* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021 (1996) (noting the existence of a norm of consensus decisionmaking on the Marshall court and describing a model of Supreme Court decisionmaking with social and intra-court norms as the primary constraints on judges).

75. *See* 28 U.S.C. § 1291 (1994) (granting the Courts of Appeals jurisdiction over all appeals from final decisions of the district courts of the United States); Richman & Reynolds, *supra* note 13, at 275.

76. A right of "appeal" to the Supreme Court exists in an extremely narrow set of cases. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 25 (1991).

77. The *certiorari* process of the Supreme Court is fundamentally different. It provides no guarantee that errors will be discernible and fixed. Errors may be detected, but the Court can, and often does, choose not to correct them. *See id.* at 36, 134.

78. Richman & Reynolds, *supra* note 13, at 275; *see also* Statement of the Honorable Carolyn Dineen King Before the Commission on Structural Alternatives for the Federal Courts of Appeals (Mar. 25, 1998) <http://app.comm.uscourts.gov/hearings/dallas/king.htm> (asking the question of whether the Courts of Appeals are exercising what is essentially discretionary review).

79. The JO is analogous to the Court's practice of granting review but deciding the case with a summary order. *See* PERRY, *supra* note 76, at 39, 99.

80. In the Third Circuit, the circuit rule governing use of a JO specifies only affirmances; reversals require statements of reasons, if not published opinions. *See* 3D CIR. R., INTERNAL OPERATING PRO. 5.4, 28 U.S.C.A. (West Supp. 1998); *cf.* Richman & Reynolds, *supra* note 13, at 276 (noting that if no opinion is issued, only a brief "*affirmation*" is released to the parties). *But cf.* PERRY, *supra* note 76, at 39 (mentioning that the Supreme Court uses the summary disposition in reversals as well as affirmances).

a denial of *certiorari* because the appellant's right to have the errors of the district court corrected would not have been satisfied.[81]

On the other hand, it is not clear that the statutory right to error correction is denied when a JO is used in a hard case. By definition, these cases have equally strong prima facie arguments on both sides.[82] With finite resources and when both sides have equally plausible arguments, it is difficult to say that there is an "error" that must be corrected. The panel would have to select one set of strong arguments over the other equally strong arguments to make a "reasoned" decision,[83] but this is not properly called "correcting error." When the appellate court discerns errors, it attempts to correct them. If a JO is used in an especially hard case, the litigant is denied a right to have the panel choose one set of reasons over another and articulate them. She is denied a reasoned judicial determination, but she is not denied the right to have trial court "errors" reversed.

The second part of the appellate role is lawmaking. This is the primary role of the Supreme Court, which delegated some lawmaking to the appellate courts when it could no longer sustain the system's entire lawmaking burden.[84] As a conceptual matter, therefore, the lawmaking role is not inconsistent with the power of deciding not to decide.[85] From an efficiency point of view, no one suggests that the parties have a right to ask for an improved or advanced interpretation of the law. The litigant's right is to have arguments about the existence of errors heard and those errors corrected.[86] In practice, at least some resources must be devoted to a case for that right to exist. The parties' right is to have a certain minimal level of scrutiny be applied by the appellate court.

Even if the appellate judges who use a JO in difficult cases are satisfying their error-correction role, are they failing to fulfill their lawmaking role? After all, law most needs to be made in the hardest cases. The failure to write and publish an opinion deprives the system of the many positive externalities created when a case is decided by a published opinion that gives reasons.[87] How-

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81. *Cf.* PERRY, *supra* note 76, at 36, 134 (purpose of *certiorari* avowedly is not error correction, although the Court will on occasion grant review to correct egregious errors).

82. "Hard" cases have strong and plausible legal arguments on both sides, thereby requiring judges to turn to policy preferences to decide the outcome. *See* BAUM, *supra* note 12, at 64; Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

83. *Cf.* Richard Zeckhauser & Donald Shepard, *Where Now for Saving Lives?*, 40 LAW & CONTEMP. PROBS. 5, 11 (Autumn 1976) (stating that often we have "no commonly accepted measures for the outputs of alternative policies").

84. *See* Dragich, *supra* note 6, at 768.

85. *See* Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 70 (1985).

86. *See* Slavitt, *supra* note 36, at 112, 118-19.

87. Dragich, *supra* note 6, at 768-85; *cf.* Daniel Purcell, Comment, *The Public Right to Precedent: A Theory and Rejection of* Vacatur, 85 CALIF. L. REV. 867 (1997) (making similar arguments against the use of *vacatur*).

An important line of scholarship criticizes the increased use of ADR and settlement mechanisms, arguing the nonpublic resolution of disputes deprives society of a valuable public good. *See, e.g.*, Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 114-19 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-87 (1984); David Luban, *Settlements and the Erosion*

ever, this argument assumes that the externalities created by giving and publishing a statement of reasons are *positive*, and that the appellate panel will improve the law, or at least not hurt it. Judges do make errors and do write bad opinions. Some opinions confuse doctrine more than they clarify or create it, particularly by failing to anticipate later cases.[88] The risks are especially high in complex fields that the judges and their clerks know little about.[89]

Therefore, an appellate panel faced with a complex issue in an area in which none of the judges is a specialist could plausibly decide that an opinion likely to cause harm to the law (through errors in the drafting of the opinion) would outweigh the benefits that would accrue from a public statement of reasons for the outcome. Our initial hypothetical represents the complex tax, securities, or antitrust cases that came before panels of judges with little or no knowledge of those substantive bodies of law. The judges and their clerks can learn enough to resolve the easy and intermediate cases with a high degree of certainty. The risk of harm to the system from their writing a lengthy precedent-setting opinion, however, might plausibly be significant enough to avoid an opinion in this case.[90] The district court's opinion, at least, does not have so much precedential value. The system of precedent, therefore, may be better served not by giving a published statement of published reasons in every hard case, but by avoiding some of these cases, focusing instead on the somewhat less difficult cases in which the appellate panel *can* contribute to the development of the law (for example, in contexts where the judges have some ability to foresee the consequences of the precedent they create).[91]

Avoiding opinions in those difficult cases with a high risk of error not only benefits the system of precedent,[92] but also complements the desire of judges to

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of the Public Realm, 83 GEO. L.J. 2619, 2620-40 (1990). Strong negative externalities can result from avoidance of the public, published statement of reasons for the resolution of all disputes in a resource-constrained system. For an important theoretical discussion setting forth the social values of informed consent in mediation, especially autonomy, human dignity, and efficiency, see Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. (forthcoming Mar. 1999).

88. *Cf.* Kirk J. Stark, Robert H. Jackson and the Fiscal Practicalities of Tax Adjudication (Jan. 1, 1998) (unpublished manuscript, on file with authors) (describing the problem in the tax context).

89. As Judge Easterbrook has emphasized, judges are overburdened generalists, not specialists. A limited amount of time and a complex issue from an unfamiliar area can provide a recipe for disaster. *See* Frank H. Easterbrook, *What's So Special About Judges*, 61 U. COLO. L. REV. 773, 780 (1990) ("A sophisticated judge understands that he is not knowledgeable and so tries to limit the potential damage [from his decisions]."); *cf.* Schauer, *supra* note 53, at 656-58 (describing the dangers of giving reasons and creating precedent).

90. Diana Gribbon Motz, *A Federal Judge's View of Richard A. Posner's THE FEDERAL COURTS: CHALLENGE AND REFORM*, 73 NOTRE DAME L. REV. 1029, 1038 (1998) (book review), argues instead that in her view efficiency demands disposal "of at least some such cases [involving non-complex points of law] by order [and that this] would leave more time for both judges and their staffs to improve the quality of precedent-creating work."

91. *See* Schauer, *supra* note 53, at 656-59.

92. We use the term "hard cases" to describe the set of cases in which the arguments on either side, precedent- or policy-based, are in equipoise and the court has to exercise its judgment in picking one set of arguments. In defining hard cases in this manner, we are excluding the set of cases that are difficult to decide because they involve the application of well-settled legal standards to unusual facts.

maintain and enhance their prestige, status, and reputation. Published opinions in the most difficult and important cases draw attention from lawyers, academics, and other courts. Badly reasoned opinions carry with them the risk of negative attention (in addition to a risk of reversal and disagreement from other circuits).[93] Judges, therefore, have a reputation-driven incentive to tackle difficult issues only when they have the time, resources, and expertise to write a well-reasoned opinion that will withstand external scrutiny and enhance the author's reputation.

According to the judicial and societal norms prevailing earlier during this century, however, part of the judicial function is to provide reasons for a decision in accordance with the values of the era in which the judge is making a decision. If judicial discretion and application of principles to fact patterns is short-circuited, the goal of administrative efficiency may be furthered but specialist administrative decisionmaking is substituted for the traditional decisionmaking characteristic of generalist common law judges. In other words, the cost-benefit analysis of the use of the JO in hard cases failed to take into account the value in having generalist judges provide reasons in complex cases[94]—that is, judicial accountability for decisions made.

E. Affirming Hard Cases Without Reasons: *Zucker* and *Tseng*

Disposing of easy cases without stating reasons saves time. In hard cases, formulating reasons that can survive public scrutiny and a possible appeal takes much more time. In addition, assuming reluctance on the part of the judges to delegate responsibility for these cases to law clerks or staff attorneys,[95] and the near zero likelihood of a rule violation being detected, there is an incentive to use a JO in some hard cases. This section describes two complex securities cases from the Third Circuit. The cases raised important, undecided substantive law issues. Nevertheless, each was affirmed by a JO.[96] In each of these

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For example, the law may be clear on the standard of behavior that merits the death penalty, but deciding whether the conduct at issue meets that standard may be extremely difficult.

93. Some fear that judges will spend a disproportionate portion of their time on difficult and complex cases in areas such as securities law since these are the areas in which one gains accolades (that is, status and prestige). *See* Motz, *supra* note 90, at 1032-33; Richman & Reynolds, *supra* note 13, at 275-77; *see also* Kamar, *supra* note 63, at 1941 ("There can hardly be a doubt that deciding [large corporate] cases on a regular basis can be particularly satisfying for judges."); Larry E. Ribstein, *Federalism and Insider Trading*, 6 SUP. CT. ECON. REV. 123, 146 n.123 (1998) (citing Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777 (1997)). The complexity of these areas, however, carries with it a high risk of error which, in turn, can bring a loss in prestige, status, and reputation. To the extent judges fear losses more than gains (assuming a symmetry in losses and gains from writing an opinion in such an area), they will avoid cases in areas such as securities law rather than rush toward them as these commentators expect.

94. Some might argue that the reasons discussed above point toward abolishing the system of generalist judges and replacing it with one of specialist judges. For the purposes of this article, we assume that our federal appellate system will remain largely one of generalist judging.

95. We are merely hypothesizing that one reason why judges might see themselves as forced to use the JO in some fraction of hard cases may be that their only other option would be to have law clerks take on the responsibility for these cases.

96. We do not claim to have made a systematic examination of any subset of cases in which the JO was used. Our selection of the two cases is fortuitous—they involved issues one of us was researching

cases, there may have been a legitimate procedural reason for the failure of the panel to tackle the complex substantive issues, but we do not know and cannot prove otherwise. The failure to explain the method of disposition—that is, giving no reasons for giving no reasons—has created the perception that the panels may have been doing no more than simply avoiding the difficult issues raised by the cases.

1. *Zucker v. Quasha*.[97] On March 31, 1994, Hanover Direct, Inc., a well-known catalog company, made a public offering of stock,[98] three days before April 2, when the fiscal quarter in progress ended.[99] The full-quarter results for that quarter were worse than expected and disgruntled shareholders who had purchased stock in the offering sued.[100] Their central claim was that Hanover's failure to disclose important interim information about the quarter ending only three days after the offering constituted an actionable omission under Sections 11 and 12 of the Securities Act of 1933.[101]

The *Zucker* case came before Judge Bassler of the federal district court in New Jersey on a motion to dismiss. The question whether a company issuing a public offering had any duty to disclose interim information about the quarter in progress was open. Two courts, a district court in New Jersey in *Renz v. Schreiber*[102] and a panel of the Ninth Circuit in *In re Worlds of Wonder Securities Litigation*,[103] had tackled related issues in cases involving the veracity of forecasts of full-quarter results made when a quarter was incomplete. This case was different in an important way. The *Zucker* plaintiffs did not claim that a misleading forecast was made. Instead, the claim was that already available information about the incomplete quarter should have been disclosed.

The issue was important for at least two reasons. First, the question whether an issuer is required to disclose intra-quarterly data in an offering arises in every public offering because every offering is by definition done sometime during a quarter in progress. Second, in recent years, the SEC has adopted rules that make it easier for more established companies such as Hanover to time their offerings to take advantage of favorable market conditions such as investor sentiment and interest rates. Besides the importance of the issue and the paucity of helpful case law or commentary, the question was difficult.[104]

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for a different article on securities law. The fact that a JO was used in each of two cases raising difficult substantive law issues, however, led to their inclusion in this article as well.

97. 891 F. Supp. 1010 (D.N.J. 1995), *aff'd mem.*, 82 F.3d 408 (3d Cir. 1996).

98. *See id.* at 1012.

99. *See id.* at 1015.

100. *See id.* at 1013.

101. *See id.* at 1018.

102. 832 F. Supp. 766 (D.N.J. 1993).

103. 35 F.3d 1407 (9th Cir. 1994).

104. *See* Mitu Gulati, *When Corporate Managers Fear a Good Thing Is Coming to an End: The Case of Interim Nondisclosure*, 46 UCLA L. REV. 677-79 (1999); *see also* Richard A. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has It Changed the Law?*

On the one hand, the following factors suggested a holding that the issuer had no duty to disclose intra-quarterly data in an offering: (1) the SEC explicitly required only the disclosure of full-quarter information; (2) the request for interim information looked suspiciously close to a request that forecasts of full-quarter information be made and disclosed (and forecasts are not required to be disclosed under the securities laws); and (3) establishing a duty to disclose would open the door to more securities litigation, when there is already a widespread perception that much existing securities litigation consists of frivolous strike suits.[105]

On the other hand, there were strong arguments in favor of finding a duty to disclose, including (1) the full-disclosure philosophy that underlies the securities laws, and (2) the resemblance to insider trading of the issuer's sale of securities at a price artificially inflated by failing to disclose certain important negative information about the company.[106]

Judge Bassler directly confronted the issue. In what for him was a rare published opinion,[107] he held that the issuer had no duty to disclose information about a quarter in progress. The request for this information, he reasoned, amounted to no more than a request that the company disclose its internal forecasts.[108] This linking of the request for interim data to a request for forecasts was important because the disclosure of forecasts, although encouraged, is not required under the securities laws.[109] Although Judge Bassler's opinion expressed no doubt about the result it had reached, the opinion did acknowledge that it was the first to have decided the issue;[110] the cases cited in support of his reasoning addressed issues that were, at best, tangential to the case.[111] Furthermore, the fact that Judge Bassler decided to publish his opinion was itself a signal to the appellate court that the district court judge thought the issue in this case important.

Has It Achieved What Congress Intended?, 76 WASH. U. L.Q. 645, 668-69 (1998) (noting the lack of clarity on the issue).

105. *See* Gulati, *supra* note 104, at 677, 716 & n.33.

106. *See id*. at 678, 719-20.

107. During the two-year period for which we collected data (Aug. 1, 1995, to Aug. 1, 1997), Judge Bassler published 15 opinions. Data on district court publication rates is on file with the authors.

108. *See Zucker*, 891 F. Supp. at 1016.

109. *See, e.g., In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1427 (3d Cir. 1997); *In re* Lyondell Petrochemical Co. Sec. Litig., 984 F.2d 1050, 1052 (9th Cir. 1993).

110. *See Zucker*, 891 F. Supp. at 1018.

111. In looking to the case law for support for its holding, Judge Bassler's opinion states:

> Even before a quarterly report is formally issued, a corporate official can probably be held liable for statements that are false or misleading in light of complete quarterly data that has become available but has not yet been made public. Courts have been reluctant, however, to impose liability based upon a corporate official's failure to disclose financial data for a fiscal quarter in progress.

891 F. Supp. at 1015 (internal citations omitted). The two cases cited in support, *Renz v. Schreiber*, 832 F. Supp. 766 (D.N.J. 1993) and *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407 (9th Cir. 1994), addressed claims of nondisclosure that were linked to company forecasts. In *Zucker*, however, the claim was that an independent offering triggered the duty to disclose interim information, not that a forecast had triggered a duty to disclose interim information. *See Zucker*, 891 F. Supp. at 1013.

Judge Bassler did suggest an alternative basis for granting the motion to dismiss, even if there were a duty to disclose intra-quarterly information. He asserted that the plaintiffs' claim would have failed in this case because they had pleaded inadequate facts.[112] The facts that Hanover had timed its public offering to occur three days prior to the end of the quarter, had raised a large quantity of capital in that offering, and had kept back the information for that quarter which, when disclosed, turned out to be much worse than expected, were not enough to raise a sufficient inference that the company had the information at the time of the offering. Courts do routinely apply heightened pleading requirements to securities *fraud* cases. Under the fraud pleading standard of Rule 9(b), Judge Bassler's argument may have had merit.[113] However, this was not a fraud case. The plaintiffs instead claimed nondisclosure in public offering documents, so the standard of liability was strict and the heightened pleading standard should not have been applied. The notice pleading standard of Rule 12(b)(6), by contrast, should have applied, under which the plaintiffs' claims would have survived.[114] Judge Bassler's alternative basis, therefore, most likely would not have held up on appeal.

Plaintiffs appealed to the Third Circuit, arguing, among other things, that the district judge had erred in holding that the issuer had no obligation to disclose intra-quarterly data. As far as we can tell, the appellants' briefs make the relevant arguments. Indeed, the quality of the briefs on both sides was far higher than usual.[115] Despite the difficulty and importance of the issue, the district court's language, the fact that the trial court opinion was published, and the high quality of the briefs, the Third Circuit decided the case without an opinion—it affirmed with a JO. The panel declined even to grant oral argument. Judge Bassler's opinion, therefore, was, for the time being, the final statement on the law in the Third Circuit.

Within weeks of the Third Circuit JO in *Zucker*, the First Circuit, after wrestling with the same issue, rendered a decision in *Shaw v. Digital Equipment Corp*. and, in a lengthy opinion, arrived at the opposite holding.[116] According to the First Circuit, the issuer had a duty to disclose certain intra-quarterly data in the offering.[117] A few months later, the First Circuit tackled the *Zucker* issue again, in *Glassman v. Computervision Corp*., and issued another lengthy opin-

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112. *See Zucker*, 891 F. Supp. at 1016.

113. *See, e.g.*, *Burlington*, 114 F.3d at 1417 (describing Rule 9(b)'s heightened pleading standard).

114. *See, e.g.*, Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1223-24 (1st Cir. 1996) (holding that a similar claim survives Rule 12(b)(6) easily and even survives Rule 9(b)).

115. Copies of the briefs for the case are on file with the authors.

116. The JO in *Zucker* was issued on March 26, 1996, and the *Shaw* opinion was published on May 7, 1996. *See Shaw*, 82 F.3d at 1194. In terms of the time it took the two courts to tackle this issue, arguments in *Shaw* were heard on February 8, 1996, whereas those in *Zucker* were submitted on March 11, 1996. The *Zucker* court beat the *Shaw* court by two and a half months. It received the issue approximately a month after the *Shaw* court, and decided it approximately a month and a half before the *Shaw* panel.

117. Specifically, the duty is to disclose known "extreme departure[s]" from market expectations for the quarter. *Shaw*, 82 F.3d at 1210.

ion.[118] Whether the panel of the Third Circuit agreed or disagreed with Judge Bassler's opinion, it is hard to imagine that the panel deemed the case easy enough to warrant a JO. Why, then, did they use a JO? Was it to avoid tackling the interim nondisclosure issue?

2. *In re Tseng Labs Securities Litigation*.[119] Tseng Labs designed and supplied semiconductor chips that improved the visual quality of computer monitors.[120] In late 1992, Tseng Labs announced a new chip, the W32, that would improve the performance of the Microsoft Windows operating system.[121] The plaintiffs' case centered around the claim that during the period between October 29, 1992, and May 21, 1993, the company's spokespersons made a number of falsely optimistic statements about the company and its prospects.[122] The plaintiff shareholders claimed that these false statements caused them to purchase stock at artificially inflated prices, which then dropped by approximately fifteen percent when the company announced on May 21, 1993, that its second quarter earnings for 1993 would not meet expectations.[123]

In particular, the claim focused on a March 9, 1993, statement by Tseng's vice chairman, John Gibbons.[124] He had stated that Tseng Labs "expected to ship 1.2 million to 1.7 million of the new [W32] chips in the second quarter of 1993."[125] Plaintiffs argued that this statement was doubly false, first, because Tseng Labs did not have the ability to supply 1.7 million chips, and second, because Tseng Labs could not possibly have expected to receive orders for that many chips.[126] More important, plaintiffs asserted that even if the statement was made reasonably and in good faith on March 9 (which would insulate a forecast from liability),[127] the company had known by March 15 that the March 9 forecast was unreasonable. Therefore, they claimed, even if the March 9 statement was not actionable, the failure to update it on March 15 was. Plaintiffs pointed to an internal forecast on March 15 made by Mark Karsh, a Tseng Labs officer, that predicted a second-quarter demand for the W32 of 974,850

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118. 90 F.3d 617 (1st Cir. 1996). The analysis of the interim disclosure issue by the panels in *Shaw* and *Glassman* was soon thereafter the subject of a note in the *Harvard Law Review* (one that failed to notice the district court opinion in *Zucker)*. *See* Note, *Living in a Material World: Corporate Disclosure of Midquarter Results*, 110 HARV. L. REV. 923 (1997); *see also* Dale Arthur Oesterle, *The Inexorable March Toward a Continuous Disclosure Requirement for Publicly Traded Corporations: "Are We There Yet?"*, 20 CARDOZO L. REV. 135, 137 & n.6 (1998) (noting the importance of the decision in *Shaw*).

119. 954 F. Supp. 1024 (E.D. Pa. 1996), *aff'd mem*., 107 F.3d 8 (3d Cir. 1997).

120. *See* 954 F. Supp. at 1025.

121. *See id*.

122. *See id*.

123. *See id.* at 1025-26.

124. *See id.* at 1025.

125. *Id.*

126. *See id.* at 1030-31.

127. *See, e.g., In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1432 (3d Cir. 1997); Glassman v. Computervision Corp., 90 F.3d 617, 631 (1st Cir. 1996).

units—a far cry from the 1.2 to 1.7 million range publicly forecasted only six days prior.[128]

The difficult but important issue in *Tseng* was the duty to update.[129] Two prior Third Circuit decisions, *In re Phillips Petroleum Securities Litigation*[130] and *Greenfield v. Heublein*,[131] had held that a duty to update existed if a statement, although true when made, became misleading when left unrevised.[132] The panels in *Phillips Petroleum* and *Greenfield*, however, while stating that they had no doubt that such a duty existed, had not fleshed out the scope of the duty because in both cases the duty to update claims had failed for other reasons.[133] Specifically, those cases had involved takeovers/mergers, so the opinions did not discuss whether a company had a duty to update an ordinary forecast of sales.[134] To make matters complicated, there was a considerable conflict among the circuits on the issue. In *Backman v. Polaroid Corp.*,[135] the First Circuit had expressed ambivalence about the existence of such a duty; the Second Circuit had suggested in *In re Time Warner Securities Litigation*[136] that such a duty might exist, but only in extreme circumstances; and in *Stransky v. Cummins Engine Co., Inc.*,[137] the Seventh Circuit had flatly rejected the existence of such a duty.

The scope of the duty to update is important because it affects the likelihood that corporations will voluntarily disclose forecasts.[138] For example, if the disclosure of an ordinary sales or earnings forecast were to trigger a duty continuously to update the investing public with all material information that arose subsequently, a large burden would be attached to the issuance of forecasts and would likely dissuade companies from disclosing forecasts.[139] On the other hand, a statement of the type such as "merger talks are progressing well" would remain alive in the minds of investors if not corrected at the point at which

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128. *See* Appellant's Brief at 34-35, *In re Tseng Labs Securities Litigation*, 107 F.3d 8 (3d Cir. 1997) (No. 96-1345) (on file with authors).

129. On the significance and difficulty of this issue generally, see William B. Gwyn, Jr. & W. Christopher Matton, *The Duty to Update the Forecasts, Predictions, and Projections of Public Companies*, 24 SEC. REG. L.J. 366 (1997); Oesterle, *supra* note 118; Robert H. Rosenblum, *An Issuer's Duty Under Rule 10b-5 to Correct and Update Materially Misleading Statements*, 40 CATH. U. L. REV. 289 (1991); Jeffrey A. Brill, Note, *The Status of the Duty to Update*, 7 CORNELL J.L. & PUB. POL'Y 605 (1998).

130. 881 F.2d 1236 (3d Cir. 1989).

131. 742 F.2d 751 (3d Cir. 1984).

132. *See Phillips*, 881 F.2d at 1245; *Greenfield*, 742 F.2d at 758.

133. *See In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 & n.19 (3d Cir. 1997) (discussing the two cases).

134. *See id.*

135. 910 F.2d 10, 17 (1st Cir. 1990).

136. 9 F.3d 259, 267-68 (2d Cir. 1993).

137. 51 F.3d 1329, 1333 (7th Cir. 1995); *see also* Eisenstadt v. Centel Corp., 113 F.3d 738, 745 (7th Cir. 1997).

138. Encouraging companies to make forecasts voluntarily has long been goal of the securities laws. *See, e.g.*, *Burlington*, 114 F.3d at 1432; Glassman v. Computervision Corp., 90 F.3d 617, 631 (1st Cir. 1996); *Stransky*, 51 F.3d 1333.

139. *See Burlington*, 114 F.3d at 1433.

merger talks were known to have failed.[140] Under these circumstances, the failure to update the public on the dissolution of the talks might well mislead the public and cause them to purchase securities based on the false expectation that a merger was likely to occur. Once again, as with the issue in *Zucker*, arguments were strong both in favor of (the principles of full disclosure and fraud prevention) and against (the fear of opening the door to a flood of frivolous securities lawsuits) creating a duty.

The duty to update, along with the other, more mundane issues in the case, arrived before Judge Kelly in the Eastern District of Pennsylvania on a motion for summary judgment.[141] Finding none of the statements at issue materially misleading or suffering from material omissions, Judge Kelly granted the motion. Even assuming the veracity of the statements issued, however, the question remained whether the existence of an internal forecast on March 15 that differed significantly from the public forecast made on March 9 to Reuters created a duty to update the March 9 forecast.[142] Unlike Judge Bassler in *Zucker*, Judge Kelly in *Tseng* did not issue a published opinion that directly addressed the issue. Instead, the district judge's unpublished opinion did not discuss the issue at all, despite language in two Third Circuit opinions, *Phillips Petroleum* and *Greenfield*, that stated that a duty to update did exist.

The plaintiffs appealed. They claimed, among other things, error in the district court's refusal to recognize a claim based on a duty to update.[143] This time the Third Circuit granted oral argument, and a significant portion of the time at oral argument was spent on the question of whether there was a duty to update. Nevertheless, within a few days, the case was affirmed in a JO. To affirm the district court's opinion would require that a duty to update either did not exist or did not apply.[144] Reaching that outcome, however, would have required either narrowing considerably the scope of the duty identified in *Phillips Petroleum* and *Greenfield*, or rejecting the duty identified in those cases altogether. Existing precedent did not decide the issue, and to the extent that precedent pointed toward an outcome, it pointed to a reversal, not an affirmance. Hence, an affirmance should have required a statement of reasons.

A few months later, a different panel on the Third Circuit, in *In re Burlington Securities Litigation*, published a lengthy opinion that tackled the duty to

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140. *See id.* at 1434.

141. *See* 954 F. Supp. 1024, 1025 (E.D. Pa. 1996).

142. Judge Kelly rejected the claim based on Gibbons's March 9 statement on the ground that plaintiffs had not made out a claim that the statement, on the date made, was either unreasonable or in bad faith. *See id.* at 1030-31. Neither in Judge Kelly's opinion nor in the Appellee's briefs is there any suggestion that the March 9 statement might be immaterial. Immateriality is not made out, given that this was a statement about the company's expectations for its most important product. Had the statement been immaterial, however, that would most likely have eliminated any duty to update claim. *See* Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1219 n.33 (1st Cir. 1996).

143. Appellant's Brief at 34, *In re Tseng Labs Securities Litigation*, 107 F.3d 8 (3d Cir. 1997) (No. 96-1345) (on file with authors).

144. Of course, as pointed out earlier, in theory the affirmance by JO need not have been based on the district court's rationale. *See supra* text accompanying notes 35-37.

update issue avoided in *Tseng*.[145] A little over a year later, another Third Circuit panel, this time in *Weiner v. Quaker Oats*,[146] again addressed the duty to update issue. Therefore, the issue was both open and worth addressing in lengthy published opinions. To the extent the panels in *Burlington* and *Weiner* were better equipped in terms of time and expertise to tackle the issue, the precedent they created might have been better than what the *Tseng* panel would have created.[147] The point to observe, however, is that both the *Tseng* and *Zucker* panels chose not to tackle certain issues even though those issues were both open and squarely before them.[148]

What do these two cases tell us? By themselves, two cases over a two-year period prove little. But we conceded at the start that we could not prove that the JO was being systematically used to avoid hard issues. What we argue is that, given the incentives and constraints that operate on overburdened circuit judges, one plausible explanation for reasonless dispositions in cases such as *Zucker* and *Tseng* is that a norm of using the JO to decide hard cases developed.[149] In the sections that follow, we develop this initial theory by looking at the possible secondary effects of such a norm and at empirical data on publication practices across the circuits.

F. Tables I-III: Use of the JO

The tables printed in the Appendix to this article detail the use of the JO in the Third Circuit and across the circuits. Table I (*see* page 208) sets forth the number of cases disposed of without comment by the Third Circuit during the period between 1989 and 1996. As the tables show, the Third Circuit consistently used the JO in over half its cases, including sixty percent of the cases from 1991 to 1996. Table II (*see* page 209) contrasts the Third Circuit's use of the JO with the use of the without-comment disposition in the other circuits. To complement this comparison, Table III (*see* page 210) compares the caseload burdens across the circuits.

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145. The *Burlington* panel substantially narrowed the scope of the duty articulated in *Phillips* and *Greenfield*. *See* 114 F.3d 1410, 1433-34 (3d Cir. 1997). Under the *Burlington* panel's narrow articulation of the duty to update, it is likely that *Tseng* would have been affirmed.

146. 129 F.3d 310 (3d Cir. 1997).

147. The Third Circuit does not *always* shy away from tackling hard securities cases. Judge Becker's opinion in *In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 364 (3d Cir. 1993), which addressed the "bespeaks-caution" doctrine, is one of the more important recent opinions on securities law. Similarly, the recent opinions in *Kline v. First W. Gov't Sec., Inc.*, 24 F.3d 480 (3d Cir. 1994), *In re Westinghouse Sec. Litig.*, 90 F.3d 696 (3d Cir. 1996), *Burlington*, 114 F.3d 1410, *Weiner*, 129 F.3d 310, and *Newton v. Merrill Lynch*, 135 F.3d 266 (3d Cir.) (en banc), *cert. denied sub nom* Merrill Lynch v. Kravitz, 119 S. Ct. 44 (1998), all tackled important and difficult securities law questions.

148. We recognize that it is possible that the reason why the panels in *Zucker* and *Tseng* used the JO instead of published opinions was that the cases had idiosyncratic facts that would have made poor law. But existing circuit rules do not permit panels to wait for the right set of facts before tackling an issue.

149. *Cf.* Judith Resnick, *The Death of Appeals?*, 5 FIFTH CIRCUIT REP. 637 (1988) (describing some appellate judges as claiming that "they can no longer do their work, that they rely inappropriately on staff, [and] that they concur in cases about which they have not thought enough").

The fact that the Third Circuit failed to give any reasons at all for more than half its dispositions is surprising enough, but the disparity in the use of this method of disposition across the circuits is more startling.[150] While the Third Circuit led the circuits in the use of this device, the Eighth Circuit used the JO in approximately one fourth of its cases and the Eleventh in approximately one fifth of its cases.[151] The real disparity, however, is between these three circuits and the remaining circuits. The First, Second, Fourth, Fifth,[152] Sixth, Seventh, and Tenth Circuits hardly used the JO at all.

Was there something radically different about the caseload in the Third Circuit? After all, the obvious explanation for the disparity in use of the JO is that the caseload burdens are significantly different. Perhaps the number of cases per judge in the Third Circuit was much higher than those in the other circuits, so the Third Circuit judges were simply overwhelmed. Looking at the per-judge caseload in the Third Circuit in isolation, this is a plausible explanation. For example, Table III shows that in 1993, the number of cases per judge was 132.4 in the Third Circuit. Assuming no holidays, that works out to deciding a case approximately once every 2.75 days; and that would include reading the briefs, checking the record, listening to oral argument, analyzing the arguments, reading the relevant precedent, and discussing the issues with law clerks and the other judges on the panel.[153] That leaves little time for writing a set of reasons for a decision, let alone a precedent-creating set of reasons. Arguably the caseload provides some explanation for why the Third Circuit chose to provide reasons in so few of its dispositions (and published reasons in even fewer).

The caseload explanation partially fails, however, because the per-judge caseload burden is even higher in a number of the other circuits—in fact in eight of the other twelve circuits.[154] The majority of these other circuits do not use the JO often, but do provide reasons in almost all dispositions. Table III also shows that the caseload of the Third Circuit, adjusted for difficulty of

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150. The use of staff attorneys in the Third Circuit and the First Circuit (which rarely uses the JO) is illustrative. In the First Circuit, highly qualified staff attorneys, almost all with extensive practice experience and some with prior service as law clerks, screen cases and draft opinions in *pro se* and habeas corpus cases. Judges supervise the work of these highly capable staff attorneys, but scrutiny is minimal. *Cf.* Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 32-33 (1990) (describing the First Circuit's extensive use of staff attorneys nearly a decade ago); King, *supra* note 78 (describing the Fifth Circuit's extensive use of experienced and skilled staff attorneys); Hatchett, *supra* note 6 (describing the same on the Eleventh Circuit). On the Third Circuit, in contrast, the judges let the staff do very little. Staff tend to be young, and competition for these positions is not keen, as it is for clerkships with individual judges.

151. It is interesting to note that, in 1996, three of the six circuits that did *not* ask Congress for new judgeships were the Third, Eighth, and Eleventh, the three circuits that used the JO in a significant fraction of their cases. *See* POSNER, *supra* note 4, at 232-33 & tbl.7.6, 235.

152. *See* Philip Shuchman & Alan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value?"*, 29 EMORY L.J. 195 (1980).

153. This rough calculation does not include the time judges spend deciding motions, working on committees, taking or giving seminars, and a number of other job-related tasks.

154. Given its unique caseload, we do not use numbers from the Federal Circuit. *See* STRUCTURAL ALTERNATIVES REPORT, *supra* note 3, at 72 (describing the specialized nature of the Federal Circuit).

cases, is not dramatically different from the other circuits.[155] For example, the Third Circuit's caseload is approximately the same as that in the First, Fourth, and Seventh Circuits, three circuits that provide reasons in nearly one hundred percent of their dispositions. What explains this disparity? How are judges on other circuits able to provide reasons for so many more of their dispositions that judges on the Third Circuit? As the tables discussed in Part V show, judges on the First and Seventh Circuits, publish more than twice the number of opinions that judges on the Third Circuit do.

The question remains about how the judges on the other circuits provide reasons, often in lengthy published opinions, in so many more of their cases. Where do they get the extra time? The judges in these other circuits must be delegating substantial portions of their work. Someone other than the judge is likely providing the written reasons in a large number of cases. Another possibility is that the supposedly "reasoned" short-form dispositions in other circuits are the functional equivalent of the "without comment" dispositions in the Third Circuit. The disparity in behavior between the Third Circuit and the others in terms of the use of the JO is interesting in and of itself, but similar disparities in the reason-giving mechanisms across the circuits are worth noting as well.

IV

SECONDARY EFFECTS OF NOT MAKING LAW: CAUSE FOR PAUSE

The use of a JO in the especially hard cases is problematic because it flies in the face of the model of the great appellate judges—Cardozo, Learned Hand, Friendly—who tackled difficult issues head on and advanced the law through opinions.[156] Has the siren call of the JO enthralled judicial norms in the name of docket control? Have judges failed to internalize the costs of not giving reasons to both the litigants and the system of precedent in order to place their desire to process cases above the interests of the public? This simplistic analysis, however, does not mesh with the observation that the judges using the JO appear to be working as hard as their colleagues on other circuits and appear to place great importance on fulfilling the error-correction and precedent-creation aspects of their roles.

These observations force us to think more carefully about the value of spending a large fraction of a finite set of resources on a few cases without a clear "right" outcome, thereby depriving easier cases that did have "right" outcomes of the resources they need. Judges have a finite amount of time that must be divided among a large set of cases. Therefore, if *T* is the total amount

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155. Discussing the attempt in POSNER, *supra* note 4, at 75, 230, to calculate the difficulty of different caseloads, Motz, *supra* note 90, at 1031-32, cautions against relying heavily on data to indicate meaningful conclusions or "quantify . . . [the] unquantifiable."

156. A number of commentators have castigated failures to give reasons for decisions on the ground that "reasoned elaboration" is both the "norm and ideal" of appellate decisionmaking and that departure from tradition is bad. *See* Schauer, *supra* note 53, at 633.

of time and an opinion in case *A* takes *x* units of time, there are necessarily only $T - x$ units of time left for the remaining cases. Whether case *A* deserves *x* units is not only a function of the benefits of using *x* units on that case, but also of the cost of not having some or all of those *x* units available for the other cases. Efficiency requires allocating scarce resources between competing cases.

The negative impact of the secondary effects of using the JO cannot be easily dismissed.[157] In a system constrained by overwhelming caseloads, the use of a JO in some fraction of hard cases may arguably be preferable to having law clerks or staff attorneys decide and write opinions in those cases.[158] The focus shifts from the effects of a JO on an individual case to the effects of using the JO on the system. In particular, there are two effects: the development of law within a circuit that uses a JO in a fraction of its hard cases and the implications of differences across the circuits in the use of this method of case disposition. The secondary systematic effects are not necessarily negative, but they are worth noting. These effects include the following: first, increasing delegation of the lawmaking role to the district courts; second, exacerbating the existing differences in power and influence among judges within a circuit; third, increasing disparities across subject areas, leading to disproportionate use of the JO in some areas; fourth, exacerbating disparities in power and influence among circuit courts; fifth, increasing room for strategic judicial behavior; and sixth, jeopardizing the core values of accountability, legitimacy, stability, and predictability.

A. Delegation of Lawmaking Role to the District Courts

An appellate court's decision to affirm a hard case without opinion shifts the primary lawmaking responsibility to the district court.[159] The district court's articulation of the law governs the case. If the district court publishes its opinion, that opinion stands as the most recent and authoritative pronouncement on the issue. An appellate affirmance without comment signifies neither approval nor disapproval of the district court's rationale. Anyone later examining the issue—an individual deciding how to act or a court deciding how to rule on a similar issue—will be guided only by the district court's opinion.[160] In addition, because the circuit court has punted, when the same issue arises in another dis-

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157. That informal social mechanisms are both the primary and most effective means of controlling judicial behavior may explain why many judges rationally resist expanding the judiciary on the grounds that such an expansion would hurt "prestige" and "collegiality," both important elements of a norm-based enforcement system. *But see* Richman & Reynolds, *supra* note 13, at 301-02, 323-25 (criticizing the premise that an expansion would hurt prestige and collegiality).

158. Judges may turn to law clerks and staff even in the Third Circuit, which used the JO extensively. *See supra* text accompanying note 15. If the judges enjoy their work and do not like delegating work to clerks and staff attorneys, however, the availability of the JO enables them to avoid delegation.

159. The increased delegation of the lawmaking function has been discussed elsewhere, albeit in a different context. *See* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

160. *See* Dragich, *supra* note 6, at 787 & n.21.

trict court in that circuit, that court will not be bound by the prior determination; the latter district court may interpret the law anew. As the appellate court performs its lawmaking function in a smaller and smaller number of cases, the judicial lawmaking role increasingly shifts to the district courts.

District judges, however, tend to be specialists in trial management, not in opinion writing or lawmaking. Moreover, they sit alone and do not have the benefit of the intellectual debate among a panel.[161] Therefore, the quality of lawmaking may decrease.[162] Furthermore, the law will be applied even less uniformly. On the other hand, a district court's opinion has little precedential effect, so the potential harm is minimal compared to a badly reasoned appellate opinion. Plus, when an appellate panel eventually decides to address the issue, it will have multiple district court opinions on the question to consider.[163]

B. Intra-Circuit Differences in Power and Influence

Differences in power and influence among individual judges on a circuit always exist. Individual judges can and do dominate the courts they sit on through personality, political savvy, the ability to build consensus, and, on occasion, sheer intellectual ability. Examples abound: Holmes, Cardozo, Brennan, Learned Hand, Friendly, and Posner.[164] The availability of the JO option makes it more likely that such differences in power and influence will emerge.

Judges care about reputation, error correction, precedent creation, and the availability of minimal amounts of leisure. Judges will, however, differ in the values they attach to these goals.[165] Some judges obtain great satisfaction from seeing their opinions cited in casebooks and law review articles, while others may derive more satisfaction from compliments from members of the local bar. Still others value fairness to the litigants above publishing opinions or counting citations. Similarly, judges differ in their interests in particular areas of the law: Some enjoy complex tax and bankruptcy cases, while others abhor them.[166] Issuing a JO in a hard case creates the possibility that these differences in goals will exacerbate existing distortions in power and influence among the judges.[167]

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161. *Cf.* David Charny, The Economic Analysis of Deliberative Procedures (Apr. 15, 1997) (unpublished paper presented at the Harvard Law & Economics workshop, on file with authors) (discussing the efficiency enhancing aspects of deliberative processes).

162. *See* Bussel, *supra* note 74, at 1086-87.

163. In some cases, it may be more important to decide an issue quickly than to decide it correctly, that is, the benefits accruing from certainty may outweigh the costs of a sub-optimal rule. But unless one can make the empirical statement that for all cases the costs of delayed lawmaking outweigh the benefits that accrue from increased certainty, it may be best to allow the appellate courts to decide when lawmaking is called for and when it should be delayed.

164. In contrast, the influence of others such as Justices Frankfurter and Douglas was far less than what might have been expected given their intellectual abilities. *See* BAUM, *supra* note 12, at 1.

165. *See id.* at 30-31 (citing studies on judges).

166. *Cf. id.* at 111 (noting that Earl Warren overassigned himself civil rights cases, but not economics cases).

167. *Cf.* David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 337-39 (1997) (documenting wide differences in influence across judges in the adjudication of habeas corpus applications—an extremely low visibility process).

Judges concerned about creating precedent or furthering their normative vision of the law will use the JO in very few hard cases. They will write and publish opinions in as many hard cases as possible—perhaps even using their law clerks to produce more opinions. Judges who care less about creating precedent and being cited and more about error correction and creating good law, on the other hand, will use the JO more frequently. They will avoid writing opinions in cases in which the risks of error are high, preferring instead to focus on the cases in which they can be confident they are correcting errors and creating good law. To the extent judges dislike using law clerks in the decisionmaking process, they will be even more likely to use the JO. These differences in style allow the first category of judge to create a great deal more precedent than the second category. This difference in lawmaking influence is further exacerbated if the first set of judges writes its opinions in broad rather than narrow language.

Analogous differences also can arise in subject areas, as discussed in the next subsection. If there are areas of the law that most judges find difficult and uninteresting, then judges will use the JO in these areas the most, avoiding the hard cases in those areas. This, in turn, has the effect of ceding the area to the few judges who find the area interesting or want to increase their influence generally. Certain judges, therefore, will be able to capture precedent in particular areas.

The creation of differences in power and influence are not necessarily negative. Judges who care about being cited and about what academics think of their opinions have an incentive to write better opinions. Similarly, judges who enjoy bankruptcy issues likely write better bankruptcy opinions because they better understand the field. For example, Justice Powell, a former corporate lawyer, wrote most of the important Supreme Court securities law opinions during his tenure, and commentators have not perceived that as unduly problematic.[168] On the other hand, academics may have simply ignored the problems of judicial capture and specialization.

C. Differences in Power and Influence Across Subject Areas

Individual judges differ in their preferences for cases in different subject areas. In the aggregate, the judges on a circuit will all most likely share a distaste for at least some unduly complex or simply boring subjects. The option of using a JO in hard cases creates a risk that the hard cases in these disfavored subject areas will be completely ignored. These areas of interest or disinterest will depend on the composition of the circuit court. If the court consists mostly of former corporate lawyers, it is likely they will consider working on corporate

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168. *See* Stephen Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Securities Fraud and Property Rights*, SMU L. REV. (forthcoming 1999) (noting the difference in how the Supreme Court decided complex securities cases when Justice Powell was on the Court and when he was not); *see also* Sachs, *supra* note 93, at 809-15 (describing how Judge Friendly during his tenure on the Second Circuit wrote a disproportionate number of the securities opinions).

tax and securities cases rewarding and enjoyable. On the other hand, in a circuit of mainly former generalists in commercial law, the judges are likely to pay less attention to tax or securities; these judges will be more likely to choose a hard employment discrimination case than a hard corporate tax case.

Even with the increasingly diverse gender and racial backgrounds of federal appellate judges, they are still likely to be middle- and upper-class, relating more easily to certain kinds of disputes than others. Judges are generally unlikely to find veterans' benefits or prisoners' rights cases interesting.[169] By contrast, employment discrimination and affirmative action are interesting subjects because judges probably have encountered and thought about these problems no matter their political persuasion. To the extent that the judges share a distaste for a particular area, the availability of the JO can mean that the hard cases in these areas will receive less attention and the case law will be underdeveloped.

The differences in judicial power and influence that the JO can potentially cause, however, are not necessarily worse than those resulting from the opposite situation. The availability of the JO distorts the development of the law toward areas that judges enjoy. To the extent judges have a distaste for the more complex areas—antitrust, securities, tax—the hard cases in these areas will receive less attention. Circuits that address all the hard cases with published opinions, but dispose of the less difficult cases with unpublished opinions, will invest resources toward the more complex cases, increasing the influence of those circuits on these issues. Both systems have inherent power differences.

In the circuits relying on the JO or other short-form dispositions for hard cases, the judges themselves determine the power differences. The judges correct errors in all cases and write published opinions in most cases in which precedent points to an answer the district court has missed. The judges also pick and choose the hard cases in which to develop precedent. In the non-JO system, on the other hand, the litigants determine the differences:[170] Litigants who present the best-briefed, complex cases will obtain precedent-creating opinions, because the non-JO system produces published opinions in hard cases (and easy cases get published opinions only if resources are left over). As Professor Marc Galanter famously pointed out, it is the "haves" in society who are likely to benefit from a litigant-dominated system of precedent creation.[171] Therefore, when hard cases receive published opinions but marginal cases are decided with short or no opinions, the hard cases (often in antitrust, securities,

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169. *See* Richman & Reynolds, *supra* note 13, at 281.

170. This is an overstatement. There are no doubt judge-caused differences even in circuits that do not use the JO. Judges can, and probably do, avoid writing opinions in hard cases by using devices other than the JO. *Cf. generally* Macey, *supra* note 32 (describing how judges, on occasion, use discretion-based procedural devices to avoid tackling substantive issues). Our point is that the JO makes it easy to avoid a distasteful case.

171. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103 (1974).

insurance, and tax) will take up a disproportionate share of judicial resources.[172] The point, however, is not that the power differences in one system are preferable to the other, but that such differences develop in a more pronounced fashion when the JO is used in hard cases.

D. Inter-Circuit Differences in Power and Influence

Just as individual judges differ in the importance they attach to the law-making role, so do entire circuits. Circuits are small groups—even the largest, the Ninth Circuit, has fewer than thirty members—and the aggregate of the preferences of group members will not necessarily converge. If norms are not determined by a simple aggregation of group preferences but are instead disproportionately influenced by factors such as the preferences of a strong leader, the norms will diverge across the circuits because the preferences of leaders are likely to differ across circuits. The tables discussed in Parts III and V demonstrate that publication norms have developed differently across the circuits. We hypothesize that it is acceptable practice to use the JO in hard cases in some circuits and unacceptable to do so in others; these differential norms can cause differences in power and influence among the circuits as well as among the individual judges on a circuit.

In a circuit that uses the JO in hard cases, judges will not only publish fewer opinions, but also will focus publication resources on areas of the law that they either find interesting or feel a social obligation to address.[173] In a circuit that does not use the JO in hard cases, by contrast, not only will judges publish more opinions, but cases in more complex areas will receive greater attention. A circuit not using the JO publishes two or three times the number of opinions that a circuit using the JO does, and publishes many more opinions in hard cases, even if some are of lower quality. Similarly, while antidiscrimination law (an area that most judges find interesting and socially relevant) may be highly developed in circuits using the JO, tax and bankruptcy law (areas for which judges do not have great enthusiasm) may be more developed in the circuits not using the JO.

Differences in power, therefore, can develop across the circuits both in the number of precedents created and in the areas of law developed. The differences in power and influence that develop across the circuits—differences independent of the circuit's size or caseload—will, in turn, add to the importance of which circuit a new judge is joining. As the data described in Part V demon-

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172. Professor David Wilkins pointed out to us that it is not that the "haves" necessarily bring the hardest cases, but rather that they have the resources (highly skilled lawyers) to make it appear that their issues are the most complex (and therefore the most worthy, or unworthy, of judicial attention).

173. It is interesting to note that as the fraction of cases disposed with a JO in the Third Circuit dropped from 62.3% in 1996 to 52.9% in 1997 and 32.8% in 1998, the fraction of cases in which published opinions were written rose from 13.7% in 1996 to 17.1% in 1997 and 24.6% in 1998. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 20, at tbl. S-3. The circuit also went from using the unsigned, unpublished opinion in no more than a handful of its cases (0.3% in 1996) to using it in more than 10% of its cases (11.2% in 1998). *See id.* Analogously, the numbers on signed, unpublished opinions went from 23.8% in 1996 to 41.4% in 1998. *See id.*

strate, if the judge is appointed to a circuit with a norm of generating as much law as possible, the judge will have a greater influence in developing precedent than if he or she were appointed to a circuit with a norm of permitting the JO in hard cases.

E. Strategic Behavior

The availability of the JO in hard cases increases the likelihood of strategic behavior by judges when deciding a case.[174] In the circuits not using the JO in hard cases, the judges on an appellate panel have two options for a case raising a difficult issue.[175] They can either affirm with a published opinion or reverse with a published opinion. In a circuit using the JO, a third option is available: affirm without writing an opinion. This third option can alter the outcome of a case because the judges may choose the simpler affirmance choice when they otherwise would have voted for a reversal if an opinion had been required.[176]

This increased room for strategic behavior is best illustrated with an example. Consider a three-judge panel faced with a difficult single-issue case, such as our initial securities law hypothetical. The judges neither enjoy securities law issues nor care much whether the investor or the issuing company wins the case. At oral argument, the judges unsuccessfully urge both sides to settle. At the post-argument conference, two of the three judges are weakly inclined to reverse the district court's resolution of the disclosure-update issue. The third judge, however, has a strong preference for affirmance and states that he is prepared to dissent should his two colleagues decide to write and publish a reversal. Assuming sincere voting, the two judges in favor of a reversal draft a majority and the third drafts a dissent from an opinion to reverse the district court.

The use of the JO in hard cases can alter this outcome. In this hypothetical, while the two judges in favor of a reversal have a weak preference for reversal, the dissenter, in contrast, has a strong preference for affirmance. Judges, for the most part, do not like writing in the face of a dissent, especially if they are

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174. We define sincere or nonstrategic behavior as voting consistently with one's outcome preference for that case, without considering the impact of the vote on the collective result for that case. *See* BAUM, *supra* note 12, at 90. Outcome preference, in turn, is the outcome that one thinks is most appropriate for the case based on normal considerations of precedent and policy arguments. What we describe as an outcome preference has been described by others as judgment-based decisionmaking. *See* Amartya Sen, *Social Choice Theory: A Re-examination*, 45 ECONOMETRICA 53, 53-54 (1977); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1343 n.113 (1995).

175. We use a single-issue case to remove the complication of judges voting differently on different issues. In theory, one could multiply the options by positing different ways of drafting the opinion, but the options still fall into the categories of either writing to affirm or writing to reverse. Others have noted, however, that the norm among judges is to vote on *outcomes* in cases and not on individual issues. *See* BAUM, *supra* note 12, at 71. For a study of judicial tailoring of historical arguments to outcomes, see C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 CAL. W. L. REV. 287, 332 (1988).

176. *See* Caminker, *supra* note 1 (asking whether it is ever normatively acceptable for justices to act strategically to alter a case outcome and thereby produce a better precedent).

unsure about and lack an interest in the area.[177] The presence of a vigorous dissent forces the author of the majority to expend greater effort on his opinion. The additional attention that a dissent attracts increases both the risk of criticism and an *en banc* or Supreme Court reversal. To the extent the third judge is well respected and has a reputation for writing strong dissents, the other two judges are even worse off.

Because in our hypothetical the two judges in favor of a reversal have only a weak preference to reverse, but a strong aversion to writing a reversal accompanied by a dissent, the JO alternative becomes more attractive. The JO creates no precedent, and the two judges do not care much which party wins. To the extent they care about creating precedent, it is easier to wait until they are on a panel with a third judge who shares their views. The third judge also has an incentive to agree to the JO because although he would have preferred an affirmance with an opinion, the JO produces an affirmance and saves the effort of dissenting. Furthermore, use of a JO leaves open the possibility that at some later date the third judge may be on a panel with judges who share his views. The result, therefore, is that all three judges can agree to dispose of the case with a JO. The availability of the JO induces the two judges with a preference for a reversal to alter their votes strategically to forestall a dissent.

Strategic behavior can also occur without the JO alternative. Assuming two judges with a weak preference for reversal and a strong dissenter, fear of a dissent may be strong enough to cause the two less committed judges to capitulate and agree to affirm with an opinion by the third. The availability of the JO, however, makes capitulation significantly easier because no precedent is created. Thus, the JO option, in addition to making strategic behavior more likely, also makes it easier for strong individual judges to exert their will on their less-committed colleagues.

F. Accountability, Legitimacy, Stability, and Predictability

The requirement of providing reasons for the outcome renders a decisionmaker externally accountable.[178] In turn, external accountability provides legitimacy, stability, and predictability to the lawmaking process: External observers can examine the judges' fidelity to the substantive law.[179] Public revelation of reasoning also clarifies whether the decisionmakers have relied on illegitimate criteria—for example, preferences based on race, class, or gender.

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177. *See generally* Posner, *supra* note 29, at 15 (noting that dissents raise arguments that require response). Posner describes the phenomenon we discuss in this section as "going-along" voting to obtain leisure, as including "aversion to any sort of 'hassle.'" *Id.* at 20.

178. *See* King, *supra* note 78 ("[G]iving reasons, however briefly, provides a basis for accountability of the panel and the system generally.").

179. Judge Wood, in a recent speech, made the point that external observability, and hence, accountability, is reduced when judging becomes more specialized and opinions become complex and difficult for an external observer to understand. *See* Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997). On specialized adjudication more generally, see Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995); Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377.

While these functions of the judicial system enhance social welfare, they are often couched in terms of values other than efficiency.

Public accountability for a decision ensures that the judges remain faithful to precedent and use legitimate criteria in their decisions. The common law has "for some long time been equated with the words and deeds of courts."[180] Making a decision that either visibly deviates from the dictates of precedent or is based on illegitimate criteria is likely to result in both reversal and a loss of reputation. This gives judges an incentive to follow the dictates of precedent, which in turn ensures stability, predictability, and, of course, legitimacy—all values integral to ensuring the rule of law.[181] The American practice of having an individual judge write the court's opinion increases the level of accountability by placing the individual author's, and not just the court's, reputation on the line.[182] Therefore, the failure to provide reasons undermines the foundations of our precedent-based system, which assumes that judges follow precedent by a process of reasoning and deliberation.[183] Furthermore, even if judges who do not provide reasons are following precedent, their failure to provide reasons creates a risk that the system will be perceived as illegitimate.[184]

Professor Fallon describes the "legal process ideal type" of the rule of law as one valid interpretation of the rule of law. The characteristics of this process of interpretation include a connection between reasonableness and law, legal analysis and procedural fairness in applying laws and making decisions, and judicial review and reasoned deliberation in governmental agencies and branches

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180. J.H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS 169 (1986).

181. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 18-21 (1997); *see also* Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (discussing different purposes served by the rule of law). Brian Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 18-21 (William Twining ed., 1986), deals with the maxims or principles of the common law as a customary system to provide guidance for future conduct.

182. *Per curiam* opinions in difficult cases are sometimes described as signs of a court's strength and solidarity (for example, *Brown v. Board of Education*, 347 U.S. 483 (1954)), but they could as easily indicate instances in which no single judge is willing to put his or her reputation at stake on the opinion.

183. "The entire appellate process is traditionally thought of as ending in a conjunction of three events—an oral argument, a set of briefs, and a judicial opinion." Frank M. Coffin, *Research for Efficiency and Quality: Review of MANAGING APPEALS IN FEDERAL COURTS*, 138 U. PA. L. REV. 1857, 1862 (1990) (book review). Cass, *supra* note 52, at 992, states: "Indeed, the common law's traditional emphasis on case-by-case development of legal doctrine accords primacy to the result. This preference for incrementalism reflects the view that rationales become less trustworthy guides to future decisions the more they extrapolate from the base of known fact-settings to which they apply." MARY ANN GLENDON, A NATION UNDER LAWYERS 147-48 (1994), argues that the

> [d]iscipline of writing out the reasons for a decision and responding to the main arguments of the losing side has proved to be one of the most effective curbs on arbitrary judicial power ever devised. . . . Those important safeguards are lost when, as is increasingly the case, decisions are rendered without written opinions and judicial panels vote after little or no discussion.

184. *See* Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 239 (Summer 1998) ("At a fundamental level, much of civil justice—particularly in the common law environment—depends on the parties' perception of the judge . . . .").

to guarantee justice and fairness.[185] Previously, at least, consent and consensus validated proper legal decisionmaking, although our current society's explicitly acknowledged pluralism makes consensus incapable of becoming universal.[186] Professor Fallon sums up this interpretation of the rule of law as the controversial purpose of setting forth "a plausibly attainable ideal for modern legal systems that include pervasive administrative bureaucracies and rely heavily on courts to adapt legal norms to rapidly changing conditions."[187]

The argument for mandating that reasons be given in cases—especially the hard cases in which the reasons are not readily visible—is strong. Accountability is crucial to ensure fidelity to rules or norms of legitimate decisionmaking. Judges on the federal circuit courts, however, are not constrained solely by external accountability. Indeed, we argue that internal accountability is extremely important as well. Judges are constrained because they make their decisions in panels and not as individuals. Cross-judge mutual monitoring and the risk of reversal by an *en banc* court should ensure that judges do not use the JO to subvert the commands of precedent.[188]

The real fear is that the use of the JO in case disposition will cause the public to perceive the system as unfair, arbitrary, and illegitimate. Avoiding this problem depends on the types of cases in which the JO is used. In discussing judicial incentives to use the JO, we described two categories of likely cases: the easy cases and difficult cases. Easy cases do not merely suggest, but actually require, a specific outcome; the difficult cases have strong arguments on either side, both precedent and policy based. Does the danger of the public perceiving the system as unfair, arbitrary, and illegitimate appear in both types of cases? Take the easy cases first. In these cases, the existing body of law points to a clear outcome, so it will, by definition, be obvious if the court fails to follow the dictates of the law. The JO outcome, therefore, will follow the dictates of law.

But what about the hard cases in which the arguments on either side are in equipoise? Is the decision to choose one side over the other without giving reasons (or even having reasons) unfair, arbitrary, and illegitimate? What about the rule of law values of stability and predictability? Two sets of prima facie strong arguments are in competition. In making a reasoned decision, the judges would be picking one set of reasons over the other. If the judges see the

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185. Professor Fallon cites, among others, the classic authorities for the basic position, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4-5, 145-53, 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988), and *Justification (and Justifiability) of Law in a Contradictory World*, *in* NOMOS XXVIII: JUSTIFICATION 71, 83-85 (J. Roland Pennock & John W. Chapman eds., 1986). *See* Fallon, *supra* note 181, at 18-19 nn.77-79, 81, 83-85, 93.

186. *See* HART & SACKS, *supra* note 185, at *l*i, cxvii-cxix (pointing out that society has far less consensus than was previously assumed).

187. Fallon, *supra* note 181, at 37.

188. *Cf.* Baker, *supra* note 6, at 927; Dragich, *supra* note 6, at 786 (imagining ways judges might abuse the JO). No one suggests that the judges are using the JO to avoid having to follow precedent or to show favoritism to one side, but rather only to reduce their work load.

reasons on either side as equally strong, their decision to pick one set of reasons over the other is, from an efficiency point of view, arguably no more unfair, arbitrary, or illegitimate than their decision to affirm in all such cases, as they would do with a JO. In fact, the decision to affirm is, again from an efficiency point of view, arguably fairer and less arbitrary because it defers to the outcome—although not the reasoning—of the prior decisionmaker, the district court. The efficient rule, in other words, is that, other considerations being equal, the winner in the district court wins on appeal. In a two-stage evaluation process which fails to produce a clear result in the second round, the optimal outcome is to reward the first round winner.[189] This process is different from saying, as the non-JO system sometimes appears to operate, "other things being equal, the winner has won the appellate court popularity contest." Such a process would in fact be random, arbitrary, and perceived as illegitimate.[190] For stability and predictability values, these hard cases are by definition ones in which the substantive law does not predict an outcome.

Accountability is not satisfied, however, by administrative efficiency alone, and the efficiency analysis only lists in *sic-et-non* fashion the competing arguments on each side. On the other hand, a value more central to law, namely that generalist judges apply their practical reasoning power to reach a principled decision in all cases, does offer more than the merely administratively efficient choice when deciding cases.

The analysis of secondary effects, especially with respect to core process values such as accountability and legitimacy, sheds doubt on the efficiency-driven calculation that the use of the JO in some fraction of hard cases might be positive. Judges who care deeply about these secondary effects would most likely resist any efficiency-driven movement toward the development of a norm of using the JO in some fraction of hard cases. But the empirical data on publication practices does little to answer our question about what the true norms are. Instead, the stark disparities in publication practices across the circuits suggest that different norms have developed in different circuits. Within the context of those differences, it is plausible that some circuits have norms derived primarily from efficiency concerns, whereas others operate under norms that are derived more from process concerns.

V

PRELIMINARY DATA: CROSS-CIRCUIT PUBLICATION PRACTICES

Tables IV through XI in the Appendix (*see* pages 211-23) present data on cross-circuit publication practices. The results suggest not only that internal

189. *But cf.* Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 333-44 (1982) (discussing the role of courts not in terms of economic efficiency but in legal terms, that is, providing guidelines for future decisions and assuring litigants that like cases are treated alike).

190. The use of random processes to resolve disputes is not entirely unknown. *See* BOSMAJIAN, *supra* note 67, at 20-21 (describing examples of societies in which disputes are resolved by chance). Indeed, in some contexts, a lottery-based system might be perceived as more legitimate than one that relies on the exercise of reasoned judgment by designated individuals.

norms in some circuits have deviated from the behavior mandated in the circuit rules, but that internal norms have evolved differently across the circuits. The focus is the development of one particular norm, the use of the JO in hard cases. Our data is preliminary because our results no more than scratch the surface of the issues we have raised: Extreme disparities in lawmaking behavior across the circuits do exist. There are, however, no easy explanations for these disparities. They can be explained partially by cross-circuit differences in caseloads, differential evolution of social norms across the circuits, and path dependence, but these explanations are only hypotheses. The disparities are real and are worth studying in greater detail.

A. Tables IV-XI: Variations Within and Across the Circuits

Individual judges on a circuit that uses the JO will differ in their publication preferences. Some judges, who likely derive satisfaction from having their opinions cited, will want to publish as many opinions as possible, and others, who dislike criticism, will avoid scrutiny and hence, publication. Assuming, therefore, that the judges in the circuit differ in their preferences for publishing, lifting the requirement that all hard cases require published opinions will result in the publication-seeking judges publishing more—that is, using the JO in fewer hard cases—and the publication-shy judges publishing fewer opinions.

Analogously, the availability of the JO also allows for differences among the judges on a circuit in the use of law clerks. Assume that the extensive use of law clerks in drafting opinions is the prevalent norm in a circuit.[191] The additional norm of avoiding an opinion in certain hard cases permits a judge who does not like using law clerks to draft opinions not to use them in such cases. Selecting which cases will receive opinions saves that judge enough time to enable that judge to draft all the opinions himself. Differences within the circuit can emerge between judges willing to use law clerks extensively in the drafting and reasoning process and those who treat their clerks exclusively as research assistants. Other factors being equal, the first group is likely to generate more case law than the latter group, thereby creating a difference in power and influence that might not exist if the judge with a distaste for the use of law clerks had been forced by the pressures of her caseload to use her clerks to draft opinions.

We hypothesized, in the context of their extensive use of the JO, that judges on the Third Circuit may have felt unconstrained to decline to publish opinions in some hard cases. The data on publication practices, however, suggest that

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191. Indeed, use of clerks in drafting opinions appears to be the dominant norm across the circuits. *See* Motz, *supra* note 90, at 1034;Richman & Reynolds, *supra* note 13, at 275. Judges, however, differ both in their views about the appropriate role of law clerks and in how they use their clerks. Judges Posner and Easterbrook, for example, are said to do all of their opinion writing themselves, whereas others are reputed to leave all of the opinion writing to their clerks. *See* Martha Middleton, *Shaping a Circuit in the Chicago School Image*, NAT'L L.J., July 20, 1987, at 1, 34.

judges on a number of the other circuits do not feel similarly unconstrained.[192] This difference creates the potential for an inter-circuit differential in publication rates. Specifically, the difference in norms will produce across the circuits a disparity in their relative influence over the development of federal law. Similarly, the availability of the JO can cause a difference in power and influence within a circuit that accepts its use in harder cases.

Table IV (*see* page 211) contains publication numbers for individual active judges on the Third Circuit for a two-year period from 1995 to 1997. The disparity among the judges in the number of majority opinions published is apparent. For example, the judge at the low end published twenty-one majority opinions, while Judge Edward R. Becker, the judge at the high end, published forty-eight during the same period. Judge Becker's production was well over twice that of the low end, but that was still significantly fewer opinions than any First Circuit judge. Similar disparities exist within the entire Third Circuit. Of the twelve active judges, four judges published between twenty-one and twenty-nine majority opinions, another four between thirty and thirty-nine, and the other four between forty and forty-eight majority opinions. Individual judges on the Third Circuit, in other words, have significantly different influence levels over the development of precedent. Our initial hypothesis is that the extensive availability of the JO in this circuit was, at least in part, responsible for the creation of this difference.[193]

The number of opinions alone, however, is a rough and imprecise estimate of an opinion's influence. It is possible, for instance, that the judges with high publication rates, such as Judge Becker on the Third Circuit and the judges on the First Circuit, have higher publication rates because they publish many short opinions in easy cases. Tables V and VI (*see* pages 212-13) contain data on the average length of opinions and citation rates for judges on the First and Third Circuits. (Neither the length of opinions nor the number of citations is a perfect measure of the importance of an opinion, but they are our best measures for now.[194]) The tables show that neither the same dramatic differences in opinion length nor in citation rate are indications that the judges who publish more are publishing opinions in easier cases: The judges publishing a significantly larger number of opinions were neither writing significantly shorter nor less-cited opinions. In fact, using the per-case rate of citation by other circuits

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192. *Cf.* Motz, *supra* note 90, at 1038 (expressing the hope that the norm on the Fourth Circuit will shift to one that allows the disposition of some fraction of cases with one-line orders).

193. The fact that the Third Circuit's recent move away from the use of the JO has resulted in an increase in the fraction of published opinions tends to support the hypothesis. *See supra* note 172.

194. *Cf.* RICHARD A. POSNER, AGING AND OLD AGE 182-92 (1995) (using the number of citations to a judge's opinions as a rough measure of quality).

The length of an opinion and the number of citations to it can be misleading measures of the difficulty of the issues tackled. For example, while harder issues make for longer opinions, the extensive use of law clerks also probably makes for longer opinions. *See* POSNER, *supra* note 4, at 146. Differences in length of opinion, therefore, may be primarily measuring differences in the use of law clerks. Opinions written in highly litigated and published areas are also likely to be more frequently cited. *See* William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEG. STUD. 271, 271 (1998) (describing the problems inherent in judicial citation studies).

as an indication of the difficulty or importance of the issues tackled, Judge Becker's per-case citation rate is the second highest in the Third Circuit[195] (the highest is that of Judge Timothy K. Lewis). Furthermore, Judge Selya's per-case citation rate by outside circuits (Judge Selya, with ninety-five published majority opinions, is the high publisher on the First Circuit) was third in the pool of First and Third Circuit judges.[196]

Tables IV through VI (*see* pages 211-13) illustrate three phenomena: the disparity in publication rates among individual judges on the Third Circuit, the disparity in publication rates between judges on the First and Third Circuits, and the lack of corresponding disparities among the opinion citation rate or opinion length of high and low publishers. Given these observations, the question has to be asked: Are those who publish more simply choosing to publish more of their difficult cases than their colleagues? It may be that the data on citation rates are misleading and that being cited more is largely a function of writing style (for example, a propensity to restate hornbook propositions) and does not correlate well with the difficulty of the substantive law issue tackled. Maybe those who publish more are doing no more than publishing more of their easy cases, but the hard question must be asked.[197]

B. Publication Behavior Across the Circuits

Having examined the individual publication rates for active judges on the Third Circuit, the next comparison is the individual publication rate for judges on the other circuits. The majority of these other circuits did not use the JO at all, while the JO was the dominant method of case disposition in the Third Circuit when we began our study. Individual judge- and total-circuit publication rates from the other circuits demonstrate wide differences in publication practices both within and across the circuits.

Once again, as Table VII (*see* page 214) demonstrates, the disparities among the circuits are dramatic. At one extreme are the Third, Fourth, and Eleventh Circuits, where active judges produced, on average, between thirty and forty published majority opinions over the two-year period. At the other extreme are the judges on the Seventh Circuit, who produced 112.5 majority opinions, judges on the Eighth, 97.5, and judges on the First, 75.8. (Recall from Table III (*see* page 210) that the difficulty-adjusted caseload burdens for these

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195. Judge Becker's per-case influence ranking turns out to be one of the highest in the country. *See* Landes et al., *supra* note 194, at 308 tbl.4A (ranking Judge Becker as fourth in a pool of 205 federal appellate judges). Among judges who were both in our pool (judges active between the period Aug. 1, 1995, and Aug. 1, 1997) and in that of Landes (judges with six years or more of tenure in 1995), Judge Becker ranked *first* in the country in per-case influence. *See infra* tbl. XII.

196. Judge Selya's per-case influence ranking, like that of Judge Becker, is also one of the highest in the country. *See infra* tbl. XII (average influence is per case influence).

197. In fairness, it should be pointed out that the Third Circuit's publication rates would not look so low were they to be compared to those of the Fourth or Eleventh Circuits instead of the First or Seventh. *See infra* tbl. VII. It also should be pointed out that we would most likely see a quantity/quality trade-off were we to compare the citation rates of Third Circuit opinions to those on the Eighth Circuit instead of the First. *See infra* note 196.

circuits were roughly equal, except for the Eleventh Circuit, which had an unusually high caseload burden.)

Between the three law-abundant circuits and the three law-starved circuits are the other six circuits. These circuits, the D.C., Second, Fifth, Sixth, Ninth, and Tenth, had individual active judges publishing an average of between forty and fifty-five majority opinions over the period we examined.[198] There are a number of interesting differences in the individual publication rates of the judges—and with one exception we shall let the tables speak for themselves. The one exception is Chief Judge Richard Posner of the Seventh Circuit. Over our two-year period, Judge Posner authored 181 majority opinions. The low publisher on the Third Circuit authored twenty-one majority opinions over the same period, while Judge Becker, the high publisher on the Third Circuit, authored forty-eight. There were also a number of judges from circuits other than the Third who published fewer than twenty majority opinions over the two-year period for which we collected data. Judge Posner's influence on the development of legal doctrine is significant through his academic writings alone. Judge Posner's opinions are also given greater deference because of his academic reputation.[199] The data demonstrate that there is a third avenue by which Judge Posner is having a disproportionate influence on the law—the sheer volume of majority opinions he publishes. Furthermore, Judge Posner's opinions are written in a straightforward but fully theorized law-and-economics framework easily applicable to other cases, thereby magnifying his influence.[200] Similarly, Judge Easterbrook, Posner's comrade-in-arms in promulgating Chicago-style law-and-economics reasoning, published 127 majority opinions during this period. The combined output of these two judges amounted to more

198. The citation rate comparison of the judges on the First and Third Circuits demonstrates that producing a high volume of opinions does not necessarily entail a drop in the quality of individual opinions. Numbers from the Landes study that we have reproduced in Table XII in the Appendix (*see* page 223) confirm that judges in certain high-opinion-volume circuits such as the First and the Seventh Circuits (Judges Posner, Easterbrook, and Selya being prime examples) are not making a significant sacrifice in terms of opinion quality *vis-à-vis* their colleagues on the Third Circuit. *See* Landes et al., *supra* note 194, at 318 (stating that frequently, as on the First and Seventh Circuits, the "more able and energetic judges produce both more and higher quality opinions"). It is interesting to note, however, that the opinions of the most prolific opinion writers on the Eighth Circuit (who, unlike the judges on the First and Seventh Circuits, do use the JO in a significant number of cases) are among the least cited. Judge Wollman, for example, ranks second in the country in terms of number of majority opinions, but has a per case citation rate that is one of the lowest in the country. *See infra* tbl. XII. The norm of high volume, therefore, does not necessarily come with high difficulty in cases.

199. Students in one of our seminars (Theory of Contracts) regularly write papers on selected opinions of Judge Posner and both of us teach out of casebooks that contain numerous opinions by Judge Posner.

200. We use the term "fully theorized opinion" to describe one that describes the goals and purposes of the statute or common law rule at issue and then articulates a theoretical framework for deciding the case that can be applied to decide later cases. *See* Cass R. Sunstein, *Foreword—Leaving Things Undecided*, 110 HARV. L. REV. 4, 14 (1996) (contrasting maximalist or fully theorized reasoning with minimalist reasoning, the latter process involving a tendency to think analogically and by close reference to actual and hypothetical cases).

than 300 published majority opinions in a two-year period. This is well over half the output of the twelve active judges on the Third Circuit at that time.[201]

The publication rates of Posner and Easterbrook, while dramatic in comparison to judges on the Third Circuit, are somewhat less dramatic compared to the other judges on the Seventh Circuit. There, Judges Cummings and Manion, with eighty-nine majority opinions each, were at the low end of the scale (Judge Becker, the high publisher on the Third Circuit, published fewer than fifty). In the Seventh Circuit, therefore, the norm was to *generate law*. In contrast, in the Third Circuit, the norm appears to have been one of *not making law*.[202]

As noted above, the JO was the primary method of case disposition on the Third Circuit, while the majority of the other circuits did not use it at all. As the data on publication rates across the circuits show, however, the acceptability of using the JO in the Third (and to a lesser extent on the Eighth and Eleventh Circuits) was but *one* of the norms creating the variation in behavior across the circuits. A number of other norms also contributed to the differences in publication rates. For example, the Fourth Circuit, which did not use the JO, and the Eleventh Circuit, which used the JO far less frequently than the Third, had publication numbers as low as the Third Circuit. The development of alternative norms in these other circuits likely explains the reduced creation of law in these circuits.

Tables VIII, IX, X, and XI (*see* pages 220-23) reveal norm variations across the circuits. Table VIII displays the fraction of cases that resulted in published opinions in the period from 1989 to 1996. The differences in the numbers of opinions published appear on this table as well. The First, Seventh, and Eighth Circuits published opinions in a significantly higher percentage of their cases than the Third, Fourth, or Eleventh Circuits. For example, in 1996, the First, Seventh, and Eighth Circuits published 56.1%, 44.1%, and 36.3% of their respective decisions, while the Third, Fourth, and Eleventh Circuits published only 13.7%, 10%, and 16.6% of their decisions respectively. The contrasting norms of high and low publication remained relatively stable over the seven-year period our data covers.

Recall that Table II (*see* page 209) described the use of the JO across the circuits from 1989 to 1996. Tables IX and X (*see* pages 221-22) present data on the use of the two other short-form methods of disposing cases without pub-

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201. The Landes study reports that Judges Posner and Easterbrook rank *first and third in the country* in terms of their total influence on the law (as measured by citations). *See* Landes et al., *supra* note 194, at 288 tbl.2A; *infra* tbl. XII.

202. Table VII (*see* page 214) also shows differences in circuit practices in terms of the practice of *writing separately*. On the Third, Fourth, and Eleventh Circuits, three circuits that produce relatively small quantities of law, 16%, 17%, and 10%, respectively, of the opinions written are *dissents*. In contrast, in the law-generating First, Seventh, and Eighth Circuits, the respective dissent percentages are 4%, 4%, and 5%. Because the norm is to write a dissent when one disagrees, our hypothesis is that a larger value is attached to disagreeing on the Third, Fourth, and Eleventh Circuits, whereas disagreement is generally frowned upon on the First, Seventh, and Eighth Circuits, leading judges to disagree only under extreme circumstances. To the extent one sees dissents and concurrences (for which the numbers are similar) as signals of problems in an opinion, certain circuits send these signals a lot more often than others.

lishing: signed, unpublished opinions and unsigned, unpublished opinions. As with the JO, these methods of disposition are used extensively in some circuits and not others; also as with the JO, these differences in use are not readily explained by differences in per-judge caseload or the level of difficulty of the caseload. In 1996, for example, the Second and Tenth Circuits used the signed, unpublished opinion (Table IX) for disposition in approximately seventy percent of their cases. The Third and Sixth Circuits came next, using this method in only 23.8% and 9.1% of their cases. The rest of the circuits rarely used this method. Once again, our hypothesis is that the evolution of different norms in the different circuits accounts for these differences.[203]

A similar pattern appears in the use of the unsigned, unpublished opinion. Table X (*see* page 222) shows that the Fourth and Ninth Circuits used this method of disposition in more than seventy-five percent of their cases, while the Second, Third, and Tenth Circuits used the method in very few cases.[204]

Finally, Table XI (*see* page 223) examines the differences across circuits in the grant of oral argument. In 1996, the Second Circuit granted oral argument in 62.2% of its cases, while the Third and Fourth Circuits granted oral argument in only 26.8% and 26.9% of cases respectively. The culture on the Second Circuit may consider the grant of oral argument as more important than the cultures on the Third and Fourth Circuits.[205]

This article merely scratches the surface of what these differences in norms are, what the differences mean to the process of appellate adjudication, and how the differences arise. Take, for example, the differences in Tables IX and X. Some circuits use the signed, unpublished opinion in a majority of cases, while a number of others use the unsigned, unpublished opinion. What do these differences mean in practice? Are unsigned opinions primarily drafted by staff attorneys while signed opinions are drafted by the judges themselves? Similarly, what does it mean to the process of judicial reasoning when a circuit denies oral argument in a majority of its cases? Does it mean that the judges

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203. Table IX contains two examples of large norm shifts. In 1989, the Second Circuit was not using the signed, unpublished opinion and the Tenth Circuit was using it in 23.9% of its cases. In 1990, however, the numbers jumped. The Second Circuit was now using this method of disposition in 35.2% of its cases and the Tenth Circuit in 51.7%. In 1991, the Second Circuit's numbers jumped yet again, this time to 62.2%. The numbers for the other circuits, in contrast, have remained relatively stable. Norms within circuits tend to shift more easily than formally sanctioned rules. Thus, for example, Ruggero J. Aldisert, a former Chief Judge in the Third Circuit, felt "an opinion should be published when the judgment of the trial court is reversed." Selya, *supra* note 21, at 413 (citing RUGGERO J. ALDISERT, OPINION WRITING 21 (1990)).

204. Table X shows the flip side of the norm shifts in Table IX in use of the unsigned, unpublished opinion which drastically dropped in the Second and Tenth Circuits in 1990 and 1991.

205. *See, e.g.*, Statement of the Honorable Jon O. Newman before the Comm. on Structural Alternatives for the Fed. Courts of Appeals (Apr. 24, 1998) <http://app.comm.uscourts.gov/hearings/newyork/0424NEWM.htm> ("Our circuit is the last one in the nation that still offers oral argument to parties, including unincarcerated pro se litigants."); *see also* Richman & Reynolds, *supra* note 13, at 280 (noting the Fourth Circuit's requirement of "a statement explaining why argument is desirable"); Stephen L. Wasby, *The Functions and Importance of Appellate Oral Argument*, 65 JUDICATURE 340 (1982). Oral argument in England is much longer than the average American appellate argument of perhaps half an hour. *See* COFFIN, *supra* note 12, at 26-30.

never discuss the case? Does a culture of discussion result in fewer dissents? We have taken a first cut at answering some of these questions in the context of the Third Circuit's extensive use of the JO, but the process of analysis has raised more questions than it has answered. The biggest new question is why different norms have developed across the circuits. These differences do not appear to be solely a function of differences in caseload. Instead, factors such as collegiality, the presence or absence of certain dominant personalities who set norms,[206] initial sets of problems faced by the circuits, and path dependence are likely at play. Understanding how these norms form and develop will require us to go beyond raw numbers and biographies of individual judges to case studies of the circuits.

VI

CONCLUSION: INTERNAL GOVERNANCE MECHANISMS MAY ESTABLISH NEW JUDICIAL NORMS BY APPLYING DUE PROCESS TO DIFFICULT AREAS OF DECISIONMAKING

The very nature of judging is called into question by the use of the JO. In determining whether its use is primarily a positive development in hard cases, three sometimes conflicting strands in the conception of judging must be taken into account: internal judicial norms, concepts of administrative efficiency, and traditional external norms of judicial accountability and creation of precedents embodying principles applicable in similar cases. Perhaps the nature of judging is changing—as Judge Calabresi put it, our system of jurisprudence may be becoming more like a code and less like the old common law.[207] Precedent matters less now. Is this a sea change? Or is there a simple economic explanation for the behavior of the judges: They are maximizing resources by managing their dockets at the expense of complete justice in each case. The problem is more complex than this, however. Our central focus in this article has been the Third Circuit's past use of the JO. But the use of the JO, especially in hard cases, is not a simple matter of judges maximizing resources at the expense of justice. Not only do the judges on the Third Circuit work hard, but they also care deeply about doing justice. In the context of an overwhelming caseload, moreover, avoiding a published opinion in some of the harder cases arguably

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206. The recent elevation of Judge Becker—someone known for his inclination toward publication—to the position of Chief Judge of the Third Circuit may have contributed to the norm shift away from the extensive use of the JO.

207. *See* Guido Calabresi, *The New Conservatism in Private Law*, Luncheon Address to the 1998 AALS Annual Meeting (available from Recorded Resources Corporation, Tape No. 175). KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960), articulates the classical values and norms of opinion writing in the common law tradition. *Cf.* Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 21 (1993) (finding a judge-written opinion "rare" today); Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A. J., Jan. 1993, at 52. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164 (1982), urged the courts to use "traditional judicial methods and modes of reasoning" in dealing with statutory materials. John Reid worked with these same traditional approaches in *Doe Did Not Sit—The Creation of Opinions by an Artist*, 63 COLUM. L. REV. 59 (1963).

may be in the interests of justice. Imagine the scenario this article began with: a hard case with prima facie equally plausible doctrinal arguments on both sides, a panel that knows little about the subject area and is likely to make a number of errors in writing an opinion, and the fact that crafting such an opinion would take significantly more time than the vast majority of other cases before the judges. Under these conditions, it is not clear that writing an opinion would serve either individual justice (there is an equal likelihood of either party winning), or contribute to the system of precedent (no law may be better than bad law that would later have to be repudiated). Thus, the use of the JO in some hard appellate cases may enhance—by inaction—both justice for the parties, that is, the correction of errors by lower courts, and the development of precedent. Nonetheless, the broad availability of the JO does raise a subsidiary set of troublesome concerns.

First, can we trust that to the extent the JO is used in difficult cases, it is used only in those with "equally plausible" doctrinal arguments? What of the risk that its use might extend to cases in which judges have a slight preference for one set of arguments, but do not want to exert the effort it would take to write a publishable opinion?

Second, in theory, the broad availability of the JO should create a bias toward the development of precedent in the areas of law that the judges find important and away from those areas in which they have little interest. To the extent that only one or two judges have an interest in a particular area of the law, those one or two judges will dominate those areas.

Third, normal differences in power and influence among the judges in a circuit will be exacerbated. Ordinarily, disparities in power exist between those who write narrowly and those who write broadly. The judges who prefer to write narrowly aid the broad writers by using the JO in hard cases, which further distributes power toward the judges who care more about establishing their legacy.

Fourth, the use of the JO increases the opportunity for strategic judicial behavior. Two judges inclined to reverse in a close case might agree to affirm without opinion when the third judge threatens to dissent from a published opinion ordering reversal; on the other hand, the third judge may agree to vote for an affirmance if only a nonprecedential JO is used. The option of using a JO, therefore, can change the outcome of close cases.

Although avoiding published opinions in certain hard cases may appear positive on first cut, these secondary effects create potentially negative outcomes. It is possible that judges care enough about these secondary effects that a norm of using the JO in hard cases could never develop. We simply do not know.

The hypothesis that use of the JO may have significantly altered the model of appellate decisionmaking in the Third Circuit leads to a second, more important question: What does this change say about the appellate system as a whole? What governs the behavior of circuit judges is not the roughly uniform

system of formal internal circuit rules, but a system of informal norms of proper judicial behavior. Despite the similarities in the circuits' work and caseload, the circuits have not converged to a single optimal set of norms. Radically different norms have developed across the circuits. For example, while the judges in the Third, Eighth, and Eleventh Circuits found it acceptable to use the JO in a large proportion of their cases, the judges in other circuits strongly disagreed. Publication rates across circuits suggest similar extreme differences in norms about the propriety of publishing dissenting, concurring, and majority opinions. Similar differentials in norms probably exist regarding the propriety of practices such as delegating work to staff attorneys or law clerks.

The supposedly uniform appellate system, therefore, is one in which similar cases receive significantly different treatment in different circuits. Furthermore, precedent is created differently across the circuits. In one circuit *pro se* and social security cases may be decided entirely by judges, while in another this authority may have been delegated to a team of staff attorneys. Similarly, tax and securities cases may be largely authored by law clerks in some circuits, not authored at all in other circuits, and authored by the judges themselves in the remaining circuits. The publication rates across circuits suggest these differences. For example, judges on the Seventh Circuit appear to have a norm of publishing a great deal, while there is a contrary norm on the Third, Fourth, and Eleventh Circuits. The result is that judges on the Seventh Circuit produce on average more than three times as many published majority opinions as colleagues on these other circuits. Thus, a President making a nomination to a Court of Appeals should realize that appointing someone to the Seventh Circuit, which has a high rate of publication, will have a significantly different impact on the law than appointing the same person to the Third Circuit.[208]

It is our view that more than administrative efficiency is at the heart of judicial decisionmaking. Professor Milsom examined the structure of social obligations under which current changes in judicial decisionmaking are taking place—a world of Medicare, social security, insurance applications, and other administrative management by zoning and planning boards.[209] The problem this presents to the common law tradition is the pressure of detail throwing the law off the center of its principles. "Complexity defies specification . . . and in the end you have to leave it to somebody's discretion."[210] If that somebody turns out to be, for example, the insurance industry, and the subject is no-fault automobile

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208. The existence of these different norms across circuits should, in theory, also be important to law students seeking clerkships. If the value of a clerkship lies primarily in the training it provides (as opposed to in the prestige of having obtained the clerkship), the existence of different norms for the use of law clerks in the drafting process, the publication of majority opinions, the writing of separate opinions, and the grant of oral argument significantly impacts the type of experience a law clerk has.

209. S.F.C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW 218 (1985), observed that "judge-made law is the product of many individuals working separately, and not just of more or less stable groups; and the number of reportable decisions is of course greatly increased." Similarly, POSNER, *supra* note 10, at 17, suggests that "the judge is, at least if he wants to be, principal rather than agent."

210. Milsom, *supra* note 209, at 221.

accidents, then judicial discretion is not being applied to tort law.[211] The extra-legal decisions of the specialist insurers, however, are not necessarily better than the decisions created by the judicial discretion exercised previously by generalist judges in that area of tort law.[212]

Professor Milsom suggests that the moral authority of the law might be restored, not by writing ever-more detailed precedent about less and less, but by increasing the importance of due process in the exercise of judicial discretion.[213] Elementary ideas of fairness might restore the moral authority of the law if fairness, or due process, is applied to the institutions that affect people's daily lives, such as the social security or planning boards, or even highly specialized courts, which may do wrong to individuals appearing before them unless the courts restrain their activities in accordance with due process.

How can or should individual circuit norms be unified? Should a federal task force study the problem? Would reconstituting the circuits so that they hear cases by subject matter and have the same numbers of judges have the desired effect? Should the number of appellate judgeships be doubled?[214] Perhaps, but there may not be an immediate need for dramatic reform. Whether the problems lie in the failure to publish in hard cases, an excessive use of law clerks, or too much delegation to staff attorneys, each problem is a function of internal norms. Norms are inherently flexible, and information can alter them. This is especially true in the case of small, closely knit groups—such as federal appellate judges—who care greatly about their reputation and the esteem in which others hold them.

Academic legal commentary has traditionally focused on the careful study of appellate opinions. With few exceptions, the study of the institutions that generate these opinions, the incentives of the judges, and the internal rules and practices that govern them has been largely left to scholars outside law schools. As a result, legal academics have provided the circuits with little feedback on their practices. We are optimistic, however, that this will change. In recent years, both institutional analysis and the study of norms have received considerable attention from legal academics. We hope that the statistics in this article demonstrate that the courts are ripe for an extended analysis of judicial norms.

Perhaps what is most difficult about the use of the JO or other equivalent short-form dispositions in hard cases is that the common law tradition is so connected to the notion of due process that a JO seems unfair in a hard case. If

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211. *See id*.

212. *See generally* Wood, *supra* note 179 (describing the value of preserving a system of judicial decisionmaking by generalist judges).

213. *See* Milsom, *supra* note 209, at 222. Using tax codes and tax avoidance, Professor Milsom concludes that avoidance is not stopped and the law is not respected. He suggests "it would be wiser and more just to accept guidelines for a discretion rather than a capricious multitude of rules, and to concentrate the law upon ensuring that the discretion is properly exercised. . . . It is in such control that the important future lies for judge-made law." *Id.*

214. *Cf.* STRUCTURAL ALTERNATIVES REPORT, *supra* note 3, at 60 (recommending that the circuits be allowed to experiment with the use of two-judge panels in certain cases and with district court appellate panels).

complexity in society and exploding dockets require decisionmaking by specialized courts or even bodies other than courts, the concept of due process could be refashioned simply from the common law tradition to provide a solution: The courts in difficult cases should be ensuring, and be seen to be ensuring, that the process by which decisions are made is fair. The increasing burden of cases prevents courts from being seen to do justice in these difficult areas. Precedent is being made, as Posner and Milsom point out, in ever narrower areas. Doing justice and shielding right from wrong in individual cases must be seen as remaining at the core of the judicial system. Posner looks outside the law to statistics and economics. Milsom looks to due process as the heart of moral authority in the justice system. The two can be combined.

The application of social and economic knowledge can shape our conception of fair process in the context of growing caseloads, complex factual situations, and expanding administrative spheres that threaten to devour the judicial system unless the system masters the situation by also imposing fair procedures on those extra-judicial decisionmakers who affect people's vital interests as much as judges do.[215] Continuing emphasis on the judicial responsibility "to keep government generally within the bounds of law"[216] is especially important when the judiciary itself is pressured by finite resources to dispatch cases in accordance with computer docket printouts rather than the actual complexity of the cases themselves.[217] Judges govern themselves, and only judges can change the way they decide cases. But outsiders can observe, analyze, and provide the impetus for change.[218]

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215. The notions of due process and the rule of law were long ago articulated for shaping administrative discretion, as LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965), wrote in detailing the scope of judicial review for administrative action. Looking back historically, CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 4-7 (1990), traced the emergence of this fair process in the agencies.

216. Fallon, *supra* note 181, at 53 (citing Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777-91 (1991)).

217. Robert E. Keeton, *Times Are Changing for Trials in Court*, 21 FLA. ST. U. L. REV. 1, 15 (1993), rhetorically described the tyranny of the docket in trial courts as casting the judges as "Terminator," lacking the time to "worry . . . about terminating justly."

218. We recognize that there is a danger that the publication of statistics on the publication and citation rates of individual judges brings with it the risk of an undue focus on those statistics. People do tend to overweigh that which is visible and rankable and underweigh that which is subjective. *See* Robert Gibbons, *Incentives in Organizations*, 12 J. ECON. PERSP. 115 (1998). However, the solution to that problem is not to keep these statistics hidden, but to recognize their shortcomings and use them in that context.

APPENDIX

LIST OF TABLES

TABLE I

THIRD CIRCUIT: PERCENTAGE OF CASES DISPOSED OF WITHOUT COMMENT, 1989-1996

Year	Total Number of Cases	Number of Cases Disposed of Without Comment	Percentage of Cases Disposed of Without Comment
1989	1,481	774	52.3%
1990	1,551	827	53.3%
1991	1,526	918	60.1%
1992	1,613	950	58.9%
1993	1,853	1,144	61.7%
1994	1,975	1,204	61.0%
1995	2,151	1,219	56.7%
1996	1,927	1,200	62.3%

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. S-3 (1989-1996).

TABLE II

NUMBER OF CASES DISPOSED OF WITHOUT COMMENT BY CIRCUIT, 1989-1996
(TOTAL NUMBER OF CASES TERMINATED ON THE MERITS IN PARENTHESES)

	Year							
Circuit	1989	1990	1991	1992	1993	1994	1995	1996
D.C.	31	4	0	6	0	4	1	0
	(803)	(615)	(695)	(706)	(799)	(785)	(725)	(661)
1st	27	15	10	4	5	0	0	0
	(747)	(728)	(721)	(744)	(858)	(742)	(785)	(774)
2d	4	9	0	0	4	0	0	0
	(1,100)	(1,246)	(1,566)	(1,468)	(1,653)	(1,861)	(1,931)	(1,832)
3d	774	827	918	950	1,144	1,204	1,219	1,200
	(1,481)	(1,551)	(1,526)	(1,613)	(1,853)	(1,975)	(2,151)	(1,927)
4th	69	1	0	0	0	1	0	0
	(1,794)	(2,154)	(2,141)	(2,066)	(2,260)	(2,459)	(2,887)	(2,969)
5th	47	64	63	95	89	82	107	92
	(2,441)	(2,659)	(2,681)	(2,922)	(3,348)	(3,409)	(3,913)	(3,922)
6th	0	0	0	0	0	0	0	2
	(2,369)	(2,359)	(2,475)	(2,350)	(2,124)	(2,473)	(2,187)	(2,067)
7th	78	94	23	32	51	34	48	41
	1,097)	(1,226)	(1,441)	(1,448)	(1,709)	(1,768)	(1,819)	(1,549)
8th	16	398	434	374	573	492	605	570
	(1,370)	(1,716)	(1,884)	(1,946)	(2,124)	(1,986)	(2,202)	(2,108)
9th	338	159	175	233	349	218	151	140
	(2,794)	(2,943)	(3,608)	(3,910)	(4,599)	(4,645)	(4,480)	(4,321)
10th	3	3	3	1	0	0	0	0
	(1,228)	(1,699)	(1,629)	(1,677)	(1,543)	(1,681)	(1,766)	(1,878)
11th	658	647	697	792	1,086	922	964	633
	(2,098)	(2,074)	(2,340)	(2,312)	(2,697)	(2,691)	(3,341)	(2,981)
Total	2,045	2,221	2,323	2,487	3,301	2,957	3,095	2,678

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. S-3 (1989-1996).

TABLE III
JUDGES' WORKLOAD BY CIRCUIT, 1993

Circuit	No. of authorized judgeships	No. of cases terminated on the merits	No. of cases per judgeship	Workload; adjusted for difficulty level (rank in parentheses)	No. of signed, published opinions	No. of signed, published opinions per judgeship (rank in parentheses)
D.C.	12	799	66.6	148.0 (12)	244	20.3 (12)
1st	6	858	143.0	285.0 (8)	502	83.4 (1)
2d	13	1,653	127.2	367.1 (3)	469	58.6 (4)
3d	14	1,853	132.4	277.9 (9)	346	24.7 (9)
4th	15	2,260	150.7	290.8 (6)	328	21.9 (11)
5th	17	3,348	197.9	426.2 (2)	713	41.9 (6)
6th	16	2,124	132.8	299.4 (5)	362	22.6 (10)
7th	11	1,709	155.4	286.8 (7)	792	72.0 (2)
8th	11	2,124	193.1	277.4 (10)	785	71.4 (3)
9th	28	4,599	164.3	337.4 (4)	711	25.4 (8)
10th	12	1,543	128.6	228.7 (11)	589	49.1 (5)
11th	12	2,697	224.8	482.9 (1)	358	29.8 (7)

SOURCES: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. S-3 (1993); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM tbl.7.6 (1996).

TABLE IV
FIRST AND THIRD CIRCUIT PUBLICATION NUMBERS
BETWEEN AUGUST 1, 1995, AND AUGUST 1, 1997

Circuit	Judge	Majority Opinions	Concurring Opinions	Dissenting Opinions	Total Opinions
1st	Juan Torruella	87	1	1	89
	Bruce Selya	95	2	2	99
	Michael Boudin	68	0	3	71
	Norman Stahl	59	0	3	62
	Sandra Lynch	70	3	5	78
	Average	75.8	1.2	2.8	79.8
	Standard Deviation	14.8	1.3	1.5	14.6
	% of Total Opinions	95%	1%	4%	100%
3d	Dolores Sloviter	41	1	4	46
	Edward Becker	48	2	9	59
	Walter Stapleton	32	8	9	49
	Carol Los Mansmann	29	0	6	35
	Morton Greenberg	44	1	7	52
	Anthony Scirica	32	1	5	38
	Robert Cowen	40	0	4	44
	Richard Nygaard	35	2	3	40
	Samuel Alito, Jr.	27	0	17	44
	Jane Roth	32	0	7	39
	Timothy Lewis	25	1	6	32
	Theodore McKee	21	4	5	30
	Average	33.8	1.7	6.8	42.3
	Standard Deviation	8.1	2.3	3.7	8.4
	% of Total Opinions	80%	4%	16%	100%

SOURCE: Westlaw searches by authors.

TABLE V
AVERAGE NUMBER OF DAYS TO WRITE OPINIONS AND AVERAGE LENGTH OF OPINIONS FOR FIRST AND THIRD CIRCUIT JUDGES BETWEEN AUGUST 1, 1995, AND AUGUST 1, 1997
(RANKINGS IN PARENTHESES)

Circuit	Judge	Number of Opinions	Total Days	Average Days	Total Pages	Average Pages
1st	Torruella	87	10,863	125 (10*)	1,994	23
	Selya	95	5,005	53 (2)	2,052	22
	Boudin	68	6,967	102 (7)	1,083	16
	Stahl	59	5,366	91 (6)	1,481	25
	Lynch	70	4,165	60 (3)	1,688	24
	Average	76	6,473	86	1,660	22
	Standard Deviation	14.8	2,656	29.9	397.2	3.5
3d	Sloviter	41	4,632	113 (9)	870	21
	Becker	48	6,571	137 (12)	1,363	28
	Stapleton	32	4,765	149 (13)	890	28
	Los Mansmann	29	2,257	78 (5)	846	29
	Greenberg	44	1,688	38 (1)	1,125	26
	Scirica	32	3,590	112 (8)	805	25
	Cowen	40	2,732	68 (4)	1,020	26
	Nygaard	35	4,362	125 (10*)	565	16
	Alito	27	4,041	150 (14)	913	34
	Roth	32	5,948	186 (16)	840	26
	Lewis	25	3,853	154 (15)	662	26
	McKee	21	4,307	205 (17)	664	32
	Average	34	4,062	126	880	26
	Standard Deviation	8.1	1,406	48.3	216.6	4.7

SOURCE: Westlaw searches by authors.

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TABLE VI
FIRST AND THIRD CIRCUIT CITATION RATES
BETWEEN AUGUST 1, 1995, AND AUGUST 1, 1997
(NUMBER OF CITES PER OPINION IN PARENTHESES)

Circuit	Judge	Number of Times Judge Cited Own Opinions	Number of Same-Circuit Opinions Citing Judge's Opinions	Number of Cites by Other Circuits	Number of Cites by District Courts in the Same Circuit	Number of Cites by District Courts in Other Circuits
1st	Torruella	54 (0.6)	158 (1.8)	71 (0.8)	218 (2.5)	65 (0.7)
	Selya	136 (1.4)	279 (2.9)	137 (1.4)	268 (2.8)	143 (1.5)
	Boudin	36 (0.5)	121 (1.8)	70 (1.0)	59 (0.9)	36 (0.5)
	Stahl	25 (0.4)	147 (2.5)	53 (0.9)	171 (2.9)	64 (1.0)
	Lynch	89 (1.3)	134 (1.9)	84 (1.2)	77 (1.1)	83 (1.2)
	Average	68 (0.8)	168 (2.2)	83 (1.1)	159 (2.0)	78 (1.0)
	Standard Deviation	45.1 (0.5)	63.7 (0.5)	32.1 (0.2)	89.8 (1.0)	39.9 (0.4)
3d	Sloviter	3 (0.1)	57 (1.4)	40 (1.0)	201 (4.9)	33 (0.8)
	Becker	8 (0.2)	46 (1.0)	78 (1.6)	149 (3.1)	51 (1.1)
	Stapleton	6 (0.2)	24 (0.8)	30 (0.9)	173 (5.4)	16 (0.5)
	Mansmann	6 (0.2)	29 (1.0)	36 (1.2)	157 (5.4)	61 (2.1)
	Greenberg	6 (0.1)	34 (0.8)	35 (0.8)	125 (2.8)	35 (0.8)
	Scirica	4 (0.1)	26 (0.8)	30 (0.9)	103 (3.2)	26 (0.8)
	Cowen	13 (0.3)	40 (1.0)	38 (1.0)	202 (5.0)	58 (1.5)
	Nygaard	1 (0.0)	28 (0.8)	21 (0.6)	111 (3.2)	25 (0.7)
	Alito	3 (0.1)	26 (1.0)	27 (1.0)	76 (2.8)	23 (0.9)
	Roth	4 (0.1)	25 (0.8)	23 (0.7)	123 (3.8)	40 (1.3)
	Lewis	4 (0.2)	23 (0.9)	51 (2.0)	106 (4.2)	39 (1.6)
	McKee	2 (0.1)	20 (1.0)	26 (1.2)	120 (5.7)	33 (1.6)
	Average	5 (0.1)	31.5 (0.9)	36.3 (1.1)	137.1 (4.1)	34.2 (1.1)
	Standard Deviation	3.2 (0.1)	11.0 (0.2)	15.5 (0.4)	39.7 (1.1)	14.0 (0.5)

SOURCE: Westlaw searches by authors.

TABLE VII
PUBLICATION NUMBERS BY CIRCUIT
BETWEEN AUGUST 1, 1995, AND AUGUST 1, 1997

Circuit	Judge	Majority Opinions	Concurring Opinions	Dissenting Opinions	Total Opinions
D.C.	Harry Edwards	50	4	6	60
	Patricia Wald	57	6	19	82
	Laurence Silberman	49	9	4	62
	Stephen Williams	51	1	5	57
	Douglas Ginsburg	64	3	3	70
	David Sentelle	53	7	7	67
	Karen LeCraft Henderson	40	7	12	59
	A. Raymond Randolph	47	0	5	52
	Judith Rogers	49	5	6	60
	David Tatel	51	4	12	67
	Average	51.1	4.6	7.9	63.6
	Standard Deviation	6.3	2.8	5.0	8.4
	% of Total Opinions	80%	8%	12%	100%
1st	Juan Torruella	87	1	1	89
	Bruce Selya	95	2	2	99
	Michael Boudin	68	0	3	71
	Norman Stahl	59	0	3	62
	Sandra Lynch	70	3	5	78
	Average	75.8	1.2	2.8	79.8
	Standard Deviation	14.8	1.3	1.5	14.6
	% of Total Opinions	95%	1%	4%	100%
2d	Amalya Kearse	66	1	4	71
	Ralph Winter, Jr.	69	2	4	75
	John Walker, Jr.	63	2	2	67
	Joseph McLaughlin	49	0	0	49
	Dennis Jacobs	58	5	9	72
	Pierre Leval	46	0	1	47
	Guido Calabresi	47	1	3	51
	Jose Cabranes	42	1	1	44
	Fred Parker	48	0	2	50
	Average	54.2	1.3	2.9	58.4
	Standard Deviation	9.9	1.6	2.7	12.5
	% of Total Opinions	93%	2%	5%	100%

Circuit	Judge	Majority Opinions	Concurring Opinions	Dissenting Opinions	Total Opinions
3d	Dolores Sloviter	41	1	4	46
	Edward Becker	48	2	9	59
	Walter Stapleton	32	8	9	49
	Carol Los Mansmann	29	0	6	35
	Morton Greenberg	44	1	7	52
	Anthony Scirica	32	1	5	38
	Robert Cowen	40	0	4	44
	Richard Nygaard	35	2	3	40
	Samuel Alito, Jr.	27	0	17	44
	Jane Roth	32	0	7	39
	Timothy Lewis	25	1	6	32
	Theodore McKee	21	4	5	30
	Average	33.8	1.7	6.8	42.3
	Standard Deviation	8.1	2.3	3.7	8.4
	% of Total Opinions	80%	4%	16%	100%
4th	J. Harvie Wilkinson	58	8	8	74
	Donald Russell	29	0	3	32
	H. Emory Widener, Jr.	31	0	8	39
	Kenneth Hall	28	0	24	52
	Francis Murnaghan, Jr.	48	3	14	65
	Sam Ervin III	42	0	2	44
	William Wilkins, Jr.	44	3	0	47
	Paul Niemeyer	58	3	8	69
	Clyde Hamilton	34	1	4	39
	J. Michael Luttig	32	8	10	50
	Karen Williams	32	3	3	38
	M. Blane Michael	24	0	15	39
	Diana Motz	41	3	10	54
	Average	38.5	2.5	8.4	49.4
	Standard Deviation	11.1	2.8	6.5	13.1
	% of Total Opinions	78%	5%	17%	100%

Circuit	Judge	Majority Opinions	Concurring Opinions	Dissenting Opinions	Total Opinions
5th	Henry Politz	68	0	5	73
	Carolyn King	18	1	1	20
	E. Grady Jolly	51	0	4	55
	Patrick Higginbotham	65	0	0	65
	W. Eugene Davis	37	0	1	38
	Edith Jones	39	3	7	49
	Jerry Smith	71	0	10	81
	John Duhe, Jr.	59	1	1	61
	Jacques Wiener, Jr.	55	3	3	61
	Rhesa Barksdale	26	0	5	31
	Emilio Garza	63	8	10	81
	Harold DeMoss, Jr.	52	0	12	64
	Fortunato Benavides	68	2	6	76
	Carl Stewart	64	0	1	65
	Robert Parker	69	1	3	73
	Average	53.7	1.3	4.6	59.5
	Standard Deviation	16.6	2.2	3.8	18.1
	% of Total Opinions	90%	2%	8%	100%
6th	Gilbert Merritt	50	4	12	66
	Cornelia Kennedy	77	1	4	82
	Boyce Martin, Jr.	54	2	2	58
	David Nelson	45	5	9	59
	James Ryan	32	9	12	53
	Danny Boggs	64	0	7	71
	Alan Norris	34	0	3	37
	Richard Suhrheinrich	21	0	3	24
	Eugene Siler, Jr.	28	0	2	30
	Alice Batchelder	25	3	6	34
	Martha Craig Daughtrey	13	0	6	19
	Karen Nelson Moore	69	1	5	75
	Average	42.7	2.1	5.9	50.7
	Standard Deviation	20.4	2.8	3.5	21.2
	% of Total Opinions	84%	4%	12%	100%

Circuit	Judge	Majority Opinions	Concurring Opinions	Dissenting Opinions	Total Opinions
7th	Richard Posner	181	1	3	185
	Walter Cummings	89	0	0	89
	John Coffey	101	0	6	107
	Joel Flaum	129	9	3	141
	Frank Easterbrook	127	2	2	131
	Kenneth Ripple	118	6	12	136
	Daniel Manion	89	3	8	100
	Michael Kanne	105	0	2	107
	Ilana Diamond Rovner	96	7	9	112
	Diane Wood	90	5	5	100
	Average	112.5	3.3	5	120.8
	Standard Deviation	28.4	3.3	3.7	28.3
	% of Total Opinions	93%	3%	4%	100%
8th	Richard Arnold	91	0	7	98
	Theodore McMillian	85	2	13	100
	George Fagg	70	0	0	70
	Pasco Bowmn	101	0	0	101
	Roger Wollman	133	0	2	135
	C. Arlen Beam	115	2	3	120
	James Loken	102	2	13	117
	David Hansen	95	0	5	100
	Morris Arnold	103	0	6	109
	Diana Murphy	80	0	2	82
	Average	97.5	0.6	5.1	103.2
	Standard Deviation	17.9	1.0	4.8	18.6
	% of Total Opinions	94%	1%	5%	100%

Circuit	Judge	Majority Opinions	Concurring Opinions	Dissenting Opinions	Total Opinions
9th	Proctor Hug, Jr.	42	1	2	45
	James Browning	8	0	0	8
	Mary Schroeder	45	3	6	54
	Betty Fletcher	66	1	13	80
	Harry Pregerson	42	1	14	57
	Stephen Reinhardt	57	7	18	82
	Cynthia Holcomb Hall	45	2	3	50
	Melvin Brunetti	49	2	3	54
	Alex Kozinski	38	6	16	60
	David Thompson	79	0	0	79
	Diarmuid O'Scannlain	64	4	16	84
	Stephen Trott	53	2	8	63
	Ferdinand Fernandez	40	2	18	60
	Pamela Ann Rymer	42	0	11	53
	Thomas G. Nelson	55	1	3	59
	Andrew Kleinfeld	53	2	11	66
	Michael Hawkins	41	2	3	46
	Average	48.2	2.1	8.5	58.8
	Standard Deviation	15.1	2.0	6.5	18.0
	% of Total Opinions	82%	4%	14%	100%
10th	Stephanie Seymour	47	0	3	50
	John Porfilio	31	0	1	32
	Stephen Anderson	41	0	4	45
	Deanell Tacha	57	0	1	58
	Bobby Baldock	50	0	2	52
	Wade Brorby	83	0	2	85
	David Ebel	73	1	3	77
	Paul Kelly, Jr.	56	1	6	63
	Robert Henry	49	3	1	53
	Mary Beck Briscoe	49	1	4	54
	Carlos Lucero	29	2	6	37
	Average	51.4	0.7	3	55.1
	Standard Deviation	16.1	1.0	1.8	15.6
	% of Total Opinions	93%	1%	6%	100%

Circuit	Judge	Majority Opinions	Concurring Opinions	Dissenting Opinions	Total Opinions
11th	Gerald Tjoflat	36	1	3	40
	Joseph Hatchett	38	0	1	39
	R. Lanier Anderson III	30	0	6	36
	J.L. Edmondson	40	1	1	42
	Emmett Cox	19	1	6	26
	Stanley Birch, Jr.	43	2	7	52
	Joel Dubina	31	0	1	32
	Susan Black	19	1	3	23
	Edward Carnes	42	1	1	44
	Rosemary Barkett	41	4	10	55
	Average	33.9	1.1	3.9	38.9
	Standard Deviation	9.0	1.2	3.2	10.2
	% of Total Opinions	87%	3%	10%	100%

SOURCE: Westlaw searches by authors.

TABLE VIII
PERCENTAGE OF CASES IN WHICH PUBLISHED OPINIONS WERE ISSUED, 1989-1996

	Year							
Circuit	1989	1990	1991	1992	1993	1994	1995	1996
D.C.	44.6%	45.1%	38.6%	40.0%	32.6%	30.0%	39.5%	40.8%
1st	59.2%	63.6%	66.1%	61.9%	62.9%	52.9%	47.4%	56.1%
2d	44.8%	41.3%	37.1%	34.9%	31.6%	35.2%	31.2%	31.1%
3d	24.6%	21.9%	17.2%	20.4%	19.1%	17.0%	17.8%	13.7%
4th	17.1%	15.8%	15.2%	16.9%	15.5%	12.7%	12.3%	10.0%
5th	35.7%	31.8%	28.4%	28.5%	24.4%	21.2%	21.0%	23.3%
6th	22.5%	20.5%	21.4%	21.4%	18.5%	19.7%	18.2%	19.5%
7th	65.0%	54.9%	50.0%	55.5%	48.1%	51.0%	49.3%	44.1%
8th	55.2%	41.0%	45.2%	45.4%	42.7%	43.1%	38.4%	36.5%
9th	35.3%	29.2%	24.6%	23.9%	17.4%	18.8%	21.1%	19.7%
10th	30.5%	29.2%	34.4%	36.8%	39.1%	32.5%	31.1%	24.8%
11th	30.2%	31.0%	31.2%	26.0%	18.5%	17.3%	15.3%	16.6%
Total	35.4%	31.6%	30.6%	30.7%	26.9%	25.6%	24.7%	23.8%

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. S-3 (1989-1996).

TABLE IX

FRACTION OF CASES IN WHICH SIGNED, UNPUBLISHED OPINIONS WERE ISSUED, 1989-1996 (PERCENTAGE OF ALL CASES IN PARENTHESES)

	Year							
Circuit	1989	1990	1991	1992	1993	1994	1995	1996
D.C.	5/803 (0.6%)	2/615 (0.3%)	0/695 (0%)	0/706 (0%)	0/799 (0%)	0/785 (0%)	2/725 (0.3%)	0/661 (0%)
1st	26/137 (3.5%)	23/728 (3.2%)	23/721 (3.2%)	30/744 (4.0%)	16/858 (1.9%)	41/742 (5.5%)	35/785 (4.5%)	36/1831 (2%)
2d	0/1100 (0%)	438/1246 (35.2%)	974/1566 (62.2%)	946/1468 (64.4%)	1123/1653 (67.9%)	1203/1861 (64.6%)	1325/1931 (68.6%)	1259/1831 (68.8%)
3d	319/1481 (21.5%)	370/1551 (23.9%)	346/1526 (22.7%)	327/1613 (20.3%)	339/1853 (18.3%)	428/1975 (21.7%)	549/2151 (25.5%)	458/1927 (23.8%)
4th	41/1794 (2.2%)	123/2154 (5.7%)	130/2141 (6.1%)	176/2066 (8.5%)	159/2260 (7%)	133/2459 (5.4%)	50/2887 (1.7%)	97/2969 (3.3%)
5th	445/2441 (18.2%)	465/2659 (17.5%)	355/2681 (13.2%)	369/2922 (12.6%)	349/3348 (10.4%)	311/3409 (9.1%)	376/3913 (9.6%)	195/3922 (5%)
6th	133/2369 (5.6%)	147/2395 (6.1%)	117/2475 (4.7%)	133/2350 (5.7%)	104/2124 (4.8%)	121/2473 (4.9%)	140/2187 (6.4%)	190/2067 (9.1%)
7th	6/1097 (0.5%)	6/1226 (0.4%)	0/1441 (0%)	0/1448 (0%)	0/1709 (0%)	1/1768 (0.1%)	5/1819 (0.3%)	11/1549 (.7%)
8th	1/8370 (0%)	4/1716 (0.2%)	1/1884 (0%)	3/1946 (0.2%)	8/2124 (0.4%)	3/1986 (0.2%)	7/2202 (.3%)	3/2108 (0.1%)
9th	1/2794 (0%)	61/2943 (2.1%)	15/3608 (0.4%)	26/3910 (0.7%)	11/4599 (0.2%)	25/4645 (0.5%)	85/4480 (1.9%)	10/4321 (0.2%)
10th	293/1228 (23.9%)	878/1699 (51.7%)	896/1629 (55%)	1009/1677 (60.2%)	906/1543 (58.7%)	1092/1681 (65%)	1196/1766 (67.7%)	1382/1878 (73.6%)
11th	23/2098 (1.1%)	23/2074 (1.1%)	35/2340 (1.5%)	38/2312 (1.6%)	27/2697 (1%)	31/2691 (1.2%)	1196/1766 (67.7%)	1382/1878 (73.6%)

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. S-3 (1989-1996).

TABLE X

FRACTION OF CASES IN WHICH UNSIGNED, UNPUBLISHED OPINIONS WERE ISSUED, 1989-1996 (PERCENTAGE OF ALL CASES IN PARENTHESES)

	Year							
Circuit	1989	1990	1991	1992	1993	1994	1995	1996
D.C.	409/803 (50.9%)	332/615 (54%)	427/695 (61.4%)	418/706 (59.2%)	539/799 (67.5%)	546/785 (69.6%)	436/725 (60.1%)	391/661 (59.2%)
1st	252/747 (33.7%)	227/728 (31.2%)	212/721 (29.4%)	250/744 (33.6%)	298/858 (34.7%)	309/742 (41.6%)	378/785 (48.2%)	304/774 (39.3%)
2d	599/1100 (54.5%)	281/1246 (22.6%)	7/1566 (4.5%)	0/1468 (0%)	0/1653 (0%)	0/1861 (0%)	0/1931 (0%)	0/1832 (0%)
3d	25/1481 (1.7%)	15/1551 (1%)	0/1526 (0%)	7/1613 (4.3%)	17/1853 (0.9%)	8/1975 (0.4%)	1/2151 (0%)	5/1927 (0.3%)
4th	1378/1794 (76.8%)	1691/2154 (78.5%)	1686/2141 (78.7%)	1541/2066 (74.6%)	1752/2260 (77.5%)	2015/2459 (81.9%)	2483/2887 (86%)	2576/2969 (86.8%)
5th	1079/2441 (44.2%)	1286/2659 (48.4%)	1502/2681 (56%)	1628/2922 (55.7%)	2095/3348 (62.6%)	2295/3409 (67.3%)	2609/3913 (66.7%)	2723/3922 (69.4%)
6th	1605/2369 (67.8%)	1660/2395 (69.3%)	1752/2475 (70.8%)	1653/2390 (70.3%)	1574/2124 (74.1%)	1776/2473 (71.8%)	1562/2187 (71.4%)	1385/2067 (67%)
7th	300/1097 (27.3%)	454/1226 (37%)	698/1441 (48.2%)	613/1448 (42.3%)	836/1709 (48.9%)	833/1768 (47.1%)	871/1819 (47.9%)	814/1549 (52.6%)
8th	597/1370 (43.6%)	611/1716 (35.6%)	599/1884 (31.8%)	687/1946 (35.3%)	638/2124 (30%)	637/1986 (32.1%)	746/2202 (33.9%)	769/2108 (36.5%)
9th	1470/2794 (52.6%)	1886/2943 (63.4%)	2532/3608 (70.2%)	2718/3910(69.5%)	3441/4599 (74.8%)	3531/4645 (76%)	3302/4480 (73.7%)	3318/4321 (76.8%)
10th	558/1228 (45.4%)	322/1699 (19%)	171/1629 (10.5%)	51/1677 (3%)	35/1543 (2.3%)	43/1681 (2.6%)	22/1766 (1.2%)	30/1878 (1.6%)
11th	784/2098 (37.4%)	762/2074 (36.7%)	878/2340 (37.5%)	883/2312 (38.2%)	1086/2697 (40.3%)	1273/2691 (47.3%)	1844/3341 (55.2%)	1806/2981 (60.6%)

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. S-3 (1989-1996).

TABLE XI
PERCENTAGE OF CASES IN WHICH ORAL ARGUMENT WAS GRANTED, 1989-1996

	Year							
Circuit	1989	1990	1991	1992	1993	1994	1995	1996
D.C.	53.7%	57.4%	50.5%	53.4%	44.7%	44.6%	56.3%	52.2%
1st	67.6%	67.6%	67.3%	63.8%	65.6%	59.9%	63.4%	55.9%
2d	80.2%	75.8%	73.4%	71.5%	68.2%	63.1%	62.8%	61.3%
3d	33.0%	27.3%	25.3%	31.2%	30.6%	30.3%	29.7%	26.8%
4th	39.3%	37.3%	35.5%	39.7%	35.3%	32.9%	28.0%	25.6%
5th	33.2%	30.1%	27.0%	29.4%	26.4%	25.6%	32.4%	31.2%
6th	49.6%	49.7%	50.3%	51.5%	47.9%	47.7%	50.8%	50.8%
7th	69.6%	56.8%	53.0%	56.5%	55.0%	60.5%	54.0%	54.0%
8th	55.7%	42.4%	45.8%	45.2%	39.3%	43.5%	37.6%	39.3%
9th	60.8%	49.5%	47.2%	40.3%	34.7%	40.5%	42.4%	41.8%
10th	45.0%	36.9%	33.4%	38.0%	32.6%	31.9%	29.4%	29.8%
11th	45.5%	45.0%	45.3%	42.3%	35.2%	37.3%	32.5%	32.2%
Total	50.4%	45.0%	44.2%	43.9%	39.7%	40.6%	39.9%	38.7%

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. S-1 (1989-1996).

TABLE XII

RANKING BY NUMBER OF MAJORITY OPINIONS WRITTEN BETWEEN AUGUST 1, 1995, AND AUGUST 1, 1997

Judge (Circuit)	Number of Opinions	Ranking	Landes et al. Total Influence Ranking†	Landes et al. Average Influence Ranking‡
Richard Posner (7th)	181	1	1	12
Roger Wollman (8th)	133	2	90	171
Joel Flaum (7th)	129	3	9	50
Frank Easterbrook (7th)	127	4	3	25
Kenneth Ripple (7th)	118	5	84	114
C. Arlen Beam (8th)	115	6	93	141
Michael Kanne (7th)	105	7	168	132
Morris Arnold (8th)	103	8	—	—
James Loken (8th)	102	9	—	—
Pasco Bowman (8th)	101	10	61	118
John Coffey (7th)	101	10	24	112
Ilana Diamond Rovner (7th)	96	12	—	—
David Hansen (8th)	95	13	—	—
Bruce Selya (1st)	95	13	2	9
Richard Arnold (8th)	91	15	46	116
Diane Wood (7th)	90	16	12	—
Walter Cummings (7th)	89	17	20	40
Daniel Manion (7th)	89	17	83	119
Juan Torruella del Valle (1st)	87	19	37	96
Theodore McMillian (8th)	85	20	19	109
Wade Brorby (10th)	83	21	129	146
Diana Murphy (8th)	80	22	—	—
David Thompson (9th)	79	23	113	135
Cornelia Kennedy (6th)	77	24	87	92
David Ebel (10th)	73	25	56	125

† William M. Landes, et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, tbl.2A (1998). Table 2A ranks federal appellate judges according to influence on other circuits. This ranking is based on the percentage increase (or decrease) in a judge's annual citations compared to the number of citations predicted by his tenure, status, and other independent variables. By comparing these coefficients among different judges, the authors ranked judges by their overall influence. The citations used were those to signed, published majority opinions of other federal courts of appeals judges in published (both signed and unsigned) opinions. The article examined 205 active and senior judges who had six or more years of tenure by the end of 1995. Our article, by comparison, examines active judges for a two-year period (August 1, 1995, to August 1, 1997).

‡ *Id.* at tbl.4A. Table 4A presents the judge-specific effects for outside citations. It ranks judges by average influence per published signed opinion; in other words, the average number of times an opinion is cited.

Judge (Circuit)	Number of Opinions	Ranking	Landes et al. Total Influence Ranking	Landes et al. Average Influence Ranking
Jerry Smith (5th)	71	26	15	48
George Fagg (8th)	70	27	116	163
Sandra Lynch (1st)	70	27	—	—
Karen Nelson Moore (6th)	69	29	—	—
Robert Parker (5th)	69	29	—	—
Ralph Winter, Jr. (2d)	69	29	30	89
Fortunato Benavides (5th)	68	32	—	—
Michael Boudin (1st)	68	32	—	—
Henry Politz (5th)	68	32	108	139
Betty Fletcher (9th)	66	35	64	76
Amalya Kearse (2d)	66	35	42	18
Patrick Higginbotham (5th)	65	37	26	66
Danny Boggs (6th)	64	38	75	83
Douglas Ginsburg (D.C.)	64	38	128	180
Diarmuid O'Scannlain (9th)	64	38	80	144
Carl Stewart (5th)	64	38	—	—
Emilio Garza (5th)	63	42	162	183
John Walker, Jr. (2d)	63	42	33	22
John Duhe, Jr. (5th)	59	44	138	165
Norman Stahl (1st)	59	44	—	—
Dennis Jacobs (2d)	58	46	—	—
Paul Niemeyer (4th)	58	46	—	—
J. Harvie Wilkinson (4th)	58	46	22	49
Stephen Reinhardt (9th)	57	49	95	58
Deanell Tacha (10th)	57	49	130	126
Patrica Wald (D.C.)	57	49	39	27
Paul Kelly Jr. (10th)	56	52	—	—
Thomas G. Nelson (9th)	55	53	—	—
Jacques Wiener, Jr. (5th)	55	53	115	117
Boyce Martin, Jr. (6th)	54	55	88	105
Andrew Kleinfeld (9th)	53	56	—	—
David Sentelle (D.C.)	53	56	132	145
Stephen Trott (9th)	53	56	170	175
Harold DeMoss, Jr. (5th)	52	59	—	—
E. Grady Jolly (5th)	51	60	156	162
David Tatel (D.C.)	51	60	—	—
Stephen Williams (D.C.)	51	60	76	106
Bobby Baldock (10th)	50	63	117	63
Harry Edwards (D.C.)	50	63	28	46

Judge (Circuit)	Number of Opinions	Ranking	Landes et al. Total Influence Ranking	Landes et al. Average Influence Ranking
Gilbert Merritt (6th)	50	63	99	123
Mary Beck Briscoe (10th)	49	66	—	—
Melvin Brunetti (9th)	49	66	—	—
Robert Henry (10th)	49	66	—	—
Joseph McLaughlin (2d)	49	66	—	—
Judith Rogers (D.C.)	49	66	—	—
Laurence Silberman (D.C.)	49	66	150	185
Edward Becker (3d)	48	72	13	4
Francis Murnaghan, Jr. (4th)	48	72	73	84
Fred Parker (2d)	48	72	—	—
Guido Calabresi (2d)	47	75	—	—
A. Raymond Randolph (D.C.)	47	75	—	—
Stephanie Seymour (10th)	47	75	57	51
Pierre Leval (2d)	46	78	—	—
Cynthia Holcomb Hall (9th)	45	79	164	137
David Nelson (9th)	45	79	151	151
Mary Schroeder (9th)	45	79	177	170
Morton Greenberg (3d)	44	82	23	65
William Wilkins, Jr. (4th)	44	82	106	8
Stanley Birch, Jr. (11th)	43	83	179	166
Jose Cabranes (2d)	42	85	—	—
Edward Carnes (11th)	42	85	—	—
Sam Ervin (4th)	42	85	74	85
Proctor Hug, Jr. (9th)	42	85	147	91
Harry Pregerson (9th)	42	85	154	122
Pamela Ann Rymer (9th)	42	85	100	99
Stephen Anderson (10th)	41	91	134	138
Rosemary Barkett (11th)	41	91	—	—
Michael Hawkins (9th)	41	91	—	—
Diane Motz (4th)	41	91	—	—
Dolores Sloviter (3d)	41	91	43	30
Robert Cowen (3d)	40	96	85	71
J.L. Edmundson (11th)	40	96	161	174
Ferdinand Fernandez (9th)	40	96	71	184
Karen LeCraft Henderson (D.C.)	40	96	—	—
Edith Jones (5th)	39	100	102	148
Joseph Hatchett (11th)	38	101	139	136
Alex Kozinski (9th)	38	101	178	157

Judge (Circuit)	Number of Opinions	Ranking	Landes et al. Total Influence Ranking	Landes et al. Average Influence Ranking
W. Eugene Davis (5th)	37	103	186	178
Gerald Tjoflat (11th)	36	104	69	23
Richard Nygaard (3d)	35	105	180	133
Clyde Hamilton (4th)	34	106	—	—
Alan Norris (6th)	34	106	190	192
J. Michael Luttig (4th)	32	108	—	—
Jane Roth (3d)	32	108	—	—
James Ryan (6th)	32	108	112	177
Anthony Scirica (3d)	32	108	125	155
Walter Stapleton (3d)	32	108	81	120
Karen Williams (4th)	32	108	—	—
Joel Dubina (11th)	31	114	—	—
John Porfilio (10th)	31	114	—	—
H. Emory Widener, Jr. (4th)	31	114	114	113
R. Lanier Anderson (11th)	30	117	111	67
Carol Los Mansmann (3d)	29	118	120	121
Carlos Lucero (2d)	29	118	—	—
Donald Russell (4th)	29	118	47	21
Kenneth Hall (4th)	28	121	148	127
Eugene Siler, Jr. (6th)	28	121	—	—
Samuel Alito, Jr. (3d)	27	123	—	—
Rhesa Barksdale (5th)	26	124	176	186
Alice Batchelder (6th)	25	125	—	—
Timothy Lewis (3d)	25	125	—	—
M. Blane Michael (4th)	24	127	—	—
Theodore McKee (3d)	21	128	—	—
Richard Suhreinrich (6th)	21	128	165	182
Susan Black (11th)	19	130	—	—
Emmett Cox (11th)	19	130	169	191
Carolyn King (5th)	18	132	58	115
Martha Craig Daughtrey (6th)	13	133	—	—
James Browning (9th)	8	134	172	111

SOURCE: Westlaw searches by authors.