Decision-Making in the Dark

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Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 **Mich. L. Rev.** __ (forthcoming 2020), available at SSRN.

Among the hallmarks of our federal court system are judicial opinions. Federal judges do not just bang their gavels and declare a winner—their decisions are memorialized in published opinions that recount the facts of the case, lay out the relevant legal framework, grapple with the parties' arguments, and explain why the law supports one side's contentions over the other's. These opinions are released not just to the parties, but to the public—allowing law students, legal commentators, and appellate courts alike to scrutinize and critique the court's reasoning.

At least that is how it used to be. As Merritt McAlister highlights in *"Downright Indifference*," the vast majority of federal cases today are decided in "unpublished opinions." That term describes any opinion that a court deems nonprecedential. But the distinguishing feature of unpublished opinions is their brevity. Because these cases involve routine issues resolved by settled precedent, the theory goes, courts need not expend resources to issue reasoned opinions that respond to the parties' arguments. Instead, unpublished opinions succinctly explain—often in just a few sentences—who won and who lost.

Unpublished opinions have received no shortage of criticism in recent years. Some have argued that courts strategically issue unpublished opinions in qualified immunity cases to avoid establishing federal constitutional rights, thereby perpetually shielding officers from civil rights suits. Others have criticized unpublished opinions—many of which are unavailable on legal research databases—as undermining the transparency of courts.

McAlister adds a new criticism to the mix: Unpublished opinions deprive litigants—pro se litigants, especially—of a reasoned decision that is essential to procedural justice. Plaintiffs of course care about the substantive outcome of their cases. But independent of that outcome, McAlister contends, plaintiffs also care about the process they receive—about whether a decisionmaker acknowledges their concerns and meaningfully addresses their arguments. And unpublished decisions, by deciding disputes with terse (if any) reasoning, fail to further procedural justice values that litigants yearn.

It was not always this way. Unpublished decisions are a relatively new phenomenon. Federal courts of appeals began issuing them in the 1960s in response to an exponentially increasing caseload. So one would think that the sharp rise in the percentage of cases decided in unpublished opinions—from 11% in 1981 to nearly 89% in 2016—corresponds with an increase in caseload volume. But that would be wrong. McAlister digs up the numbers and demonstrates that, while the number of appeals in most circuits has decreased, the number of unpublished opinions has continued to go up.

The rise in unpublished opinions does, however, correlate with another figure: the rise in the number of appeals filed by pro se litigants. And this gets to McAlister's provocative thesis: By deciding so many cases in unpublished opinions largely devoid of reasoning, courts implicitly suggest that pro se litigants and their problems are not worth judicial time. Indeed, McAlister characterizes unpublished opinions as the bedrock of a two-tier justice system in which courts resolve most cases—all but the "important" cases brought by "elite" counsel—with cursory, nonprecedential decisions that receive little judicial oversight.

So unpublished opinions, when properly understood, are perhaps part and parcel of a phenomenon discussed in previous jots: A concerted effort by federal courts to close the courthouse doors on litigants and to constrict the relief provided to those who manage to sneak their way in. Unpublished opinions routinely affirm lower court judgments

against pro se litigants, immigrants, and prisoners. And because these opinions largely lack independent reasoning—they often reject the petitioner's arguments solely because the appellate court finds "no reversible error"—courts can insulate their decisions from scrutiny by an en banc panel or by the Supreme Court of the United States. Unpublished opinions, therefore, allow courts to systematically shun certain litigants' claims and deprive them of a path for recourse.

What is the solution to this troubling trend? McAlister offers a practical, if limited, suggestion to judges: Show your work. The article argues that unpublished opinions should at least explain the basis for the court's conclusions and demonstrate that the judges understood and considered the parties' arguments. Such a move wouldn't solve all the concerns associated with unpublished decisions, but it would improve what has become the dominant method of judicial decision-making.

Most importantly, reason-giving would demonstrate more respect for pro se litigants and others who may feel marginalized by the justice system's handling of their disputes. By responding to the parties' arguments and offering reasoning independent of the lower court's decision, judges would demonstrate that they have heard the litigants and meaningfully assessed their claims. But the perks of reason-giving do not stop there—it would also promote judicial candor and perhaps even ensure greater accuracy in decision-making. McAlister cites Welch v. United States to illustrate her point. There, in an unpublished order, the Eleventh Circuit denied a certificate of appealability to a pro se litigant on the ground that "he ha[d] failed to make a substantial showing of the denial of a constitutional right." The Supreme Court reversed, explaining in a 15-page opinion why the Eleventh Circuit ought to have granted Welch a certificate of appealability. One may wonder how many other unpublished decisions reached results that were not as straightforward as their conclusory reasoning would suggest. At least a few—last term the Court summarily reversed and vacated an unpublished Ninth Circuit opinion denying officers qualified immunity, and it recently granted cert in another unpublished Ninth Circuit opinion addressing whether the Securities and Exchange Commission can obtain disgorgement as a remedy for securities violations.

McAlister provides a valuable contribution by criticizing unpublished opinions from the perspective of those for whom these opinions are written: the litigants. And she offers a practical solution that would not require courts to overhaul their prevailing method of decision-making. Whether federal courts will implement McAlister's proposal—issuing reasoned opinions for every case that comes before them—remains to be seen.

The views set forth herein are the personal views of the author and do not necessarily reflect those of his employer.

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