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ARTICLE: SORCERERS, NOT APPRENTICES: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law

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**BIO:** + B.A., LL.B., Ph.D, University of Sydney; Professor of Law, Villanova University School of Law. I wish to thank Dean Mark Sargent and Associate Dean for Faculty Research John Gotanda for the research support that enabled the writing of this article; Villanova University School of Law student Sarah Stevenson (J.D. 2007), and Bryce Coughlin, (J.D. 2006, American University Washington College of Law), for first class research assistance; Villanova Faculty Services Librarian Amy Spare for invaluable assistance in locating obscure material; John B. Oakley, for his scholarly insights and for suggesting some useful sources; my former colleague Ian Gallacher, of Syracuse University School of Law, and my colleagues Steve Chanenson and Mike Carroll, for their encouragement; and, as always, David Caudill. The title of this article was changed from its proposed and working title, Sorcerers' Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law, when Artemus Ward and David L. Weiden published Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court in 2006 (and thanks are due to both David Caudill and Judith Resnik for their assistance as I reconceived the title). Ward and Weiden's subject matter is U.S. Supreme Court clerks, who are generally peripheral to my concerns in this article, which focuses on the lower U.S. federal courts, but which deals with institutions and practices that also characterize contemporary state courts in the U.S. While a detailed critique of their thesis is beyond the scope of this article, I should note both that their focus on the problems of individual misuse of clerkly influence, while understandable in the Supreme Court context, is in my view misplaced because it fails to address the structural and ideological or judicial ontological problems of de facto delegation of Article III judicial power, and that their thesis that the role of the clerk has its origins in the British apprenticeship model of legal professionalism is shortsighted. See Artemus Ward & David L. Weiden, Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court (2006). Rather, drawing on Paul Kahn's perception that the contemporary U.S. Constitutional judiciary derives its sense of authority from asserting its own legitimacy rather than from a model of judging authorized by legal expertise, see Paul W. Kahn, Comparative Constitutionalism in a New Key, 101 Mich. L. Rev. 2677 (2003), I suggest that practices of legal education and professional subject formation peculiar to the U.S. are responsible for an understanding of judicial authority produced by an extremely narrow and hierarchical understanding of merit, and by an ingrained tolerance for developing judging practices that marginalize the voices of "others," see **Penelope Pether**, Regarding the Miller Girls: Daisy, Judith, and the Seeming Paradox of In re Grand Jury Subpoena, Judith Miller, 19.2 Law & Literature \_\_ (forthcoming 2007), and that this accounts for the characteristic willingness of U.S. judges to delegate their authority to clerks and staff attorneys.

**LEXISNEXIS SUMMARY:**

... Opponents of Rule 32.1 claim that allowing citation to an unpublished opinion that was likely written by a staff attorney, as if the opinion represents the view of the court, "is a particularly subtle and insidious form of fraud. ... This now institutionalized practice, which in less particular courts does not involve judges in the initial decision of which cases to consign to second-tier justice, sees certain classes of cases, typically those involving "have-nots," diverted to

the "screening" path of no oral argument, disposition by staff attorney or judicial clerk (who, anomalously, often both function as the court and "represents" the litigant, who is frequently proceeding pro se), and termination in an unpublished opinion. ... Laurence Tribe reported that "a number of opinions [he] worked on" as Justice Stewart's law clerk "are really almost exactly as [he] drafted them," including one of Justice Stewart's most celebrated opinions. ... There are of course schools of thought which would not find it puzzling that appointment by Democrats to the Ninth Circuit bench was more likely to produce at least one kind of behavior that arguably signals disqualification for judicial office than appointment by Republicans. ...

**HIGHLIGHT:** Every judge and lawyer in America has internalized the hierarchical nature of our justice system. <sup>n1</sup>

As the docket is "dumbed-down" by an overwhelming number of routine or trivial appeals, judges become accustomed to seeking routine methods of case disposition ... . The situation is like that of a competitive tennis player forced to spend the bulk of his time rallying with novices. Just as the player's competitive edge will erode from lack of peer contact, so are judges' legal talents jeopardized by a steady diet of minor appeals. <sup>n2</sup>

Opponents of Rule 32.1 claim that allowing citation to an unpublished opinion that was likely written by a staff attorney, as if the opinion represents the view of the court, "is a particularly subtle and insidious form of fraud." <sup>n3</sup>

**TEXT:**

[\*2]

Introduction

The period since 2002 has seen a bitter dispute over the apparently trivial <sup>n4</sup> issue of a proposed and eventually enacted uniform citation rule <sup>n5</sup> splitting the ranks of the federal judiciary, a dispute that eventually pitted [\*3] Judge (later Chief Justice) John G. Roberts, Jr. <sup>n6</sup> and Judge (later Justice) Samuel A. Alito Jr. <sup>n7</sup> against another powerful circuit judge, the Ninth Circuit's Alex Kozinski, <sup>n8</sup> himself frequently mentioned as a potential candidate for the Supreme Court <sup>n9</sup> vacancies eventually filled by Roberts and [\*4] Alito. <sup>n10</sup> The disinterested observer might find the subject of the dispute puzzling. The apparent triviality of its articulated subject made the rhetorical heat generated by those on the eventual <sup>n11</sup> losing side of the argument difficult to fathom. Predictions of an "impairment of the ... corpus juris" <sup>n12</sup> and egregious threats to do the judicial equivalent of "working to rule" by withholding reasons for judgment from litigants, <sup>n13</sup> accompanied by doomsaying about unmanageably increased workload <sup>n14</sup> and other problems, such as ending citation bans "would probably greatly interfere with our screening program and cripple our productivity," <sup>n15</sup> seem disproportionate to the substance of FRAP 32.1, which provides as follows:

Rule 32.1.Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

[\*5] (ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited. <sup>n16</sup>

Some brief background is necessary to attempt to explain the intensity of the controversy over the rule. Rule 32.1 is a late, grudging, and extremely modest response to sharp academic and legal professional <sup>n17</sup> criticism of what I have called "institutionalized unpublication of opinions" <sup>n18</sup> in the U.S. federal courts. <sup>n19</sup> This criticism dates from at least 1978, when Reynolds and Richman published the first <sup>n20</sup> in their series of critiques <sup>n21</sup> of the practice. [\*6] The best evidence thus far available suggests that the practice of institutionalized unpublication itself dates from at least as early as 1962, when the United States Court of Appeals for the Fourth Circuit, feeling the need for "protection" from the "burden" of an increase in postconviction prisoner appeals since 1956-57, <sup>n22</sup> developed joint practices that are central to my concerns in this article.

These are, first, the "screening" of what today on the Ninth Circuit, for example, is approximately half of the appeals filed with it that actually result in an opinion rather than some more abbreviated form of disposition, which group of appeals probably accounts for half of all the appeals filed. And second, the employment of what have come to be known as staff attorneys <sup>n23</sup> to handle these screened appeals, which federal appellate judges do not believe merit consideration in chambers. Together with the tendency to give elbow clerks significant responsibility for resolving those appeals resulting in unpublished opinions that are actually handled in chambers, screening/processing by staff attorneys means that most unpublished opinions are largely and probably often wholly the work of what one federal judge has called "kids that are just out of law school." <sup>n24</sup>

A member of the Ninth Circuit has said that the expressed reason for the U.S. Courts of Appeals adopting the practice - the problems of indexing court law libraries so judges could keep track of the law, resulting from a sharp increase, beginning in the 1960s and continuing today, in the numbers of federal appeals filed - had a "silent partner," the federal judiciary's disquiet about perceived "floods" of certain classes of those appeals: civil rights and pro se prisoner post-conviction matters. <sup>n25</sup> These were prompted by Brown and the Fifth Circuit's implementation of it; <sup>n26</sup> the Civil Rights [\*7] Acts of 1957, 1960, and 1964; and the Warren Court's revolution in criminal procedural jurisprudence. <sup>n27</sup> The institution of the staff attorney/habeas clerk/pro se clerk has its shared origins with modern institutionalized unpublication.

The origins of "screening" and institutionalized unpublication, and with them the beginning of the delegation of the vast majority of Article III appellate judicial power to law clerks and staff attorneys, have discriminatory origins. As I have argued elsewhere, "forced to abandon enforcement of Jim Crow laws, which were the successors of the legalized slavery constitutive of the nation, U.S. courts developed institutionalized practices that both produced and avoided the evidence of their structural subordination of "others.'" <sup>n28</sup>

Given its origins, it is perhaps unsurprising that the charges leveled at institutionalized unpublication are multiplicitous and damning. They include the identifying of damaging "rule of law effects" of the practice, such as enabling powerful and repeat player litigants to rig the system of precedent so it operates in their favor; <sup>n29</sup> unconstitutionality; <sup>n30</sup> lack of transparency and judicial accountability, <sup>n31</sup> the enabling of judicial corruption <sup>n32</sup> or the engendering of public suspicion that it is occurring, <sup>n33</sup> and [\*8] the producing of public and practitioner disrespect for the judicial system. <sup>n34</sup> Of most significance to this article is the second group of problematic effects of institutionalized unpublication: different types of structurally subordinating effects that subject "have-nots" to discrimination <sup>n35</sup> and systematically advantage the powerful. <sup>n36</sup>

The ways in which unpublication can structurally subordinate are multiplicitous. The body of unpublished law, that is, the majority, may generally reveal very low success rates for litigants from these classes, while the public record of published decisions suggests that the losers are typically the winners, with the predictable public fallout. <sup>n37</sup> Or judges

may hide in these cases those which may be ideologically unpalatable to them or controversial,<sup>n38</sup> appearing to be liberal on what might be called "social justice" issues, for example, when their complete record reveals them to be conservative.<sup>n39</sup> The privileged can use the system to manipulate the body of precedent, and the formally unprecedential status of unpublished opinions means that courts are free to treat similarly situated litigants differently in unpublished opinions,<sup>n40</sup> making predictability and thus successful litigation less likely<sup>n41</sup> for those whose problems are consigned to the federal appellate court system's farm team, with the various costs this incurs.

The rule change is modest, because while it means that circuit courts can no longer forbid lawyers to cite back to them decisions they have made but [\*9] designated "not for publication," nor sanction them if they do, the prospective ban on citation bans does nothing to solve the major problems of institutionalized unpublication: it will not dismantle the U.S. courts' binary system of "precedential" and "unprecedential" judicial opinions, with the various problems this system produces, nor will it address the logical problem of designating opinions precedential or non-precedential in advance.<sup>n42</sup> Given its modesty of scope, the controversy over FRAP 32.1 is not explained, then, by the range and seriousness of the questions raised by the critical literature.

So why, given the nature of scholarly, practitioner, and occasional judicial criticisms of the various aspects of institutionalized unpublication, together with the powerful judicial and practitioner support for the rule, was its most visible opponent, the Ninth Circuit's Judge Alex Kozinski, so trenchant and vigorous in his opposition? Why does a survey of federal judges conducted by the Federal Judicial Center<sup>n43</sup> contain so much extreme and, as this article will go on to note, troubling evidence of judicial attitudes revealed in responses to the proposed rule change? In significant part because, in Judge Kozinski's own telling phrase, at least some circuit judges believe that unpublished opinions are metaphorically "not safe for human consumption."<sup>n44</sup> That is, according to the Federal Rules Decisions,<sup>n45</sup> the judges are afraid that they are "wrong."<sup>n46</sup> They are alleged to have another major shortcoming, too. According to (one of) Judge Kozinski's accounts, unpublished opinions are drafted in "loose, sloppy language"<sup>n47</sup> that has the effect of undermining his manifest desire for "binding precedent," which resembles a naive version of the constraints of a civilist code<sup>n48</sup> on lawyers and subsequent courts.<sup>n49</sup>

[\*10] Why is it that the texts which make up 80 percent of the opinions produced by the U.S. Courts of Appeals are perceived to suffer from what are two different but likely related defects: fears that they may be "wrong";<sup>n50</sup> and assertions that they are sloppily drafted? How could these flaws come to characterize the vast majority of federal appellate court opinions, given the rigorous appointment process to circuit judgeships? In part because, as I have indicated supra, they are not written by federal appellate judges, but rather by the predominantly recently-graduated corps of judicial clerks and staff attorneys, to whom the federal appellate bench de facto delegates a significant majority of its Article III judicial power, and over whom it does not exercise meaningful supervision.

If some judges and other key players in the litigation system think the work of clerks and staff attorneys in producing unpublished opinions is likely to be wrong or "sloppy," there is also evidence, referred to supra, of what some would consider a more serious shortcoming in the work of elbow clerks and staff attorneys. While the institutional decision by the federal judges to practice institutionalized unpublication is primarily responsible for the "rule of law" problems with institutionalized unpublication and one<sup>n51</sup> of the more serious problems that it masks, that of the binary divide between precedential opinions, which must be followed, and unprecedential, which can be ignored by subsequent courts, it is the work of these usually newly-graduated lawyers that produces many widespread and troubling inequality effects. These inequality effects include those documented by David Law, whose ten-year study of asylum cases decided by the Ninth Circuit concluded that some Democratic appointees to the Ninth Circuit bench were significantly "more likely to vote in favor of [\*11] asylum in published cases" than in unpublished cases; no Republican appointees demonstrated this tendency.<sup>n52</sup>

How does the "strategic voting" alleged by Law to be practiced by some Democratic appointees to the Ninth Circuit produce inequality effects? His conclusion is that this group of judges votes more frequently in favor of asylum-seekers in published, precedential decisions than in unpublished ones, apparently in order to "make their votes count."<sup>n53</sup> The blind spot in Law's otherwise careful (although, as I will go on to suggest, not uncontested) analysis is his attribution

of authorship.<sup>n54</sup> Most unpublished opinions produced by the Ninth Circuit, "churned out at a rate of more than one per day per panel,"<sup>n55</sup> are not judicial work product. Rather, they

are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our [unpublished opinions] are in screening cases, which are prepared by our central staff. Every month, three judges meet with staff attorneys who present us with the briefs, records, and proposed [unpublished opinions] in 100 to 150 screening cases. If we unanimously agree that the case can be resolved without oral argument, we make sure the result is correct, but we seldom edit the [unpublished opinion], much less rewrite it from scratch.<sup>n56</sup>

In a letter to (then) Judge Alito, Judge Kozinski expanded on this account of how much judicial time goes into those unpublished opinions that are consigned to the "screening" track on the Ninth Circuit:

[These opinions are] drafted by our central staff and presented to a panel of three judges in camera, with an average of five or ten minutes devoted to each case. During a two-or three-day monthly session, a panel of three judges may issue 100 to 150 such rulings. We are very careful to ensure that the result we reach in every case is right, and I believe we succeed. But there is simply no time or opportunity for the judges to fine-tune the language of the disposition, which is presented as a final draft by staff attorneys.<sup>n57</sup>

**[\*12]** The Ninth Circuit's practice is not anomalous.<sup>n58</sup> It is also worth noting, for those disposed to take comfort from Judge Kozinski's bromide that screening panels reviewing the work of staff attorneys "make sure the result is correct," that it is contradicted not only by his own writings, both in the letter to Judge Alito,<sup>n59</sup> and elsewhere, but also by those of some of his more unselfconscious peers. In a piece aptly titled "The Appearance of Propriety," Judge Kozinski himself has revealed that:

Ninth Circuit judges generally have four law clerks, and the circuit shares approximately 70 staff attorneys, who process roughly 40 percent of the cases in which we issue a merits ruling.<sup>n60</sup> When I say process,<sup>n61</sup> I mean that they read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges during a practice we call "oral screening" - oral, because the judges don't see the briefs in advance, and because they generally rely on the staff attorney's oral description of the case in deciding whether to sign on to the proposed disposition. After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, **[\*13]** and the urge to say O.K. to whatever is put in front of you becomes almost irresistible.<sup>n62</sup>

Two of Judge Kozinski's Ninth Circuit colleagues have given differently-shaded accounts of whether members of screening panels read anything other than the draft unpublished disposition before approving it. One wrote "about one-half of our unpublished dispositions are written by central staff attorneys (not elbow clerks). Judges review them minimally, mostly for result."<sup>n63</sup> Another wrote that where unpublished opinions are produced in "'screening' cases, drafts are prepared by central staff and approved by three-judge panels after oral presentations and brief reviews of documents."<sup>n64</sup> Others surveyed were defensive: "our dispositions that come out of our screening panels in large volume are essentially right as to result";<sup>n65</sup> and "we lack the resources to give 10,000 dispositions the same attention and scrutiny as precedential opinions must have; all that is necessary is for three judges to agree on the disposition, not each word."<sup>n66</sup>

More unvarnished is the remark of a member of the Seventh Circuit surveyed by the Federal Judicial Center, who wrote "in our circuit, staff attorneys prepare routine drafts that judges approve but do not research or write."<sup>n67</sup>

Judge Edith Jones of the Fifth Circuit is apparently more circumspect than Judge Kozinski:

Appeals are processed on different tracks, depending on such criteria as whether they were filed pro se or whether they present "routine," as opposed to novel, issues. Simply to keep up with the volume of appeals, growing components of which are cases filed by prisoners and direct criminal appeals, courts have had to employ staff attorneys rather than leaving initial review to individual judges. Staff attorneys often take primary responsibility for reviewing the trial court record, assessing the issues presented, and preparing memoranda that can readily be transformed into unpublished or published opinions. <sup>n68</sup>

Nonetheless, she is equally unselfconscious, and her remarks are revealing of another phenomenon of significance to this article: an egregious elitism. [\*14] Her mid-90s prescription for "rationing justice" identifies those to whom rationing is to be administered as those who originally inspired the Fourth Circuit to develop modern institutionalized unpublication - prisoners who have the temerity to appeal conviction or sentence or file civil rights appeals, notwithstanding the disincentives placed in their way by the Prison Litigation Reform Act <sup>n69</sup> - and another class of litigants characteristically singled out for "screening" away from actual judicial scrutiny: pro se appellants. The groups perceived to justify rationed justice identified by judges in the recent Federal Judicial Center Survey were both pro se litigants <sup>n70</sup> and a recently-emergent group of appellants whose appeals circuit judges "prefer not" <sup>n71</sup> to hear: immigration appellants, of which asylum seekers are a subgroup. The Second Circuit has recently set up a special division in its staff attorney unit to handle this latter group of cases. <sup>n72</sup>

Accordingly, it appears that where a Ninth Circuit judge tends to decide unpublished asylum cases differently - less favorably for the asylum-seeker - than published cases, the high likelihood is that the "decision" is made by a staff attorney, if the case has been diverted to the nonargument track via screening, or an elbow clerk, if it has not. That is, clerks and staff attorneys tend to decide cases more like Republican appointees to the bench than those Democratic appointees who Law accuses of "strategic" decisionmaking in asylum cases. <sup>n73</sup> Those Democratic appointees identified by Law find more frequently in favor of asylum seekers in published cases, in which they are more likely to exercise meaningful decisionmaking power than is the case in unpublished opinions, whether written by a staff attorney or written by an elbow clerk in chambers, in the production of which they have somewhere on a spectrum from significantly less to no meaningful role.

If the work of appeals is delegated, what actually gets done and by whom? It seems likely that as a practical matter, the fact that only one full [\*15] copy of the record exists means that no one reads the full record. <sup>n74</sup> Where a case is pro se, there is not even the fallback of having counsel provide excerpts from the record of district court proceedings. <sup>n75</sup> There may be more or less actual judicial care and scrutiny given by the clerk's judge, particularly to parts of the record or the briefs, where the opinion is produced by an elbow clerk in chambers. <sup>n76</sup> In the case of staff attorney work product, <sup>n77</sup> given the mechanisms of screening, it is unlikely that anything but the "result" receives judicial attention, <sup>n78</sup> especially in circuits where there is no judicial involvement in initial screening decisions. This, of course, begs questions about how a screening panel can reach a safe "result" without reading the record and briefs if there are any (many of these cases are pro se), questions in part answered by Cohen's study, which revealed that "several clerks indicated that they had worked on cases without excerpts [from the record] and the other judges on the panel had not ordered the record or requested any of the documents from the record." <sup>n79</sup> Cohen concludes, unexceptionably, that "that is particularly troubling because it means that at least some judges make decisions about [the] sufficiency of the evidence, jury instructions, and the like without seeing the evidence or instructions being reviewed." <sup>n80</sup> As Judge Kozinski notes,

Once in a while, ... what looked like an easy case is actually quite difficult, because of a small fact buried in the record or a footnote of a recent opinion. After more than two decades of judging I have [\*16] found no way to separate the

sheep from the goats, except by taking a close look at each case. <sup>n81</sup>

But perhaps at least some who exercise Article III appellate jurisdiction de jure are not as squeamish about unpublished opinions as Judge Kozinski but are no more ethically perturbed by institutionalized unpublication. As one member of the Federal Circuit wrote unselfconsciously to the Federal Judicial Center, screening and unpublished opinions are a useful cover for wrong decisions made about the appeals of "have-nots":

Many of our non-precedential opinions are in pro se appeals by federal employees from decisions of the Merit Systems Protection Board. Because these cases are often poorly briefed, it is easy to miss potentially important legal issues or to make statements in opinions that, with better briefing, would likely not be made. Allowing citation of these decisions would ... suggest that the court has reached considered decisions on particular issues when in fact that is not often true. <sup>n82</sup>

This then suggests why the judicial opposition to the rule change was so heated. If citation bans are done away with, courts will be confronted with evidence of past decisions that they do not wish to follow, and still formally will not have to, unless the federal appellate courts decide to address the more fundamental problem of the designation of most of their opinions unprecedential. These may be "wrong" about the law or facts, or so sloppily drafted that if the issuing court was bound to follow them they might give lawyers space to advance arguments that the court's ironclad precedential opinions would at least theoretically foreclose.

They may be embarrassing for other reasons, too: many of them give no reasons for the court's decision or reasons which are so terse or circular that they in fact do not reveal how and why the court reached the decision that it did. <sup>n83</sup> Anticipation of embarrassment of this kind is prompting at least some judicial concern that the federal appellate bench can no longer conduct what has increasingly become "business as usual" since the early 1960s. Some judges fear having to take more care to keep circuit law consistent, if inconsistencies can embarrassingly be brought to the court's attention. As one Ninth Circuit judge recently surveyed by the Federal Judicial Center wrote, "we are already laboring under a back-breaking caseload. The immigration caseload continues to expand. Having to spend more time [\*17] reading and researching cases when the caseload is already extremely heavy would create an additional burden on chambers." <sup>n84</sup>

As to the potential embarrassment caused by opinions that are "wrong," give lawyers space to make arguments because of their "sloppy" drafting, or do not reveal why the court reached its decision, judicial opponents to the proposed rule change divided two ways. Some threatened to give no reasons at all in unpublished opinions:

In most cases the unpublished opinions will be reduced to a bare minimum. This will have the effect of depriving litigants of the general reasoning of the dispositive decision and perhaps make it more difficult for the litigant to seek further review whether by rehearing or by petitioning the Supreme Court; <sup>n85</sup>

and "I will do shorter ones - e.g., 'the evidence is sufficient,' etc. - if they are going to be cited back to us." <sup>n86</sup>

Others indicated that actual judicial time would need to be applied to make sure the clerks and staff attorneys got it right - or narrow enough: "it would immeasurably increase the amount of time spent by judges in reviewing the draft orders of the staff law clerks, who do not usually operate under the direct supervision of a judge;" <sup>n87</sup> and "in some cases, the result would be ... a greater expenditure of time and effort than would otherwise be the case to create a more fulsome [sic] unpublished opinion that approaches the kind of effort required by a published opinion." <sup>n88</sup>

Perhaps what is most significant, however, is what is not visible to the judges. The judges cited by the Federal Judicial Center survey on proposed FRAP 32.1 did not display any awareness of the evidence adduced by scholars that

the corpus of clerk and staff attorney-authored opinions is not merely likely to be sloppy or wrong, but that it has structurally subordinating effects. On the rare occasion that they register the kind of second-class treatment that is likely to produce injustice, they do not make the connection between flawed procedure and its result: systemic injustice somehow becomes invisible. <sup>n89</sup>

Law's case study of Ninth Circuit asylum jurisprudence accords with other data on unpublished opinions which suggest that they tend to produce inequality effects disadvantaging social and legal "have-nots," <sup>n90</sup> contrary to [\*18] the speculations of the young William Rehnquist, reflecting on his own recent Supreme Court clerkship, that law clerks were more liberal than judges and thus that the influence of clerks on decisionmaking and the corpus juris was likely to be liberal, or in Rehnquist's code, "political" rather than legal. <sup>n91</sup> Rather, the evidence is that judicial clerks and staff attorneys on the Ninth Circuit tend to "decide" asylum cases against asylum-seekers and in favor of the federal government <sup>n92</sup> on other than meritorious grounds, as I will demonstrate in Part II, *infra*. That is, that their work bears traces of "politicization," although not that of the stripe that William Rehnquist feared.

This article explores how and why the work of judicial clerks and staff attorneys treats "have-nots" unequally, and suggests how "mistakes" and "sloppiness" in clerk and staff attorney decisionmaking and opinion-writing reinforce these effects. It concludes that the sociology, education, selection, and training of judicial clerks and staff attorneys, together with the material practices by which they produce unpublished opinions, manifest a reflexive and insistently replicating hierarchy, to the enormous cost both of U.S. common law itself and of those members of structurally subordinated groups who are effectively denied access to justice. It focuses largely on the federal courts of appeals, because data about the material practices which lead to the production of the unpublished opinions of these courts is comparatively readily available, as a result of the recent work of the Federal Judicial Center. <sup>n93</sup> There is ample evidence, however, that the issues that it raises also squarely confront federal district court and state court systems nationally.

Part I shows how clerks and staff attorneys came to exercise the majority of Article III judicial power, critically evaluates the rationalizations advanced for the practice, and explores the material practices of delegating judging to clerks and staff attorneys. Part II documents the ways in which [\*19] U.S. law is impoverished by the wholesale delegation of judicial power. Part III collects the scant evidence about the histories of the predominantly young people who become judicial clerks and staff attorneys. In Part IV, I describe the attitudes that judges transmit to clerks and staff attorneys, and in Part V, drawing principally on the work of the sociologist of the professions, Pierre Bourdieu, I identify the modes of transmission of professional habitus from judges to clerks and staff attorneys.

There are volumes of proposals for reforming the federal appellate courts. As Cohen has noted, however, the federal courts of appeals are highly resistant both to significant structural change and change that comes from outside. <sup>n94</sup> There may come a point, however, when the steady stream of evidence of the inequality effects of modern institutionalized unpublication might provoke a crisis of legitimacy for the federal courts. Accordingly, in the Conclusion, I make some modest practical suggestions that the courts could take to avert such a crisis of legitimacy. I also suggest steps that other significant legal institutional actors could take to intervene in the transmission of inequality effects by the law clerks and staff attorneys who exercise so much Article III judicial power *de facto*.

### I. The Federal Courts' Open Secret, and Why It Matters

The most serious problem ... may be invisible ... . The ... concern, that the Courts of Appeals are [becoming] opinion writing bureaucracies, applies with particular force here. In effect, the bureaucracy is deciding what the bureaucracy can decide and what needs to be passed on to the judges. It amounts to a self-fulfilling or self-denying prophecy. A staff attorney, first determines that there is no issue in an appeal worthy of serious consideration, *i.e.*, full judicial consideration, second recommends against oral argument, and third drafts a *per curiam* opinion incorporating the prior reasoning. <sup>n95</sup>

An American institution, that of systematized unpublication of judicial opinions, has given us a binary system of law: that which is published, readily findable, and formally precedential, and that which is unpublished, difficult to find, and designated not precedential.<sup>n96</sup> Despite his own pronouncement in a significant published judicial opinion that judges write [\*20] unpublished opinions,<sup>n97</sup> Judge Kozinski has revealed in less authoritative texts that they are the work of judicial clerks and staff attorneys,<sup>n98</sup> and should remain unpublished, unprecedential, and uncitable because, as one frank commentator has put it, they may be wrong.<sup>n99</sup> This now institutionalized practice, which in less particular courts does not involve judges in the initial decision of which cases to consign to second-tier justice, sees certain classes of cases, typically those involving "have-nots," diverted to the "screening" path of no oral argument, disposition by staff attorney or judicial clerk (who, anomalously, often both function as the court and "represents" the litigant, who is frequently proceeding pro se), and termination in an unpublished opinion.<sup>n100</sup>

Let me briefly explain a little more about the features and other troubling effects of unpublication, the most widespread of the practices of private judging in the U.S. courts.<sup>n101</sup> The vast majority of U.S. judicial opinions are "unpublished": the rate in the U.S. Courts of Appeals runs just under eighty percent, with the Fourth Circuit topping the national statistics in excess of ninety percent.<sup>n102</sup> In addition to the fundamental inequality effects identified above, and adding to the more or less obvious rule of law problems posed by what are effectively different court systems for different classes of persons, there is evidence that as well as structurally subordinating post-conviction criminal and civil rights appellants, unpublication discriminates against the indigent, members of racial and ethnic minority groups, social security claimants, and other comparatively powerless individuals suing the federal government.<sup>n103</sup> Immigrants, including asylum-seekers, are the most recent group singled out for decisionmaking by clerks and staff attorneys.<sup>n104</sup>

Unpublication results in the opinion becoming differentially available to lawyers and litigants with different amounts of economic and legal capital. Some of them may appear on Lexis and Westlaw and nowhere else, which of course places economic limits on access of kinds that those in the legal academy, with "free" access to the online databases of the legal informational duopoly in the U.S., don't often turn our minds to.<sup>n105</sup> Many legal practices of the kind that the majority of our students practice law in [\*21] after graduation cannot afford the kind of access to these incomplete but nonetheless "Rolls-Royce" databases of legal "authority" that we are encouraged to take for granted.<sup>n106</sup> Repeat player and economically privileged litigants and their lawyers also characteristically maintain their own indexed databases of these records of what the courts do in practice.<sup>n107</sup> But institutionalized unpublication does not merely result in differential access to the (public) record that enables a lawyer to predict as accurately as possible what a court will do to someone situated like her client and to make the argument on her client's behalf most likely to persuade a court. It also enables the privileged to manipulate the system and make the law in their image, so that they get the precedents they want and disappear those they don't.<sup>n108</sup>

The federal bench maintains this binary system of justice because of what is perceived by them as a workload crisis, and because of the ways they have chosen to address it. There has certainly been a significant increase in appellate caseload<sup>n109</sup>: between 1960 and 2000 the number of appeals filed in the federal courts increased from 3765<sup>n110</sup> to 54,697.<sup>n111</sup> The numbers of federal appellate judges has not kept up with this increase; rather, justice has been "rationed."<sup>n112</sup> How has justice been rationed? The increase in filings has largely been accommodated by the diversion of large amounts of work to non-judicial actors, and, it appears, by the differential allocation of actual judicial resources - and perhaps court system resources more generally - to a small group of "high status" appeals.<sup>n113</sup>

Perhaps the key<sup>n114</sup> response of the federal appellate courts to the perceived workload crisis since the late 1950s has been increased reliance on non-judicial "organizational actors, including increased numbers of law [\*22] clerks [and] staff attorneys."<sup>n115</sup> "The current roster of 170" federal appellate judges now have three to four elbow clerks each.<sup>n116</sup> The Ninth Circuit has seventy staff attorneys.<sup>n117</sup> It is of course extremely large, and some circuits rely less on staff attorneys than the Ninth Circuit to process appeals.<sup>n118</sup> In some circuits, additionally, judges do their own screening.<sup>n119</sup> Even so, my own rough calculations suggest that the number of staff attorneys in federal courts of appeals likely hovers around 700 to 800.

The circuit courts have not, however, done everything they can to help themselves. Many on the federal appellate bench, including Judge Kozinski, are opposed to increasing its size. <sup>n120</sup> Reynolds and Richmond conclude this opposition emerges in part from elitism. <sup>n121</sup> Citing federal judges who opined that "the desirability of being a federal judge is inversely proportionate to the number of routine cases brought to federal court ... the professional quality of those who seek a federal judgeship is inevitably affected by the prestige, the challenges and the responsibilities of being a federal judge"; <sup>n122</sup> "judges also resist more judges simply because mathematics dictates that as the size of the court increases, each judge's chance of drawing an important case diminishes"; <sup>n123</sup> and "[a larger judiciary ... only dilutes the prestige of the office and aggravates the problem of image," <sup>n124</sup> they conclude that "themes of power, elitism, status, and image appear with distressing regularity" in judicial discourse on the size of the Federal Appellate bench. <sup>n125</sup> Even though Judge Reinhardt, an opponent of FRAP 32.1, has written that "those who believe we are doing the same quality [\*23] work that we did in the past are simply fooling themselves," <sup>n126</sup> the response of the federal judiciary is to preserve the eliteness of their office:

We federal judges are simply unable to abandon our notion of the appellate courts as small, cohesive entities operating in a pristine and sheltered atmosphere. It appears that, rather than surrender this wholly unrealistic and outdated vision of the federal judiciary, many of us are willing to ration justice. <sup>n127</sup>

Judge Kozinski argues that efficiency necessitates the binary system of unpublished and published opinions that is supported by, and in turn used to justify, the delegation of judicial work to actors with little or no legal experience beyond a J.D. degree that all-too-frequently involves vestigial training in legal research and the skills of written legal analysis and reasoning. Crudely put, his argument is that Article III appellate judges need to be free to write the twenty <sup>n128</sup> or so tightly crafted precedential opinions a year that are needed to keep the law "clean" and tightly controlled, <sup>n129</sup> and that the "unsafe" and "sloppy" work of staff attorneys and clerks is necessary to enable them to do that. Citation bans and the designating of these opinions as non-precedential provide the necessary prophylactic against the error and disorder bred in the "black box" <sup>n130</sup> of institutionalized unpublication.

Judge Kozinski's own account of the production of published opinions, however, suggests that the blame for the excessive demands on the resources of federal judges is misplaced. According to one significant study, civil appeals eat up disproportionate amounts of appellate court time despite criminal appeals being blamed for doing this. However, it seems that the staggering expense of published opinions may be the biggest drain on the judicial resources of the federal courts of appeals, which appear to have become quasi-legislatures, doctrinally entrepreneurial inquisitorial courts with little faith in the abilities of the lawyers who brief them:

While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, [\*24] sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and half the time of their clerks, to cases in which they write opinions, dissents, or concurrences... . It's not unusual to go through 70-80 drafts of an opinion over a span of several months ... .

Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions or additions. Judges frequently exchange lengthy inter-chambers memoranda about a proposed opinion. <sup>n131</sup>

Additionally, the considerable judicial time and energy that goes into managing staffs, staff time and labor, and the resources that fuel the unpublication machine <sup>n132</sup> are being expended in the interests of inferior work product that has to be controlled - effectively "disappeared" - by citation bans, and more fundamentally by legislating such material

unprecedented. Such practices, which have seen the federal courts of appeals largely abandon their error-correction function, themselves lead to the lack of coherence in rule-articulation<sup>n133</sup> that is used to justify the "Rolls-Royce" system used to produce published opinions. The lack of predictability produced by the unreliability and inconsistency of rule-application by clerks and staff attorneys also likely leads to increased numbers of appeals,<sup>n134</sup> thus fueling the crisis it seeks to solve.<sup>n135</sup>

The imbalance of judicial resources consumed by published opinions aside, the claimed rationality of massive delegation of Article III judicial power to non-judicial actors may be no more than a chimera. Despite Cohen's sympathetic<sup>n136</sup> former insider's perspective,<sup>n137</sup> one can come away from his study concluding that the federal courts' responses to their [\*25] workload crisis are characterized by a panicky amateurism, leading to "innovations" such as "significant changes in the use of law clerks, bench memoranda, and the en banc process,"<sup>n138</sup> that may in fact exacerbate and certainly do not cure the problem of inadequate judicial productivity. They have left obvious basic, and readily locally remediable, problems of efficiency untouched.

Some of the evidence of the inefficiency of the federal appellate courts that emerges in Cohen's study and from the Report of the Federal Judicial Center is remarkable. For example, the large and geographically dispersed Ninth Circuit, where much of the opposition to FRAP 32.1 was located, is so "organized" that a panel can prepare an opinion or opinions on a case only to have the work wasted because another panel has been addressing the same issue, unbeknownst to the first panel, and has beaten it to the punch on issuing a (published) opinion, which binds the circuit.<sup>n139</sup> A member of the Second Circuit revealed that "since summary orders are never pre-circulated to the full court and do not appear as slips, judges who were not on the panel have no opportunity ever to know what they say."<sup>n140</sup>

Even if the evidence suggested that the current allocation of resources within the federal courts of appeals was entirely rational, the ostensible drive to rationality has a heavy price. Cohen has argued that the "delegation of adjudicative duties to judicial staff" is an aspect of the federal appellate courts' privileging of what he calls "the rationality of organizational efficiency" over "reasoned justice."<sup>n141</sup>

The federal appellate bench is so beset by the perception of workload crisis that judges "develop an emergency attitude" that is in tension with "the normative ideal of justice," and are willing to accept procedural changes, such as increasing reliance on staff, as long as they "perceive that [these changes] increase efficiency and that the cost to justice is minor."<sup>n142</sup>

So what evidence is there of the "cost to justice"? Cohen notes that judges rely heavily on law clerks to undertake research for them<sup>n143</sup> - a far from novel suggestion in the literature on law clerks. Less likely to be anticipated, however, is his passing revelation that elbow law clerks may [\*26] miss even Supreme Court cases in conducting research.<sup>n144</sup> How much less likely might they then be to find relevant unpublished opinions among that likely relatively small group of unpublished opinions that have information that would make them usable by a legal researcher, that is, a reasonably detailed account of the facts and/or the reasons for the court's decision? Some of them do not appear on Lexis or Westlaw, and where they do, they have fewer editorial enhancements that would make them findable in a search driven by the electronic equivalents of digest-like searching.<sup>n145</sup>

Despite federal legislation apparently mandating posting of all unpublished circuit court opinions in "text-searchable" form on court websites,<sup>n146</sup> only some circuits make even comparatively crude key-word searching available, rather than the more sophisticated Boolean logic employed by Lexis and Westlaw. Others require the researcher to know the matter number or name of a case in order to locate it, that is, their unpublished opinion databases are not meaningfully searchable at all.<sup>n147</sup> The Federal Judicial Center established that the Eleventh Circuit "only permitted electronic access to ... unpublished opinions in April 2005, and ... only prospectively," while observing that "all of the unpublished opinions of this court that we examined were 'tabled' in the Federal Appendix, showing only whether the lower court was affirmed or reversed."<sup>n148</sup> Further, the federal legislation does not specify for how long circuit courts must self- [\*27] publish their formally unpublished opinions on line.<sup>n149</sup> The Ninth Circuit's articulated policy is to leave them up for thirty days.<sup>n150</sup> Given that elbow clerks typically have much more paradigmatically elite

academic qualifications than occupants of staff attorney positions, is this latter group of de facto judicial actors even as well qualified to "find the law" as the clerks?

There may be problems with the quality of delegated judicial work, however, even if a clerk has strong research skills. Various federal appellate judges Cohen interviewed indicated that the legal analysis of work done in chambers by clerks or law students acting as judicial externs could be unreliable<sup>n151</sup> - an unremarkable matter given that clerks are likely to be fresh out of law school and externs still undertaking law studies.

What kinds of cases are clerks and staff attorneys (and externs) delegated responsibility for, and how? All too often, the decision to delegate is itself made by court staff or elbow clerks rather than by judges,<sup>n152</sup> and it is a decision based on categories<sup>n153</sup> rather than, for example, based on some independent evaluation of complexity.

Whether or not such a categorical cut is made, the cases assigned second-class handling tend to be those which federal appellate judges find distasteful, or irksome.<sup>n154</sup> As indicated above, postconviction appeals, appeals from pro se litigants,<sup>n155</sup> civil rights cases, including those brought by prisoners,<sup>n156</sup> and asylum and immigration appeals have been identified at differing times as the paradigmatic stuff of the "screening" track. Criminal cases are more frequently allocated to the screening track than civil appeals.<sup>n157</sup> Other types of cases that may be categorically consigned to screening/disposition by unpublished opinion or which end up on that track include veterans'<sup>n158</sup> and social security<sup>n159</sup> benefits claims, ADA cases,<sup>n160</sup> and [\*28] employment discrimination cases.<sup>n161</sup> Some of these categories may overlap. These cases may not characteristically or frequently involve doctrine-crafting, but they do, as Richman and Reynolds register, characteristically involve claims of denial of justice, and by those "most in need of judicial protection."<sup>n162</sup>

Judges, on the other hand, are more likely actually to themselves decide "important cases (usually measured by monetary value),"<sup>n163</sup> such as "'important' securities or antitrust,"<sup>n164</sup> or "corporate tax"<sup>n165</sup> cases and those brought by "powerful litigants."<sup>n166</sup> "[A] litigant's ability to mobilize substantial private legal assistance" makes it more likely that his appeal will actually be considered by a judge.<sup>n167</sup>

Davies's important study suggests that the system of delegation of judicial work to clerks and staff attorneys leads to a diversion of appellate court resources away from criminal appeals to "more attractive civil appeals."<sup>n168</sup> This effect occurs "regardless of the incidence of 'frivolous' criminal appeals."<sup>n169</sup> This diversion is produced by the competing "professional satisfactions and incentives" handling civil appeals accords appellate judges and the "disincentives" they experience from handling criminal appeals.<sup>n170</sup> It is accompanied by discourses privileging the asserted "efficiency" of delegating the exercise of judicial power, and also by denigration of the types of matters typically screened away from the judges, which are characterized as "frivolous" or "routine," and thus "unchallenging" and "boring," and so on.<sup>n171</sup>

The discourse of the judges interviewed by Davies<sup>n172</sup> also exhibits a characteristic tunnel vision: the pressure on the appeals courts is perceived [\*29] to be a result of the Warren Court's due process jurisprudence revolution and the (frequently related) increase in civil rights litigation precipitated by the enforcement of Brown in the federal courts.<sup>n173</sup> In addition, however, in complaining about the increase of appeals in these classes of cases, the judges do not characteristically focus on the commands of due process or civil rights;<sup>n174</sup> these subsets of the discourse of equality are notably absent from their assessment of the demands made by the perceived workload crisis. Remarkably, what they focus on is what is represented by the presumed privilege of indigent criminal defendants and the lack of desert of appellants who cannot "pay their way." As one of Davies' informants put it:

I never consciously approach the decision making differently in criminal and civil cases ... . In a criminal case, though, we have to understand this; we have a large number of criminal cases that are appealed, I assume that it is a high percentage of all cases that are tried. The defendant really has no reason not to appeal - he gets a free transcript, free counsel, he may be out on an appeal bond and it doesn't hamper his out time with the Adult Authority ... . You don't find

that situation in civil cases; everyone is paying there. <sup>n175</sup>

There is no recognition here that there may be things other than the inferred "privileges of indigence" that might prompt criminal appeals (or prisoner civil rights suits): a perception of miscarriages of justice resulting in unfairness on a scale culminating in substantively wrongful conviction, say; or harsh conditions experienced during criminal punishment. The appeals of indigent prisoners themselves are perceived to be not merely frivolous and unmeritorious but actively unjust. For example, Chief Justice Burger characterized criminal appeals as "an endless quest for technical errors unrelated to guilt or innocence," making a "mockery of justice." <sup>n176</sup> In fact, the appeals court processes themselves seem to place almost no priority on "justice."

First, the reliability of screening is undermined by a failure of courts to define either consistent or safe criteria for frivolous or routine matters that may be safely screened, often by staff attorneys themselves, to be disposed [\*30] of by staff attorneys rather than by judges. <sup>n177</sup> Davies argues both that appellate courts characteristically exercise a broad discretion (analogous to their discretion in hiring clerks) in deciding what kinds of matters are sufficiently meritorious to be handled by judges and sufficiently frivolous to be handled by staff attorneys, and that "the 'merit' or 'hopelessness' of an appeal is to some degree a function of the appellate court's receptivity to the issues raised." <sup>n178</sup> Here again, the courts' tunnel vision is exacerbated by their reluctance to consult outsider perspectives and their reliance on what and whom they know, the people whom they employ. <sup>n179</sup>

Next, the discourse of workload crisis that justifies screening masks the fact that while an increase in criminal appeals accounted for a significant proportion of the marked increase in appellate court filings in the 1960s, that is of caseload, civil cases, not criminal cases, are disproportionately responsible for appellate workload, <sup>n180</sup> because that's what gets the lion's share of appellate court resources as a result of choices made by appellate courts in response to the volume crisis and their differing attitudes towards different kinds of appeals. Davies concludes that "the concentrated use of expedited procedures in criminal appeals may reflect the informal, extra-legal, political priorities of appellate court organizations rather than being merely neutral managerial tools," <sup>n181</sup> arguing that "the actual distribution of appellate attention and resources appears to be heavily skewed in favor of civil appeals; indeed, the typical criminal appeal occupies a rather marginal status." <sup>n182</sup>

Davies sought to identify whether factors other than "legal 'merit'" played a role in this skewed allocation of resources. <sup>n183</sup> He concluded that the generally hierarchical nature of the legal profession was a significant source. <sup>n184</sup> Specifically, civil appeals are higher status than criminal appeals and are generally handled by higher status lawyers than those on the defense side of the criminal bar. <sup>n185</sup> Civil appellate litigation specialists see oral argument as providing affirmation of their professional abilities in their (paying) clients' eyes. <sup>n186</sup> Quoting an appellate lawyer to the effect that "in a civil appeal, the Court of Appeal wouldn't dare write a two-page opinion[, [\*31] for t]hey know the lawyer has to show something to his client to prove he's worth the fee," Davies hypothesizes that "given the influence and interest of the civil bar, it can be predicted that the concentrated use of expedited procedures in civil appeals would create conflict." <sup>n187</sup>

Ideology played another significant role in this skewing of resource allocation toward civil appeals. Davies' judicial informants saw civil cases as "more interesting, more satisfying, and more prestigious," and less "repetitious and monotonous" than criminal ones, even when "frivolous" and "routine" appeals had been screened out. <sup>n188</sup> Because public law appeals were increasingly likely to be granted certiorari to the jurisdiction's highest court, intermediate appellate court judges increasingly had the opportunity to distinguish themselves in private law civil cases, which offered them "their most satisfying, visible and prestigious work." <sup>n189</sup> Criminal appeals, on the other hand, tended to involve serious criminal cases with little contestation about the factual guilt of the appellant. <sup>n190</sup> "Because of the clear social costs involved in the potential release of such appellants, the criminal convictions appealed present a highly unattractive set of cases for appellate intervention." <sup>n191</sup> This attitude affects outcomes as well as the allocation of resources. One of Davies' informants reported that while the threshold for legal error was formally higher in civil appeals than criminal appeals because of the (formally) higher due process standards applicable in criminal appeals, as a practical matter, it was easier to win civil appeals than criminal appeals, "even when substantial due process issues were

involved." <sup>n192</sup> That is, as a practical matter, the relative positions of the de jure thresholds for legal error were reversed de facto.

Davies concluded that, contrary to dominant court discourse, criminal appeals may be "routine" rather than "complex" because "inexperienced and underpaid appointed counsel fail[] to identify or develop latent issues," <sup>n193</sup> and that "an allocation of appellate resources based on legal 'complexity' is, indirectly, an allocation based on litigation costs and wealth." <sup>n194</sup>

Davies' study suggests that court staff decide cases differently from judges. Among his quantitative findings in his empirical study of [\*32] California's First Appellate District were that reversals of criminal cases were significantly lower for staff-processed than judge-processed criminal appeals. <sup>n195</sup> It also suggests that merit cannot account for the difference. Noting that "the proponents of expedited processing" of criminal appeals have not (and likely cannot) identify criteria for establishing "frivolous appeals," he concluded that, even if this were possible, "one may ... legitimately question whether two-thirds of all criminal appeals filed are so inherently 'hopeless' or 'frivolous' that staff processing is appropriate." <sup>n196</sup> His study also theorized that judicial evaluations of complexity of cases suggested "that legal complexity itself is linked to economic status. Wealthy litigants can afford to pay lawyers to develop 'complex' points; less affluent appellants cannot." <sup>n197</sup>

What happens when cases are diverted to staff attorneys by a circuit's "screening" practices? Most of the available data dates from the 1980s, but it still appears to be the case that different circuits rely on them to exercise Article III judicial power to differing extents. <sup>n198</sup> In the 1980s, some circuits only screened "certain types of cases" although others submitted all cases to screening. <sup>n199</sup> In the 1980s, the circuits studied by Cecil and Stienstra had criteria based on complexity for screening cases away from oral argument and towards summary disposition. <sup>n200</sup> For example, the Ninth Circuit followed "detailed written guidelines [published in a staff attorneys' handbook] that list the characteristics of cases generally designated for nonargument." <sup>n201</sup> However, Cecil and Stienstra concluded that "factors [\*33] other than the stated criteria explained screening onto the nonargument track that today leads to staff attorney processing and unpublished opinions." <sup>n202</sup>

The identity of those making the screening decisions also varies. At the time of the Cecil and Stienstra studies of the circuit courts' unpublication and screening practices in the mid 1980s, <sup>n203</sup> for example, the Ninth Circuit delegated to court staff the task of determining which appeals were assigned to the "nonargument" track. <sup>n204</sup> The initial screening work of staff attorneys was reviewed by the "supervisory staff attorney," not by a judge. <sup>n205</sup> In other instances, circuit court judges do the screening themselves. <sup>n206</sup>

In the 1980s, reviewing panels were provided with briefs and case records as well as material prepared by staff, <sup>n207</sup> which could involve "no more than a summary of the issues in the case or ... may be as detailed as a draft disposition with a supporting memorandum." <sup>n208</sup> We do know that today the staff prepares a draft unpublished opinion. <sup>n209</sup> A more critical issue, however, is how much of what they receive screening judges read. Remarks by Ninth Circuit judges quoted in the Introduction suggest that there is some obfuscation about what the judges read that might enable them to be certain, independent of a staff attorney's analysis and recommendations, that they have decided a case correctly. There are assertions that the judges do read the materials, <sup>n210</sup> and other statements undercutting those assertions. <sup>n211</sup> It is unlikely, although of course not impossible, that in the case of careful judges on circuits less inclined than the Ninth to delegate [\*34] Article III jurisdiction to clerks and staff attorneys, judges duplicate the work of those staff attorneys. To do so would be to defeat the rationales for the binary system of justice: to enable the painstaking production of a tiny number of precedential decisions, which passes for efficiency. Even in the 1980s, when all federal appellate judges surveyed by Cecil and Stienstra said they read memoranda prepared by staff attorneys, and most reported that they read any briefs filed, albeit selectively, only two read the record. <sup>n212</sup> Whatever the judges may have read in advance of screening meetings in the 1980s, today on the Ninth Circuit the screening panel, whose members have not even read the briefs in advance, <sup>n213</sup> meets monthly with the staff attorneys to dispose of these cases. <sup>n214</sup> Then the "embedded ethical issue ... no one ever talks about" confronts judges: how to pay attention to the detail of dozens of cases briefed to you orally, together with their "final draft" dispositions, rather than succumbing to the

"almost irresistible" "urge to say O.K. to whatever is put in front of you." <sup>n215</sup>

In the absence of reading an appeal's fundamental documents, the claim that screening panels decide or ensure the decisional accuracy of staff-attorney-produced opinions is untenable, and this likely applies also to unpublished opinions written by clerks. As has been registered elsewhere, the federal courts of appeals have come to function like certiorari courts rather than like courts to which appeals are formally as of right. <sup>n216</sup> The cover that enables them to function as de facto certiorari courts, all too frequently by according second-class treatment to "have-nots," is reliance on new law graduates.

**[\*35]** And what of the quality of the work of those "denying certiorari," in many cases foreclosing meaningful appellate review? <sup>n217</sup> Some circuit court clerks may have the skills and abilities that make it safe to rely on their researching what the law "is." This assumption, and the much more contestable parallel assumption that it is appropriate or safe, or safe enough, given the importance of the matter in question, to delegate judicial power to them, has been mirrored by lower courts and extended within both circuit and district courts from elbow clerks to staff attorneys, whose work even a conscientious and ethical individual judge has little capacity to influence in a circuit that delegates screening and the work of actually reading appeals documents to staff.

There is ample evidence that this assumption about the quality of the work of those to whom the majority of Article III appellate power is delegated is not a safe one. Ninth Circuit judges surveyed by the Federal Judicial Center described the "screening track" process in this way: "About one-half of our unpublished dispositions are written by central staff attorneys (not elbow clerks). Judges review them minimally, mostly for result. That practice could not be maintained [if they were citeable]"; <sup>n218</sup> and

we have two kinds of unpublished decisions - those issued in calendared cases before regular panels (not all of which are argued), and those issued in "screening" cases, in which drafts are prepared by central staff and approved by three-judge panels after oral presentations and brief reviews of documents. I would be comfortable having the first group cited, as long as they are not precedential, because a substantial amount of chambers work, by both law clerks and judges, go into them. As to the second group - screened cases - the dispositions are exceedingly short, and I have much less confidence in whatever reasoning does appear. <sup>n219</sup>

This comes perilously close to conceding what Hanglely has characterized as the "apparent (although almost never articulated) [fact] that some of the circuits' attitudes toward their non-reporter published opinions is driven less by the belief that those opinions say nothing new than by the fear that they may say something that is wrong," <sup>n220</sup> apparently because they are drafted by staff attorneys.

**[\*36]** What of those unpublished opinions that result from cases that are not handled by staff attorneys? How do judges delegate judging to elbow clerks, and does the practice of delegation differ between published and unpublished opinions? There are various contemporary models involving delegating decision-making, and thus a distance from both the idealized model of clerks as judicial adversary, engaging in an intra-chambers Socratic exchange designed to refine the judge's step-by-step reasoning toward a decision, <sup>n221</sup> and Sheldon's model of "assistant" clerks, <sup>n222</sup> who carried out research, cite checking, editing, <sup>n223</sup> and even the drafting of opinions that had limited influences on the judge's final decision and its reasons for judgment.

In the case of elbow clerks there may, at the extreme, be more or less complete delegation of "decision-making power." <sup>n224</sup> Cohen, a former Ninth Circuit clerk, suggests that at least in some cases, judges delegate primary decision-making to clerks. <sup>n225</sup> The complete delegation of decision-making and opinion-writing may be the inevitable result of the binary system of opinion-production, <sup>n226</sup> and seems flagrantly unethical, <sup>n227</sup> despite attempts to justify it. In the face of mounting criticism of its binary system of publishing, which the federal appellate bench apparently "just doesn't get," <sup>n228</sup> 63% of those judges who responded to a 1990 survey said that they "rely on their clerks to do at least

some work they believe they should do [\*37] themselves, and 30% do so "often" or "usually," and 39% of them said that staff attorneys did work they should have done themselves "sometimes," "often," or "usually." n229

Another model is that the judge "makes the decision" and then has the clerk prepare the "reasons for judgment," n230 in "briefs [written] to support a predetermined result." n231 This is problematic for a number of reasons. First, as Judge Wald, for example, has indicated, there is a view that good judicial decisionmaking occurs in the writing of the "reasons for judgment," and thus a decision rationalized under delegation ex post facto may not be right. n232 The clerks may be making the decision rather than merely giving reasons for it or articulating the rule on which it was based. In a world less civilist than Judge Kozinski's, the articulation of reasons why a rule does or does not apply to a given set of facts might be seen as "the law." As Anne Coughlin (no poststructuralist jurisprudential radical) writes in her own account of clerking for Lewis Powell, "words are (most of) that stuff we call law." n233 Thus only the fiat that declares clerk-written opinions "not law" means that clerks are not making law in any unpublished opinion. And in chambers where the ostensibly-authoring judge delegates all but formal "decision-making" to clerks, this presumed prophylactic ceases to function. Judge Posner, as well as criticizing clerk-written opinions as suffering from a range of stylistic deficits, including excessive length and reliance on citation, has suggested that the phenomenon of reliance on clerks is likely to inhibit the development of judges themselves. n234

Further down the scale of delegating responsibility for the judicial function is the model of judge and judicial clerk that constructs the judge as editor and the clerk as drafter, n235 with or without initial tentative or more or less final decision-making on the outcome of the dispute by the judge. There are variants on this model. According to Mark Tushnet, on the modern Supreme Court,

several [Justices] outlined the main points of an opinion to their law clerks and then edited the draft the clerk produced. The degree [\*38] of editorial supervision varied as well, with some Justices going over the drafts in detail and others merely inserting paragraphs into what their law clerks had produced. Chief Justice William Rehnquist has written that he has his clerks "do the first draft of almost all cases" in his chambers, and that sometimes he leaves those drafts "relatively unchanged." Laurence Tribe reported that "a number of opinions [he] worked on" as Justice Stewart's law clerk "are really almost exactly as [he] drafted them," including one of Justice Stewart's most celebrated opinions. Indeed, all of the Justices relied heavily on their law clerks, particularly for working out details; ... "The Justices normally outline the way they want opinions drafted. But the drafting clerk is left with a great deal of discretion on the details of the opinion, particularly the specific reasoning and research supporting the decision." n236

It is said that some judges may concur, dissent, or even accept or reject an assignment to draft a panel's opinions based on the skills and ideological positions of their law clerks. n237

Less direct delegation to clerks of judicial decision-making can occur where judges rely largely or solely for decision-making on the bench memorandum or bench memoranda prepared by clerks, rather than on the record or the briefs. There are various levels of judicial involvement in bench memoranda prepared in chambers by elbow clerks n238 or by judicial externs who are still enrolled in law school. n239 However, there is evidence that where a memorandum has been produced with no judicial oversight, it may contain "errors or omissions that an experienced attorney would have caught." n240 This problem can extend to draft unpublished opinions produced without judicial oversight. One of Cohen's sources complained, "I get some [bench memos] that say [the judge has] not read the bench memo. I get memorandum dispositions where the judge says "I have not read this.'" n241

Paradoxically, judges are supposed to be kept from making mistakes n242 and kept up to date n243 by people whose research and written legal analysis [\*39] and reasoning skills they mistrust. This paradox signals that even in the face of the recognition that it is unsafe to do so, business continues as usual, obscured by familiarity. The "appearance of propriety" in all these cases is (superficially) maintained by the regulatory fiat, or legal fiction, that says these opinions are unprecedented - not law.

## II. Evidence of Impoverishment

The U.S. federal courts' system of institutionalized unpublication and binary appellate justice impoverishes U.S. law in two main ways, by producing negative "rule of law" effects and by producing inequality effects. Many of these effects, including the unpredictability caused by differential access to unpublished opinions<sup>n244</sup> and frequent lack of meaningful searchability of those opinions,<sup>n245</sup> operate independently of the work of clerks and staff attorneys. Responsibility for them must be laid at the feet of the judges themselves, as must the overriding responsibility for the impoverishing effects of clerk and staff attorney work in producing unpublished opinions, as a result of their delegating Article III judicial power to young people who are insufficiently trained and experienced to exercise it safely.

My concern in this Part is to document the kinds of impoverishment of U.S. law produced by clerk and staff attorney work itself, with a view to identifying reforms that could reduce the impoverishment of U.S. law "from the bottom up."

Unpredictability traceable to the work of clerks and staff attorneys is caused by "sloppily-drafted" opinions<sup>n246</sup> and ones that get the law, or facts, or decision wrong.<sup>n247</sup> Inexperience, inadequate legal research and analysis skills, and the difficulties in finding in favor of litigants whom court culture disparages affect "have-nots" disproportionately, because their cases are the ones that these junior de facto federal judges most frequently process.<sup>n248</sup> Clerks and staff attorneys are more likely than judges to make factually or legally wrong findings because they have missed or misinterpreted something where a more thoroughly trained or more experienced person [\*40] might not have done.<sup>n249</sup> The culture in which they do their work also plays a role. "It is not difficult to understand why unpublished opinions are dreadful in quality. The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference."<sup>n250</sup>

Sloppiness and errors may have differing kinds of inequality effects when coupled with unpredictability produced by differential access to legal knowledge. For example, a relatively poorly-resourced litigant may not be equally able to determine that her chances of succeeding or failing on appeal are better or worse than they actually are as a better-resourced one, who knows what the court who will hear her appeal is actually doing across the body of its jurisprudence with cases like hers. This may be exacerbated if the first litigant or her lawyer does not know enough about how the law is actually being administered<sup>n251</sup> to determine that a "sloppily worded" unpublished opinion, perhaps drafted by a judicial clerk, does not give meaningful guidance about how her case will be treated, or that a decision that is wrong as to the law is just that, and thus unsafe to rely on. These problems may be magnified if the lawyer or litigant is not sophisticated enough to know that the sloppy or wrong opinion gives no guidance about what actual circuit judges think.<sup>n252</sup>

Staff attorney-drafted opinions are especially likely to give no or no meaningful reasons for the court's judgment, which impoverishes the corpus juris, making us unable to determine how the courts are really treating disputes.<sup>n253</sup> It is of course difficult for a new law graduate to engage ethically with a court culture that accepts an opinion without reasons as "normal" for certain kinds of cases.

What of the more profound and direct disadvantages experienced by the poor and the powerless when judges delegate the work of considering their appeals to clerks and staff attorneys? What evidence is there that "have-nots" do more poorly when clerks and staff attorneys process their appeals than when judges do? Let us return to Law's study of strategic voting in Ninth Circuit asylum jurisprudence, discussed in the Introduction.<sup>n254</sup>

[\*41] Law's study is complex, positing three different hypotheses, each with subparts.<sup>n255</sup> To some extent, the data most relevant to this article are not the most significant for Law. In particular, he is especially interested both in an increase in publication rates for pro-asylum seeker decisions made by Democratic panels when the periods 1992-1997 and 1999-2001 are compared,<sup>n256</sup> and in evidence that those Democratic appointees to the Ninth Circuit bench who are more likely to find for asylum seekers in published than in unpublished opinions are engaging in "strategic behavior."<sup>n257</sup> According to his interpretation of data on Ninth Circuit asylum cases from 1992-2001, when an opinion will be

published, some Democratic appointees "demonstrate[] a heightened tendency to vote in favor of the asylum seeker,"<sup>n258</sup> in order to "make 'good law,' and to avoid making 'bad law,' by casting 'good' (ideologically preferred) votes in published cases, while restricting 'bad' (ideologically disfavored) votes to unpublished cases."<sup>n259</sup> Davies' research suggests that meritoriousness or its absence does not account for lost appeals,<sup>n260</sup> and thus that it cannot explain the significant difference in the rate at which these Democratic appointees find for asylum-seekers in their unpublished and published opinions respectively.

If it is correct, Law's hypothesis means that some Democratic appointees to the Ninth Circuit bench and no Republicans are sufficiently intellectually dishonest or disrespectful of their office to let publication status rather than "merits" drive their decision-making in the case of a paradigmatic group of disadvantaged litigants, namely asylum seekers. They

show greater willingness [than other Ninth Circuit judges] to vote against their ideological convictions in unpublished cases ... because unpublished cases do not damage as precedent, [such a judge,] who would prefer to decide the case differently[,] may trade her vote in return for nonpublication or may acquiesce for the sake of "collegiality," which [may] include a meaningful expectation of reciprocity over the course of repeat play.<sup>n261</sup>

There are of course schools of thought which would not find it puzzling that appointment by Democrats to the Ninth Circuit bench was more likely to produce at least one kind of behavior that arguably signals [\*42] disqualification for judicial office than appointment by Republicans.<sup>n262</sup> There may, however, be alternative hypotheses.

Knowing what we know about who typically produces unpublished opinions and the conditions under which they are produced, there is an apparently more plausible interpretation of the data than that offered by Professor Law. Judges Kozinski and Reinhardt have revealed that most Ninth Circuit unpublished opinions are clerk and staff attorney work product, rather than the fruits of judicial labor.<sup>n263</sup> Further, forty percent (some estimates put it at about half<sup>n264</sup>) of the Ninth Circuit's unpublished opinions are not chambers work product, subject to proximity to a judicial editor, but rather the work product of staff attorneys, who do not work under direct judicial supervision.<sup>n265</sup> How could Law's analysis fail to account for the fact that most unpublished opinions on the Ninth Circuit are not apparently judicial work? The answer may lie in the fact that Professor Law was himself a Ninth Circuit elbow clerk,<sup>n266</sup> and was thus presumably more familiar with the production of unpublished opinions in chambers than those produced by staff. What appears certain, however, is that his implicit assumption that in the case of the strategic judges, the decision to publish is always a product of a judicial decision at the point of vote-casting, is undermined by screening to the staff attorney track by staff at the point of entry to the appellate court system. Simply put, if an appeal, by virtue of its subject matter or the type of appellant who brings it or through adherence to some more principled form of sorting appellate sheep from goats, is screened to be handled by staff attorneys, it is presumptively highly likely that it will terminate in an unpublished opinion, which, on the Ninth Circuit, is brought fully drafted to the conference between panel and staff attorneys at which its fate is formally decided.<sup>n267</sup> The decision about publication status is often made elsewhere than chambers or conference by someone other than a judge.<sup>n268</sup>

A finding of Law's study that is not emphasized in his conclusions about his study is that most "Republican" asylum decisions are made against the [\*43] asylum seeker.<sup>n269</sup> This is unsurprising. After all, "studies of judicial behavior have, consistently and with success, used party of appointing president as a proxy for judicial ideology."<sup>n270</sup> Equally unsurprisingly, Law also concluded that "panels dominated by Democratic appointees render a significantly higher proportion of liberal decisions than panels dominated by Republican appointees, regardless of publication status; moreover the extent of this disparity for unpublished opinions rivals what has been observed of published decisions."<sup>n271</sup> However, Law's research also shows that while Democrats favor asylum-seekers and Republicans favor the government, majority Democratic panels on the Ninth Circuit are much more likely to find in favor of asylum-seekers in published opinions than in unpublished ones.<sup>n272</sup>

The disparity is significant. In unpublished cases asylum seekers secure favorable decisions before majority Democrat panels in 20.5 percent of cases; in published cases they secure favorable decisions in 70 percent of cases. <sup>n273</sup> However, Republican-dominated panels are also more likely to find for the government in unpublished cases than in published cases: in unpublished cases Republican-dominated panels granted asylum-seekers any kind of relief in only 7.5 percent of appeals; in published cases the proportion rose to 48.2 percent. <sup>n274</sup>

Thus, no matter the party of the president who appointed the judge, asylum seekers do worse in unpublished decisions than published ones, although they do worse in the face of Republican panels than Democratic ones. However, if we proceed on the basis that published opinions are wholly or largely judicial work product, whereas unpublished opinions are wholly or largely the work of clerks and staff attorneys, the low success rate of asylum-seekers in cases terminating in unpublished opinions is likely to reflect the "preferences" of staff attorneys or clerks, rather than those of judges. That is, clerks and staff attorneys, aggregated, tend to decide cases against asylum-seekers, finding for them somewhere in the range of 7.5% to 20.5% of cases, well short of the rate for even Republican-appointed panels, with the difference between the proportion of unpublished opinions finding against asylum-seekers in Republican and Democratic panels plausibly being attributable to the effect of judicial ideology on decisions made in [\*44] chambers by elbow clerks. As indicated above, <sup>n275</sup> this cannot be explained purely by assumptions about differential merit. As Robel notes, "judges rarely disagree with the initial decision to decide an appeal on the briefs alone. This means that staff determinations about the relative merits of the cases almost always prevail, and ... staff determinations may be guided largely by the subject matter of the opinion." <sup>n276</sup>

As for the four "strategic" Democratic appointees, who vote more frequently in favor of asylum-seekers than they would be predicted to do in published opinions but not in unpublished ones, their increased tendency to favor asylum-seekers in published jurisprudence might reflect differing levels of control over clerk-written opinions than those of their Democrat-appointed brethren and differing levels of assiduousness in scrutinizing staff attorney decisions. It does not, however, safely lead only to the conclusion that they are only voting "contrary to their own preferences" because the opinion will be unpublished, and thus unprecedented. <sup>n277</sup>

The multiple cultures of hierarchy that shape clerks and staff attorneys, discussed in Part IV, *infra*, are the likely sources of the inequality effects produced by delegating Article III jurisdiction to clerks and staff attorneys. This is inequality on a large scale. The Ninth Circuit receives approximately three quarters of the nation's asylum appeals, <sup>n278</sup> and publishes about half as many asylum opinions as it does over all. <sup>n279</sup> This inequality is not confined to Ninth Circuit asylum cases. Colker notes a significant disparity in the way ADA plaintiffs are treated in published and unpublished opinions. <sup>n280</sup> She concludes that,

Defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases. These results are [\*45] worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly. <sup>n281</sup>

Nonetheless, the results are much worse for plaintiffs in unpublished cases, and thus "reliance on publicly available opinions overstates plaintiffs' success rates both at trial and on appeal." <sup>n282</sup> Additionally, Colker notes that "the plaintiff win rate in employment discrimination cases at the district court level ... is four times higher in published than in unpublished opinions." <sup>n283</sup>

Fresh analysis of earlier studies of "strategic judicial behavior," which does not assume with the authors of those studies that judges write most unpublished opinions, supports my reading of Law's data. For example, Merritt and Brudney's research revealed that there was an increasing historical trend, unexplained by any shift in the applicable doctrine, from 1987 to 1993 for unpublished decisions to reject union claims; <sup>n284</sup> this coincided with an the increasing reliance on court staff to perform judicial functions in cases on the unpublication track.

### III. What Do We Know About Judicial Clerks and Staff Attorneys

The history of minority groups in the U.S... demonstrates that one group gains ground at the expense of another's losing its tenuous grip... .

[\*46]

Everyone knows how plantation owners treated house slaves slightly better than those in the fields, and even recruited some of them to spy on others. But less well known is that around 1705, when the slave population was growing, Virginia gave White servants, some of them indentured, more rights so that they would not be tempted to join forces with the slaves. <sup>n285</sup>

We know, then, who makes the bulk of the nation's law. The first group is comprised of the favored personal servants, intimates, <sup>n286</sup> engendered in the image of the judges at whose elbows they learn <sup>n287</sup> anew the lessons of influence and privilege. They will take this knowledge from clerkships into the legal academy, the ranks of the judiciary, and other speaking positions in law <sup>n288</sup> and (what is in this nation's juridical context) its conjoined twin, government. <sup>n289</sup>

The other class, who labor largely out of sight of the judges, are the staff attorneys, habeas clerks, pro se clerks, to whom characteristically are assigned the problems, litigants, and bodies of law deemed insufficiently intellectually interesting to merit or otherwise unworthy of serious judicial labor, or even that of judicial proxies whose legal skills the judges trust at least marginally better than theirs. This curial "underclass" delivers appellate justice to those whose appeals affront a judiciary who do not want to face what they confront them with: inequalities based on differences of race, of class, of alienage, and so on.

This Part seeks to explore what is "written on the bodies" of these two groups of influential young lawyers, and reproduces itself in their work. <sup>n290</sup> In order to do so, it draws together the available data on the sociology, education, and selection of judicial clerks and staff attorneys. That data is thin. As one commentator has put it, "the selection methods, the [\*47] qualifications, and the experience of law clerks and [staff] attorneys are different than judges. The clerks and attorneys have no relevant traceable history." <sup>n291</sup> What scraps of information do we have to interpret, and what can it tell us?

Let us begin with the history of these "peculiar institutions," law clerks and staff attorneys. We know that the institution of the judicial clerk was born from the Supreme Court and from Harvard, when in 1882 Justice Gray hired the first of clerks he was to refer to, in a contextually resonating phrase, as "his boys," at the recommendation of his brother, the Harvard law professor John Chipman Gray. <sup>n292</sup> We also know that it has recently been the subject of controversy because of its alleged failure to admit women and minorities to the institution equally to white men. <sup>n293</sup>

It was institutionalized in the state and federal courts in the second quarter of the twentieth century, a time when elite law schools and the legal profession were still addressing the first in a series of crises of professionalism, <sup>n294</sup> and was a response to yet another perceived crisis: in judicial workload. <sup>n295</sup> The first crisis of professionalism concerned the entry of "others," initially white men of the working classes and Jews, <sup>n296</sup> to law practice (a crisis born, like the institution of judicial clerkships, around the time of the movement of legal education to the universities). The institutionalization of the staff attorney was a later response to yet another crisis of professionalism owing something to each of those earlier crises: "the extension of the right to counsel on appeal in indigent criminal cases and ... an explosion in litigation [- including civil rights litigation - ] by incarcerated prisoners." <sup>n297</sup>

What of the education of the people who become clerks and staff attorneys? Elbow clerks on elite courts are typically privileged products of [\*48] an extremely hierarchical <sup>n298</sup> system of higher and professional education that systemically disadvantages women and minorities. <sup>n299</sup> There is substantial evidence that compassion for others is

reduced by the acculturating effects of law schools.<sup>n300</sup> Given the relentless press of hierarchy, it is unsurprising that "many court clerks come out of relatively few law schools."<sup>n301</sup> Although there is some evidence that the paradigm may be shifting slightly,<sup>n302</sup> the further up the food chain of eliteness a law school is positioned the more likely it is that those who are disproportionately likely to be clerks are taught legal research, analysis, reasoning, and writing by upper level J.D. students, post-J.D. student "fellows," typically studying for an LL.M. or J.D., or by adjunct or contract (rather than tenured or tenure-track) faculty, overwhelmingly women, who work for much lower salaries and under much less favorable conditions of employment than their tenured or tenure-track counterparts.<sup>n303</sup> This is a fundamental misapplication of the model<sup>n304</sup> that assigns to low status, feminized faculty in the [\*49] University the inculcation of general tertiary literacy skills to undergraduates, but not discipline-specific literacy skills to graduate students. Accordingly, at best, most elite law schools that produce federal clerks are assigning the teaching of the fundamental skills either to people whom they do not think worthy of tenuring, which, inter alia, sends powerful symbolic messages about the status and value of high quality legal research, analysis and reasoning. At worst, they are delegating the teaching of the fundamental skills used in judging to persons without the workplace experience that might compensate for deficiencies in skills at the point of entry to the legal profession. Generations of the blind are leading the blind.

What are the mechanisms for selecting clerks and what can those mechanisms tell us about their subject formation? "Judges appoint clerks with virtually no regulation."<sup>n305</sup> Unsurprisingly, then, there are no meaningful controls that might prevent discriminatory practices in clerk selection.<sup>n306</sup> Equally unsurprisingly, although the Federal Judicial Conference has made a "formal" commitment to equality,<sup>n307</sup> women and members of racial and ethnic minorities are underrepresented among them.<sup>n308</sup> For example, the Second Circuit's Task Force on Gender, Racial, and Ethnic Fairness in the Courts, which shows women, and ethnic and racial minority groups are "significantly underrepresented" in the corps of [\*50] clerks compared with the cadre of enrolled law students, also concludes that women are more likely to clerk for district court judges than men, men are more likely to clerk for appellate judges, and African-American clerks employed by the court of appeals are twice as likely to be pro se clerks as elbow clerks.<sup>n309</sup> The report's authors attributed this under-representation of women and African-Americans in appellate elbow clerkships in this way: "anecdotal evidence suggests that women and minorities obtain fewer prestigious clerk positions than white males because they do not do as well academically and do not obtain as many editorial positions on the top law review of their law schools,"<sup>n310</sup> as well they might not, given the raced and gendered production of merit in legal education.<sup>n311</sup> Further, the regular systems for recording data about the identifying characteristics of clerks and staff attorneys, such as they exist, do little to provide a conscientious judge with information about whether her biases in selection are normal. Clerks and staff attorneys are often grouped with staff including secretaries and other clerical workers in the statistical sources.<sup>n312</sup>

If there are no legal controls on judicial discretion to appoint whomever they wish to clerkships, what affects selection? Clerks are hired based on a combination of interlocking circles of influence and an assumption that indicia of eliteness, signaled by a narrow range of paradigmatic credentials, equal merit. The decision is also influenced in some cases by blatant nepotism or equally blatant reliance on candidates' idiosyncratic regional or institutional histories, or the lack thereof.<sup>n313</sup>

This mechanism itself reproduces the untrammelled discretion of federal judges to do whatever they prefer to do in the exercise of their office, with scant attention being paid to outsider perspectives such as those which see the principles of anti-discrimination law or equal opportunity in public employment, say, as normative. It also privileges the appointment of "people like us," formally justified by the discourse of compatibility that characterizes much discussion about clerkship selection.<sup>n314</sup> Reflecting their [\*51] origins, discriminatory practices come to be seen to produce selections based on merit.<sup>n315</sup>

The cultural lore that informs clerks' understanding of the value of serving as a clerk also plays a role in shaping them. Federal appellate clerkships, whose occupants are almost always new law graduates, appointed prospectively while still in law school,<sup>n316</sup> are particularly prestigious and their occupants influential.<sup>n317</sup> Clerking, especially for the federal appellate bench, can "open doors in practice and teaching, and ensure a degree of financial security" in the

clerks' future professional careers,<sup>n318</sup> where marks of elitism such as graduating near the top of one's class at an elite law school, serving, especially in a senior position, on that institution's law review, or clerking for a federal appellate judge are extremely helpful in securing entry to the professoriate<sup>n319</sup> or a job in an elite law practice.

Clerkships have both a literal and a symbolic market value: federal "clerkship graduates are ... wooed by [large city law firms], many of which pay them large signing bonuses,"<sup>n320</sup> (the current market rate among large commercial law firms for signing a Supreme Court clerk is \$ 200,000, three thousand dollars less than the annual salary of the associate Justices themselves)<sup>n321</sup> because they have been clerks. This marker of hierarchy is assumed by elite law firms to provide not only "increased general knowledge of the law" but also valuable insider knowledge: the "understanding of the inner workings of courts before which the firms practice."<sup>n322</sup> These elite legal institutions get the markers of eliteness that they value, no doubt, and perpetuate and inculcate an unreflecting respect for "prestige," influence, and the value of privileged access to insiders. As Norris writes,

[\*52]

Clerks can ... look forward to a broader<sup>n323</sup> array of career opportunities. A clerk's judge usually knows people (often lawyers) in high places, and judges frequently take an interest in their clerks' careers. In addition, a judge's chambers will occasionally serve as a meeting place for those who have clerked for her over the years, giving young lawyers a golden opportunity for networking.<sup>n324</sup>

The attitudes of judges and lawyers towards the research and written legal analysis and reasoning skills of clerks, however, suggest that these elite employers' assumption that superior legal research, analysis, reasoning and writing skills come with clerkship graduates<sup>n325</sup> may be misplaced.

What do clerks learn about the job beyond a respect for status and a thirst for connections? They learn that apprenticeship to great figures on the bench is the best place to learn about law;<sup>n326</sup> that promoting their own personal growth joins enhancement of professional success as the virtues of serving in the peculiar institution of judicial clerk;<sup>n327</sup> and that while they may be required to undertake menial jobs in the service of their judge such as clerical work, running errands,<sup>n328</sup> chauffeuring,<sup>n329</sup> catering<sup>n330</sup> - or even barbering<sup>n331</sup> - their access and influence also makes them (at least in their own estimation, and that of people like those whose values dominate the nation's legal academy) extremely influential. They are also both branded by and bound to the judge whom they serve: "a clerk is forever marked by the judge for whom he or she worked, bonded to that judge's reputation and inevitably dependent on that judge for many years of professional and personal references."<sup>n332</sup> This network of influence entangles the nation's law professoriate as well; many judges rely on the estimation of law professors whose values they share to recommend prospective clerks,<sup>n333</sup> and this [\*53] influence<sup>n334</sup> is in turn valued by, and adds to, the institutional cachet of the professor in question. Powerful members of the three arms of government, including federal judges, have often been clerks.<sup>n335</sup>

We know much less about the people who become staff attorneys<sup>n336</sup> than we do about clerks. For example, "we do not know ... who hires [them], what their qualifications are, ... or how long they stay on the job."<sup>n337</sup> Observation among one's former students would suggest that those who obtain positions as staff attorneys tend to have less paradigmatically elite qualifications than those who become appellate clerks, as common sense would suggest. A revealing clue to the differing status of clerks and staff attorneys emerges from responses of Ninth Circuit Judges to the Federal Judicial Center's survey on proposed FRAP 32.1. Chambers clerks write long opinions that are presently minimally edited by judges but which, at least according to one judge, will need to be edited a great deal more, apparently to cut out interpretable play in the opinions now that FRAP 32.1 has in fact passed Congress.<sup>n338</sup> It appears, then, that clerks get opportunities to express themselves through the reasoning in opinions in ways that staff attorneys do not. Staff attorney opinions are characteristically "exceedingly short," and according to one Ninth Circuit judge, "I have much less confidence in whatever reasoning does appear" in them than in chambers-prepared opinions."<sup>n339</sup>

#### IV. The Attitudes that Circuit Judges Transmit About Litigants "on the Margins"

What happens once the clerks and staff attorneys enter the courts and start work? They add to an accreting professional habitus that leads them to decide cases against the interest of the powerless, and in favor of the powerful. First, they learn lessons about the matters they handle and the litigants whose appeals are delegated to them. Second, they learn about hierarchy and their own position in it.

We know that the work that produces unpublished opinions and the work of producing them are perceived as low status,<sup>n340</sup> and that the "have-not" [\*54] litigants who bring cases tracked this way are viewed by judges as troublesome or vexatious, their appeals unmeritorious.<sup>n341</sup> The staff then internalize those perceptions.<sup>n342</sup> As well they might. Among other sources of influence, they depend, especially in the case of the staff attorneys, who generally do not have the blue chip credentials of those in elite elbow clerkships, upon the judges whose work they do for employment recommendations after the year or two of their time on the court. Clerks and staff attorneys, even more than judges, are almost never captured "on the record" informing scholars about their attitudes to litigants and classes of cases. On the other hand, anyone who has talked "off the record" with them is struck by the rapidity with which even clerks and staff attorneys who might be expected, because of life experiences, for example, to be relatively resistant to getting the message that Social Security cases are boring and prisoners are crazy, become acculturated.

What other messages do the judges send? The courts of appeals have developed a characteristic tunnel vision, so that what is important to them is the precise craft of writing a handful of precedential opinions.<sup>n343</sup> Invisible to them is what counts to lawyers and litigants - guidance about how their case will be treated on appeal and thus whether an appeal is merited.<sup>n344</sup> Likewise, manifest unfairness fades from view,<sup>n345</sup> because of the circuit courts' effective abrogation of their error-correcting function.<sup>n346</sup> Paradoxically, these attitudes undermine the meritorious basis for caring about the crafting of precedential opinions - aiding predictability. What is left is judicial amour propre grounded in elitism.

Further, accountability suffers when, as is frequently the case with unpublished opinions, the parties are just given the bare decision, an approach justified because they are presumed to know the issues and the facts.<sup>n347</sup> This dismissive attitude towards the basic accountability signaled by giving reasons for judgment fails to register that facts may also be in dispute, especially if the decision being appealed from itself bears the [\*55] characteristic brevity and impenetrability of much of the corpus of unpublished opinions, which it often does.<sup>n348</sup> Even more troubling, skeletal decisions, at their most extreme only consisting of one word,<sup>n349</sup> are rendered and justified in the face of evidence that the judges register that parties appearing pro se, or those with less competent attorneys, may not indeed know what the appellable issues arising in their cases are.<sup>n350</sup> No wonder, in such a culture, "the absence of accountability and responsibility ... breeds sloth and indifference"<sup>n351</sup> of which unreasoned judgment is the hallmark.

Accordingly, part of what clerks and staff attorneys learn may be that the cultural values that dominate the courts are more significant than the view that criminal appeals and pro se appeals are precisely those which demand the most actual judicial attention: the claims to justice made by the poor and the marginal are culturally constructed as negligible. And perhaps worse than negligible: for example, clerks and staff attorneys learn that prisoners and asylum-seekers, disproportionately made up of members of ethnic and racial minority groups markedly underrepresented among judges and by the clerks and staff attorneys themselves, deserve discriminatory treatment.

Equally troubling, they may learn that fitting in justifies being "economical with the truth."<sup>n352</sup> There is evidence of sharp conflicts between official statements about who does the judging<sup>n353</sup> and those that appear in more obscure sources,<sup>n354</sup> implying institutional tolerance for what is at best disingenuousness. Similar attitudes are manifest in judicial tolerance both for a lack of accountability and for irresponsibility, evidenced by courts' [\*56] frequent and repeated failure to follow their own criteria for screening cases to the staff attorney track and issuing unpublished opinions.<sup>n355</sup> Likewise, the pervasive judicial discourse about cases characteristically tracked to clerks and staff attorneys itself may not be correct. Its inaccuracy, and thus the justification for the binary system of appellate justice, may be perceptible to the young lawyers who handle these cases, again producing a culture that tolerates marked gaps between justificatory rhetoric and fact. Cohen, for example, notes that "there have been substantial increases in some of

the most complex types of cases" that come before federal appellate courts.<sup>n356</sup> He characterizes these "complex" case types as including criminal appeals and "civil rights claims, personal injury/product liability claims, and prisoner petition appeals."<sup>n357</sup> These are precisely the types of cases that federal judges supportive of the institutionalized unpublication status quo tend to characterize as the types most suited for screening to the staff attorney/unpublication track<sup>n358</sup> because they are perceived to be boring, and lacking intellectual challenge, on the one hand, or vexatious or pointless on the other.<sup>n359</sup>

Then there is judicial disparagement of the work that clerks and staff attorneys do in producing unpublished opinions. If the former chief judge of the Federal Circuit was sufficiently indiscreet to describe unpublished opinions as "junk" at his circuit's annual conference,<sup>n360</sup> it seems likely that those who write them get the message. What are the characteristics of that [\*57] message beyond characterizations like this, or like Judge Kozinski's likening unpublished opinions to tainted food? That implied by Davies' rhetorical question, "what supervision is possible when staff attorneys write two-thirds of the court's criminal opinions with the expectation that they are dealing with only 'routine' or 'frivolous' cases,"<sup>n361</sup> or are actively discouraged from believing that the screening judges will pay attention to them if they decide a case in favor of a pro se prisoner appellant, say, in an overwhelming jurisdictional culture that says such cases are never meritorious.

Next, the delegated decisional role itself sends messages. As we know, the workload crisis that has come to characterize the federal appeals courts' sense of identity since the early 1960s has led to the increasing delegation of judicial work to staff and law clerks.<sup>n362</sup> Carpenter has described the process of delegated Article III authority in this way:

briefs are delivered to law clerks and staff attorneys who are often too young to have full life experiences, do not know trial practice, appellate practice, or the jurisdiction's body of law and, while extremely bright, have not developed the wisdom and practical experience that citizens expect in a high judicial office. The law clerks and staff attorneys filter the case, recommend the answer, and draft the opinion.<sup>n363</sup>

In a sharp criticism of those who justify the binary system of justice, he describes "carefully prepared, dearly paid for briefs which set forth ... [litigants'] causes ... [being] mailed to a great black box staffed by bright, young interns who submit a solution to senior management for approval."<sup>n364</sup> Unsurprising then, that one effect of this wholesale delegation of Article III power to neophytes is that inflated views of their own importance tend to come with the territory of elite federal clerking.<sup>n365</sup> This has likely fueled clerks' pre-existing sense of their importance. They are generally elite law schools' "big men on campus," the recipients of the glittering prizes that signal merit in this context: superb first year grades and editorial positions [\*58] on law review.<sup>n366</sup> How can we square this with evidence that staff attorneys became dissatisfied<sup>n367</sup> with the largely pro se caseload assigned to them? First, screening means that the most "interesting" of those cases deemed unworthy of actual judicial attention tend to be decided by clerks, and the least "interesting" by the staff attorneys. Davies' research also suggested that staff themselves, in the interests of increasing their status, were likely to seek an expansion in their jurisdiction beyond frivolous and routine appeals.<sup>n368</sup> Thus, as Bourdieu's account of the replication of hierarchy within fields predicts,<sup>n369</sup> hierarchy becomes even more firmly entrenched and normalized.

Clerks and staff attorneys learn from court processes - the material practices that shape their work - as well as from express judicial attitudes. The adequacy of their supervision on the job depends on the ethical sensibilities of a court in general, or particular judges supervising their elbow clerks or the pool of staff attorneys. We know that at least in some courts, at some times, no judge ever sees any part of the record of a case before signing off on the unpublished opinion that closes it.<sup>n370</sup> Taken together, these judicial attitudes, embodied in work practices, send two messages. First, while the clerks' and staff attorneys' work may not be reliable, it is "good enough" for some kinds of cases and litigants. And second that those in the most powerful positions in the institution do not believe that the competent and ethical exercise of their constitutional office requires that they are satisfied of the accuracy of that which goes out into the public, albeit

formally designated as something other than "real law," over their signatures.

And what of the influence of "liberal" judicial ideology on clerks? If Judge Kozinski, a prominent feeder judge to Supreme Court clerkships as well as a prominent conservative jurist, who has a tendency to hire clerks who are both men and members of the Federalist Society, <sup>n371</sup> has little tolerance for clerks who do not share his ideological views, <sup>n372</sup> why don't we [\*59] see the influence of the ideological "liberals" on the federal appellate bench influencing their clerks, and countering the tendency of the unpublished opinions they write to disadvantage the powerless? That influence is, by all accounts, profound, as Lazarus's remarkable account of the affiliations of his judge, Justice Blackmun, suggests:

This was a man who had kissed the cheek of a man - his grandfather - who had risked his life in the war that freed the slaves and enshrined in our Constitution the words "equal protection of the laws." The spirit of that struggle, the sense of its incompleteness, fairly radiated from the man.

... Now I can say that I have kissed the cheek that kissed the cheek. <sup>n373</sup>

If clerks, like staff attorneys, tend to produce unpublished opinions that structurally subordinate the comparatively powerless, how can we account for the liberals among them, the passionate advocates of what they identify as equality? The answer is that the culture of hierarchy in which clerks and staff attorneys work is likely produced by "liberals" on the bench as well as "conservatives." While for obvious reasons published evidence of any direct correlation between individual judicial ideology and contribution to clerk and staff attorney work culture is difficult, if not impossible, to find, <sup>n374</sup> there is evidence, that even judges perceived as extreme ideological liberals are deeply marked by a court culture characterized by hierarchy and rationalization of inequality. <sup>n375</sup> As a black Supreme Court employee, one of Nina Totenberg's informants for the notorious essay which labeled the Supreme Court "the last plantation," put it: "those words that are on this [\*60] building - 'equal justice under law,' ... they don't apply to us here inside. The justices are liberal with everyone else, but not here in their own backyard." <sup>n376</sup>

Most of the judges in circuits that did not, before the recent rule change, impose strict bans on citation of unpublished opinions surveyed by the Federal Judicial Center do not think that "a change in the rules making such opinions either more or less citable would have [any] impact on the number of unpublished opinions, the length of unpublished opinions, or the time it takes to draft them." <sup>n377</sup> This suggests that even in circuits which, before the rule change, had permissive attitudes to citation, including those, like the D.C. Circuit, that had relatively recently liberalized its rules, the binary system of precedential and unprecedential opinions and the institutions, material practices, and discourses that sustain it, are so well-entrenched that the potential embarrassments caused by citation back to the courts of their unprecedential decisions have not changed business as usual. <sup>n378</sup>

The answer to the generalized tendency of clerks and staff attorneys to decide against "have-nots" lies, then, in those pervasive aspects of the judicial habitus that are not foregrounded by Lazarus as his liberal idealism is, such as the conflation of privilege and merit, the normalizing of a culture of influence, and the rendering invisible of evidence that contradicts that self-image. <sup>n379</sup>

#### V. How Clerks and Staff Attorneys "Get the Message"

Competition for control of access to the legal resources inherited from the past contributes to establishing a social division between lay people and professionals by fostering a continual process of rationalization. Such a process is ideal for constantly increasing the separation between judgments based upon the law and naive intuitions of fairness. The result of this separation is that [\*61] the system of juridical norms seems ... totally independent of the power relations

which such a system sustains and legitimizes. <sup>n380</sup>

The sociologist of the professions, Pierre Bourdieu, is arguably most famous for the development of the concept of "cultural capital." <sup>n381</sup> Most significant for this article of the many other terms and concepts he coined is that of the "habitus," <sup>n382</sup> the "'embodied experience' which makes members of particular culture or professions 'who they are.'" <sup>n383</sup> The habitus is inculcated, structured, durable, generative and transposable. <sup>n384</sup>

The ways and places we live, learn, and work imprint the habitus on both mind and body in ways that "reflect where they came from." <sup>n385</sup> These ways of being are also "pre-conscious," <sup>n386</sup> "mysterious," <sup>n387</sup> generally invisible, and thus, unlikely to change. And as we acquire our habitus from the world we inhabit, so we structure the world in its image. <sup>n388</sup> Thus a clerk who has learned to value connections or hierarchy from both law school and clerkship, and who in turn becomes a professor and/or a judge, is likely to transmit those values to those whose education she is responsible for. She is also likely to manifest those values in other places, as in the characteristic designation of some types of matters but not others as deserving of judicial attention in a resource-stressed court system.

Likewise, institutional practices in the juridical field, "strongly patterned by tradition, education, and the daily experience of legal custom and professional usage," <sup>n389</sup> both manifest and transmit where they came from. "They have a life, and a profound influence, of their own." <sup>n390</sup> Thus, if screening and modern institutionalized unpublication have their origins in rationalized intolerance for civil rights suits and appeals by prisoners, it is to be expected that they would produce intolerance in clerks and staff attorneys for "others." Likewise, if federal appellate judges typically "come [\*62] from a background in practice in which they acted as team leader," delegating work according to its complexity to junior partners or associates of varying degrees of experience or to clerical staff, <sup>n391</sup> they may continue to delegate on the bench without registering consciously that new graduates, especially those who work outside chambers, may not have the skills and knowledge possessed by a junior partner or senior associate.

If we become lawyers through working in institutions and through schooling in discourse that value efficiency over justice, and presume that justice naturally has two tiers, we will develop, and in turn replicate, those values. In Bourdieu's terms, while the law's orthodoxy, or externally "socially legitimized belief," may be equal protection, its doxa, or the invisible, "self-evident ... normalcy" <sup>n392</sup> that judges, clerks, and staff attorneys take for granted, is the binary system of justice that has come to characterize the federal courts of appeals. "Miscognition is structurally necessary for the reproduction of the social order, which would become intolerably conflicted without it." <sup>n393</sup>

The values transmitted by the system and professional subjects within it reflect those at the top at any given point, who, in that part of the juridical field comprised of the courts, are the judges. As in any Bourdian field, the juridical field manifests an internal struggle for control, which itself "leads to a hierarchical system within the field." <sup>n394</sup> Because of its essentially (not merely, in Bourdian terms, inevitably) hierarchical structure, then, hierarchy may be so persistent in the federal appellate courts because it is doubly reproductive.

Kanter's classic sociological article on the effect of "token women" in workplace groups "composed of people of different cultural categories or statuses" <sup>n395</sup> provides insights into why staff attorneys, although comparatively separated from association with judges by comparison with [\*63] law clerks, might replicate hierarchical attitudes towards historically structurally subordinated groups. Kanter posits, following Simmel, that structural inequalities of power generate majority behavior towards "tokens" that in turn produces characteristic behavior among the "tokens." <sup>n396</sup> She demonstrates her thesis through the example of behavioral categories generated in token women in a male-dominated occupation. However she also suggests that it yields insights about such structurally-produced behaviors that are "also applicable to other kinds of tokens who face similar interaction contexts." <sup>n397</sup> My suggestion, which depends on analogizing situationally low status workers with tokens, is that her argument might account for the behavior of low-status staff attorneys in a court culture where the "situational dominants" <sup>n398</sup> are powerful judges and, to a lesser extent, their proteges, the elbow clerks.

Kanter's thesis is based on groups in which a relatively small percentage of the total of employees comprises the

token group.<sup>n399</sup> Thus it might at first blush seem to explain why clerks and staff attorneys (and indeed judges) who are women or members of racial minority groups (in a court where the dominant and numerically powerful group is privileged white men) behave in ways that might tend to reinforce hierarchy, but be of less use in identifying hierarchy-maintaining behavior in staff attorneys. However, Kanter's study was based on a group where tokens were formally in peer and not status-subordinate roles to the majority, but the majority of the group treated them as if they were actually in status-subordinate roles.<sup>n400</sup> It is thus potentially useful in providing insights into ways in which the workplace dominance of judges in the federal courts might produce behavior among staff attorneys that structurally subordinates comparatively powerless litigants.

Kanter's research into group behavior suggests that when a homogeneous group is "threatened with change" because an "obvious outsider" appears, its members realize what they as insiders have in common, and begin to raise boundaries.<sup>n401</sup> This is frequently accompanied by resentment for the "extra work" caused by the appearance of outsiders in the group.<sup>n402</sup> This reaction mirrors the resentment expressed by judges to burgeoning appeals from powerless groups when those groups - first [\*64] convicted criminals, then prisoners, then civil rights appellants, and today immigration litigants and asylum-seekers - get and/or exercise the ability to make appeals to a court that considers its time is more appropriately spent "making law" and focusing on high-stakes civil litigation.

How might staff attorneys react to such attitudes on behalf of "situational dominants," the judges, if their behavior is like that of tokens? "For token women," Kanter writes, "the price of being 'one of the boys' is a willingness to turn occasionally against 'the girls.'"<sup>n403</sup> Tokens may also "take over 'gate-keeping' functions for dominants ... , letting them preserve their illusion of lack of prejudice."<sup>n404</sup>

Conclusion: What's happening to U.S. Law in the Federal Courts, Why Does it Matter, and What Can We Do About It?

We have only recently emerged from a phase in U.S. history when legislature and executive were more or less ideologically identical, and the legislature had a limited willingness to check the executive's curtailing at home of the rule of law that is a key rhetorical underpinning of the nation's policy abroad. Whether the recent changes in government will see a significantly increased willingness to check escalating curtailments of civil liberties is at present an open question. Such checking would operate in the interests of a vision of democracy that is fundamentally egalitarian, rather than merely majoritarian. Thus the courts to which we all at least theoretically have access, and the Article III judges who stand between executive government and what the national imaginary calls our rights, may indeed be the only meaningful check and balance we have.

As Julius Stone registered long ago, those who have any level of conviction about the utility of the "Rule of Law" need to pay attention to practices and ethics, rather than precepts.<sup>n405</sup> If in fact the "personal beliefs in the importance of the rule of law" of judges influence their willingness to "follow legal precedents" and "the effectiveness of the formal doctrines of stare decisis and the standards of review hinge in large part on each judge's ability to learn the law and facts necessary to independently review each case,"<sup>n406</sup> then the material practices by which the courts of appeals process appeals and the habitus of the judges and the clerks who often become both judges and tenured legal educators give us serious cause for concern about the condition of the rule of law at home.

[\*65] The dirty little - or rather scandalous and pervasive - secret that this article takes as its starting point is that it is not Article III judges nor their less independent Article I brethren who provide that potential buffer from unchecked executive power to those among us who most need it. Rather, it is very junior lawyers, fresh out of law school, working often without any meaningful judicial oversight, sometimes without any judicial involvement at all, graduates of a system of legal education that does nothing so well as train for, normalize, and indeed normativize hierarchy, making it invisible. These junior lawyers are learning how to practice law on the job in a court culture that increasingly tolerates secrets, remains deaf to evidence of systemic impropriety and inequity, appears unashamed of duplicity, and is blind to the structural subordination it (re)produces.

The federal courts of appeals are of course, perennial subjects for law reform proposals from scholars and others. The critical literature on unpublished opinions and citation bans forms a significant part of that scholarship. The evidence adduced in this article suggests that the majority of the federal appellate bench is deaf or impervious to the ethical, legal, and likely constitutional problems of delegating the majority of its Article III jurisdiction to very junior court employees, in whose competence the bench itself has very little faith. Further, the U.S. courts of appeals have a history of internally-generated quick fixes for the challenges of modernity and of the increasing demands of law's outsiders, the paradigms of which in this context are the convict and the asylum-seeker, and of resistance to structural change of the kind that professional law reformers might recommend. Accordingly, there seems little likelihood of return in suggesting reforms to the courts.

That said, while there is a de jure right of appeal to the circuit courts, de facto it does not exist. There is compelling evidence suggesting that what access exists is disproportionately likely to be "rationed" if one is a "have-not." Additionally, the federal courts of appeals routinely assign serious matters that they know will not get the treatment they deserve to people who are neither up to the job nor adequately supervised by Article III judicial officers. Taken together, these phenomena suggest that the courts should both be open about and do an adequate job of what, at present, is less than adequate certiorari process masquerading as consideration on the merits.

The designation of clearly-delineated grounds for appeal, and the use of adequately-qualified and transparently-appointed judicial or quasi-judicial actors, perhaps appointed under Article I, may not be culturally palatable suggestions. However, they have the appeal of transparency, accountability, and competence to recommend them. Additionally, if prisoner and [\*66] immigration litigation continues to be a disproportionate burden, despite legislative barriers to appeals by these classes of litigants,<sup>n407</sup> the time has come for consideration of major structural reform of the places where the grounds for these appeals proliferate. Independent investigation of the bases and motives for "frivolous" prisoner civil rights appeals and effective Ombudsmen to investigate prison civil rights complaints are two such reform initiatives that might suggest themselves.<sup>n408</sup> They have the additional merits of lacking the peculiar difficulties of immigration law reform in the current political context, although improving the conditions of incarceration of those convicted of crimes is rarely a high-return legislative strategy.

Another comparable grass roots initiative might involve the courts picking up the slack evidently created by gaps in law school curricula and pedagogy by taking on the responsibility for training clerks and staff attorneys in the skills of legal research and written legal analysis and reasoning so that they are able to do their jobs in a way that the judges trust. Yet another initiative might lead all the federal courts to responsibly fulfill the Congressional mandate that their unpublished opinions be text searchable online,<sup>n409</sup> enabling judges, lawyers, clerks and staff attorneys to readily find the law.

Beyond such institutional reform, formal judicial education and other means of encouraging individual judges to be vigilantly self-critical about the ethical, legal, and constitutional dimensions of their own delegation of their duties to clerks and staff attorneys, recommend themselves. The Supreme Court currently has two recently-appointed members who have been key figures in the modest reforms of binary justice in the federal courts of appeals; leadership from Chief Justice Roberts and Justice Alito could be critical to the development of a much-needed change in the culture of the federal judiciary. Additionally, the A.B.A. should begin the process of generating a Model Code of Professional Ethics for those members of the bar who serve as clerks and staff attorneys, the current judicial and clerical canons manifestly being inadequate to the task of forming ethical judicial and clerical subjects insofar as the operation of the nation's binary system of justice is concerned.

Finally, law schools, including, but not confined to, those which conduct formal training programs for judicial clerks, should place significant [\*67] emphasis on educating those of their student body who will proceed from graduation immediately to service as de facto Article III judges about the complex ethical, legal, and constitutional dimensions of the current working environment of clerks and staff attorneys in the federal courts. Above all, the nation's law schools need to equip their graduates with a grasp of the fundamental skills of legal research and written legal analysis and reasoning adequate to make it likely that, until the status quo inside the courts changes, they can get their

delegated job of deciding federal appeals right. Paradoxically, this last, seemingly modest proposal might require a paradigm shift away from the business as usual of "training for hierarchy" as significant as the proposed paradigm shift, *supra*, for the federal courts of appeals.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Prisoner Rights Access to Courts Civil Rights Law Prisoner Rights Prison Litigation Reform Act Judicial Screening Criminal Law & Procedure Habeas Corpus Procedure Filing of Petition Pleadings

### FOOTNOTES:

n1. Memorandum from Patrick J. Schiltz, Reporter to Advisory Comm. on Appellate Rules 46 (Mar. 18, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/Schiltz\\_summary.pdf](http://www.secretjustice.org/pdf_files/Comments/Schiltz_summary.pdf) (quoting Letter from E. Vaughn Dunnigan, Esq., U.S. Attorney's Office to Peter G. McCabe, Sec. for Comm. on Rules of Practice and Procedure 1 (Feb. 8, 2004), available at [http://www.secretjustice.org/pdf\\_files/comments/03-AP-322.pdf](http://www.secretjustice.org/pdf_files/comments/03-AP-322.pdf)). Ironically in context, Schiltz goes on to differentiate the authoritativeness of judicial opinions from that of other forms of legal writing. *Id.* Professor Schiltz was subsequently appointed to the Federal Bench. See 38 Admin. Office, U.S. Courts Office of Pub. Affairs, Judicial Milestones, The Third Branch, Newsletter of the Federal Courts, June 2006, available at <http://www.uscourts.gov/ttb/06-06/milestones/index.html>).

n2. Edith H. Jones, Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction, 73 Tex. L. Rev. 1485, 1493 (1995).

n3. David S. Caudill, Parades of Horribles, Circles of Hell: Ethical Dimensions of the Publication Controversy, 62 Wash. & Lee L. Rev. 1653, 1660 (2005) (quoting Letter from Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, to Judge Samuel A. Alito, Jr., Chairman, Advisory Comm. on Appellate Rules 7 (Jan. 16, 2004) [hereinafter Kozinski Letter] (on file with the author)). Judge Kozinski writes:

Any nuances in language [in unpublished dispositions], any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel - most likely not - but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals. To cite them as if they were - as if they represented more than the bare result as explicated by some law clerk or staff attorney - is a particularly subtle and insidious form of fraud.

Kozinski Letter, *supra* at 7.

n4. But in the national legal context this issue is remarkably symbolically significant. See generally **Penelope Pether**, Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories, 10 Griffith L. Rev. 101 (2001).

n5. Fed. R. App. P. 32.1 (2006).

n6. See, e.g., Tony Mauro, Court Opinions No Longer Cites Unseen: Judicial Conference Approves Use of Unpublished Opinions in all Circuits; Also Declines to Split up 9th Circuit, *Legal Times*, Sept. 26, 2005, at 2 ("As a private practitioner and then as a judge on the U.S. Court of Appeals for the D.C. Circuit, [Chief Justice] Roberts served on the advisory committee that recommended the new Rule 32.1. "A lawyer ought to be able to tell a court what it has done," Roberts said at the April 2004 meeting at which the advisory committee first endorsed the rule."). Chief Justice Roberts also spoke in support of the proposed rule at an April 2004 Meeting of the Advisory Committee on Appellate Rules. See Minutes of Spring 2004 Meeting of Advisory Comm. on Appellate Rules 2 (Apr. 13-14, 2004) [hereinafter Minutes of Spring 2004], <http://www.uscourts.gov/rules/Minutes/app0404.pdf>. He was also Chief Justice when the Supreme Court prescribed and submitted the proposed amendment to Congress. See Letters from John G. Roberts, Jr. to the Hon. J. Dennis Hastert, Speaker of the House of Representatives and the Hon. Dick Cheney, President of the United States Senate (Apr. 12, 2006) [hereinafter Roberts Letters] (copies on file with the author).

n7. Alito was the Chair of the Advisory Committee on Appellate Rules of the Federal Judicial Conference that recommended that an earlier version of Fed. R. App. P. 32.1 be approved by the Committee on Rules of Practice and Procedure of the Federal Judicial Conference, see Comm. on Rules of Practice and Procedure, Fed. Judicial Conference, Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 1 (2005) [hereinafter Comm. on Rules of Practice and Procedure Report] (copy on file with the author), and a member of the Supreme Court when the Supreme Court prescribed and submitted the proposed amendment to Congress, see Roberts Letters, *supra* note 6. Like Chief Justice Roberts, he spoke in support of the proposed rule at an April 2004 Meeting of the Advisory Committee on Appellate Rules. See Minutes of Spring 2004, *supra* note 6, at 2.

n8. Kozinski has been actively and personally involved in attempting to prevent the passage of the rule. See **Penelope Pether**, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 *Stan. L. Rev.* 1435, 1464, 1471 (2004) [hereinafter Pether, *Injunctions*]. Judge Kozinski has apparently organized opposition to it, both by organizing a letter writing campaign that was followed by the reinstatement of hearings on the proposed amendment, see Tony Mauro, *Difference of Opinion: Should Judges Make More Rulings Available as Precedent? How an Obscure Proposal Is Dividing the Federal Bench*, *Legal Times*, Apr. 12, 2004, at 4 (quoting Judge A. Wallace Tashima), and by intervening with the Solicitor General, resulting in the Solicitor General's representative on the Advisory Committee on Appellate Rules abstaining from voting on an earlier version of the amendment on November 18, 2002, see Jason Hoppin, *Proposed Rule Would Allow Citation of Unpublished Opinions*, *The Recorder*, Nov. 19, 2002 at 2. Kozinski was joined in organizing opposition to the rule change by his brother judge, Stephen Reinhardt, with whom he co-wrote *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, *Cal. Law.*, June 2000, at 43. See also David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 *U. Cin. L. Rev.* 817, 819 n.10 (2005) (noting that Judge Reinhardt had written to former law clerks "urging [them] to voice their opposition").

n9. See, e.g., Jeff Chorney, *Taking a Gamble on the Next Justice*, *Legal Times*, Dec. 27, 2004, at 1 (noting that if someone were to bet on who would be the next U.S. Supreme Court Justice, naming Judge Kozinski could "really ... make [someone] money").

n10. In a defense of Judge Kozinski, Professor Patrick Schiltz, the former Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure, which had carriage of and eventually approved FRAP 32.1, has argued, quite rightly in my view, that the proposed rule was very controversial before, and independent of, Judge Kozinski's taking an aggressive public and private stance on the issue. See Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 *Wash. & Lee L. Rev.*

1429, 1434-62 (2005) [hereinafter Schiltz, *Much Ado*] (detailing the recent history of the Rule). However, Judge Kozinki's willingness to make his opposition to the rule more or less public, the variations in the accounts he has given of his opposition, and the undeniable facts that he both organized a campaign against the proposed rule and went so far as to intervene with the Solicitor General to attempt to prevent its passage - and to disclose to a journalist that he had done so - make it appropriate to identify him as a leader of judicial opposition to the proposed rule, even though others also intervened with the Solicitor General, see, e.g., *id.* at 1449.

n11. Congress could have decided to vote down, amend, or defer the proposed amendment by December 1, 2006. See 28 U.S.C. §2074 (2000) and Roberts Letters, *supra* note 6, but did not do so, and thus it has passed into law. The heat of the opposition is all the more remarkable because, as Professor Barnett registers, some circuits allow citation to unpublished opinions, and if the prospective end to citation bans effected by FRAP 32.1 would have the severe adverse effects predicted by its judicial opponents, it is remarkable that they have not passed local rules to change their practice. See Stephen R. Barnett, *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 Wash. & Lee L. Rev. 1491, 1550-51 (2005).

n12. Robert Timothy Reagan et al., *Fed. Judicial Ctr., Citing Unpublished Opinions in Federal Appeals* 66 app. (2005) (quoting Judge J2-1) [hereinafter *FJC Report*].

n13. See, e.g., *id.* at 66, 69 app. (quoting Judges J2-2, J2-3, J7-2).

n14. *Id.* at 67 app. (quoting Judges J2-7, J2-8).

n15. *Id.* at 72 app. (quoting Judge J9-14).

n16. Fed. R. App. P. 32.1.

n17. See, e.g., *Comm. on Rules of Practice and Procedure Report*, *supra* note 7, at 4 (noting that an earlier version of "the proposed new rule was supported by major national bar organizations, including the American Bar Association and the American College of Trial Lawyers, by bar organizations in New York and Michigan, by such public interest organizations as Public Citizen Litigation Group and Trial Lawyers for Public Justice, and by the Department of Justice"); see also *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) (opining that unpublication is unconstitutional); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999); William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication & Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 651 (2002); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1375 (1995) [hereinafter *Wald, Rhetoric*]; Patricia M. Wald,

The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?, 42 Md. L. Rev. 766, 784 (1983).

n18. See, e.g., Pether, Injunctions, *supra* note 8, at 1440.

n19. This is also true of state courts, although this article focuses on federal courts, because there is more data publicly available on the aspects of the practices of unpublication and its effects relevant to this article in the federal courts.

n20. 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 (1978) [hereinafter Reynolds & Richman, Non-Precedential].

n21. William L. Reynolds & William M. Richman, Justice and More Judges, 15 J.L. & Pol. 559 (1999); William L. Reynolds & William M. Richman, The New Certiorari Courts: Congress Must Expand the Number of Judges on the U.S. Courts of Appeals to Restore Their Traditional Role, 80 Judicature 206 (1997) [hereinafter Reynolds & Richman, Certiorari]; William L. Reynolds & William M. Richman, Studying Deck Chairs on the Titanic, 81 Cornell L. Rev. 1290 (1996); William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 Cornell L. Rev. 273 (1996) [hereinafter Richman & Reynolds, Elitism]; 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 (1981) (also published by the Federal Judicial Center); William L. Reynolds & William M. Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 807 (1979); Reynolds & Richman, Non-Precedential, *supra* note 20; William M. Richman, Much Ado About the Tip of an Iceberg, 62 Wash. & Lee L. Rev. 1723 (2005) [hereinafter Richman, Much Ado]; William M. Richman, An Argument on the Record for More Federal Judgeships, 1 J. App. Prac. & Process 37 (1999); William M. Richman, Rationing Judgeships Has Lost Its Appeal, 24 Pepp. L. Rev. 911 (1997).

n22. *Jones v. Superintendent*, 465 F.2d 1091, 1094-95 (4th Cir. 1972).

n23. Staff attorneys are also called "habeas clerks," or "pro se clerks," or "death clerks" in federal courts, often when their functions are specialized in the way the titles signify.

n24. Jonathan Matthew Cohen, *Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals* 177 (2002). There is some evidence that some courts are beginning to look for some post-graduation practice experience as a prerequisite to appointing both clerks and staff attorneys. The author has known former students appointed to staff attorney positions immediately on graduation at one end of the spectrum, and a former colleague appointed with several years post-graduation practice and teaching experience at the other.

n25. Audio Tape: What is "Authority"? Panel Presentation, held by the Association of American Law Schools (Jan. 3-6, 2001) (on file with author) (remarks of Judge Margaret McKeown, United States Court of Appeals for the Ninth Circuit).

n26. See generally Jack Bass, *Unlikely Heroes* (1981) for an account of this history.

n27. See Thomas Y. Davies, *Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources*, 6 *Just. Sys. J.* 372, 374 (1981) (giving an account of the widespread judicial (and scholarly) view that "the Warren Court's due process decisions [gave] indigent criminal appellants a 'free ride' on appeal - ... creating incentives to appeal which are not balanced off by any costs or disincentives").

n28. Pether, *Injunctions*, *supra* note 8, at 1441 n.20.

n29. See, e.g., *id.* at 1511 & nn.441-42.

n30. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (holding that rule prohibiting citation to an unpublished dispositions did not violate Article III of the U.S. Constitution); *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) (holding it unconstitutional not to treat unpublished opinions as precedential); *In re Rules of the U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1992) (opining that "to deny a litigant [the right to cite unpublished decisions] may well have overtones of a constitutional infringement"); David Dunn, *Unreported Decisions in the United States Courts of Appeals*, 63 *Cornell L. Rev.* 128, 141-45 (1977) (discussing cases that examined the no citation rule under principles of due process and equal protection); Salem M. Katsch & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 *J. App. Prac. & Process* 287, 297-315 (2001) (arguing that the no citation rule violates the First Amendment); Drew R. Quitschau, *Anastasoff v. United States: Uncertainty in the Eighth Circuit - Is There a Constitutional Right to Cite Unpublished Opinions?*, 54 *Ark L. Rev.* 847, 848 (2002) (citing one judge's opinion that the no citation rule "unconstitutionally ... allows courts to depart from stare decisis without sufficient justification").

n31. See Pether, *Injunctions*, *supra* note 8, at 1483 n.266.

n32. See *id.* at 1483, 1487-88; see also John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8

J. App. Prac. & Process 123, 128 (noting that the current practice of "supplanting ... a collegial culture of deference to precedent with strict rules of horizontal stare decisis" means that "there are also substantial incentives to distinguish ... ostensible precedent on shaky if not candidly spurious grounds, and, because such distinction will largely turn on how the facts are characterized, to bury this departure from or narrowing of precedent in the nether world of cases decided by summary disposition or unpublished opinion").

n33. See Pether, Injunctions, *supra* note 8, at 1483-84 & n.267.

n34. *Id.* at 1483-84 & n.265.

n35. *Id.* at 1505 (noting that research by predecessor scholars had revealed that institutionalized unpublication and associated practices of private judging have disadvantaged *pro se* litigants and those with low quality legal representation, in other words "'one-shotter' litigants[,] ... members of ... minority groups, ... indigent persons[, and] gay men and lesbians").

n36. *Id.* at 1511 & nn.441-44 (noting, following Lauren Robel, that repeat player litigants, including the federal government, accrue a range of advantages through the system of institutionalized unpublication).

n37. See generally Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. L. Rev. 99 (1999) (analyzing the reasons for the historically pro-defendant outcomes of ADA litigation).

n38. See Law, *supra* note 8, at 820.

n39. See *id.*

n40. See, e.g., **Penelope Pether**, Take a Letter, Your Honor: Outing the Judicial Epistemology of *Hart v. Massanari*, 62 Wash. & Lee L. Rev. 1553, 1558 (2005) [hereinafter Pether, Epistemology].

n41. See Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 Wis. L. Rev. 11, 28 (1996).

n42. See, e.g., 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, 782-83 (1995) (raising the logical problem of predicting precedential value).

n43. FJC Report, *supra* note 12.

n44. Mauro, *supra* note 8, at 10.

n45. Hangley, *supra* note 17, at 651.

n46. *Id.*

n47. Kozinski Letter, *supra* note 3, at 21 (explaining Judge Kozinski's opposition to proposed FRAP 32.1).

n48. Oakley has registered that the delegation of judicial power to staff attorneys drives the appellate justice system to an "inquisitorial" model and away from an "adversarial" one. See John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. Rev. 859, 922 (1991). This tendency is exacerbated when many of appeals managed by staff attorneys are *pro se*, see Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 145 (1994), or where the quality of representation is poor, as common sense suggests is disproportionately likely to be the case when the appellant is comparatively low-income. Goodrich has indicated why this civil law-inspired model is naive. See Peter Goodrich, *Reading the Law* 39 (1986) (suggesting that the civil law dogma that judges do not make law and that fact-based precedent is not relevant in such systems is undermined by the "annual series of annotated case reports ... listing the decisions relevant to each sections of the code and [the fact that] these are used both academically and in legal argument").

n49. See Pether, *Epistemology*, *supra* note 40, at 1567-75.

n50. Hangley, *supra* note 17, at 651 ("No one can deny ... that speeding up the production line" that crafts judicial opinions, by "screening" and institutionalizing unpublication - that is - by delegation of judicial power to clerks and staff attorneys "will increase the risk of mistakes in any operation. It is apparent (although almost never articulated) that some of the circuits' attitudes toward their non-reporter published opinions is driven less by the belief that those opinions say nothing new than by the fear that they may say something that is wrong.").

n51. The other is differential access of rich and poor, "repeat player" litigants like the federal government and "one-shotters" like asylum seekers to unpublished opinions which, whether formally precedential or not, let attorneys and litigants know what the courts are doing in the vast majority of cases like theirs, at least where the court gives any meaningful reasons, or indeed, any reasons at all, for its decision. See *supra* notes 35-36 and accompanying text.

n52. David S. Law, *Strategic Judicial Lawmaking: An Empirical Investigation of Ideology and Publication on the U.S. Court of Appeals for the Ninth Circuit 1* (unpublished version on file with the author).

n53. Law, *supra* note 8, at 831 (arguing that "strategically minded judges who wish to maximize the precedential effect of their published opinions may prefer to focus their time ... upon less fact-intensive areas of law").

n54. Law proceeds on the unspoken assumption that judges author the unpublished opinions which bear their names. *Id.*

n55. Hangley, *supra* note 17, at 651.

n56. *Id.* at 651 & n.15 (quoting Kozinski & Reinhardt, *supra* note 8, at 43-44).

n57. Kozinski Letter, *supra* note 3, at 5 (citation omitted) (second emphasis added).

n58. See, e.g., FJC Report, supra note 12, at 68-69, 76 app. (quoting Judges J7-1, JF-7).

n59. In the letter, Judge Kozinski writes that unpublished opinions "most likely [do] not" "reflect the view of the three judges on the panel" which purportedly decided the case; rather, they "represent[nothing] more than the bare result as explicated by some law clerk or staff attorney." Kozinski Letter, supra note 3, at 7.

n60. While the federal appellate courts publish only approximately twenty percent of their opinions, with approximately eighty percent unpublished, the appeals disposed of by any kind of opinion by the federal circuit courts appears to be the tip of the iceberg. The Federal Judicial Center study of proposed FRAP 32.1 reveals that

approximately half of the [650 appeals selected at random from those filed in federal courts of appeals in 2002] were not resolved by an opinion. [The Center] designated these cases as resolved by "docket judgments." The cases have docket entries stating how the cases were resolved (e.g., appeal voluntarily dismissed, certificate of appealability denied) and an order to that effect may be in the case file, but not a document in the form of an opinion.

Tim Reagan et al., Fed. Judicial Ctr., Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report 19 (2005).

n61. This is a process authorized by a local rule, providing that:

The staff attorneys shall orally present the proposed dispositions to the screening panels at periodically scheduled sessions. After the staff attorneys have presented each case, the panel members discuss the proposed disposition and make any necessary revisions... . Disposition of cases presented at the oral screening and motions panel ordinarily will be by unpublished memorandum or order.

Ninth Circuit Court of Appeals, General Orders 6.5(b)(i) (2006).

n62. Alex Kozinski, *The Appearance of Propriety*, Legal Affairs, Jan.-Feb. 2005, at 19 [hereinafter Kozinski, *Propriety*] (emphasis added).

n63. FJC Report, supra note 12, at 72 app. (quoting Judge J9-11).

n64. *Id.* at 73 app. (quoting Judge J9-21).

n65. *Id.* (quoting Judge J9-22).

n66. *Id.* at 74 app. (quoting Judge J9-25).

n67. *Id.* at 70 app. (quoting Judge J7-6).

n68. Jones, *supra* note 2, at 1492; see also Baker, *supra* note 48, at 145 ("Staff attorneys in most circuits play a prominent role in handling pro se appeals.").

n69. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 to -77 (1996) (codified in 18 U.S.C. §§3601-3626 and parts of 28 and 42 U.S.C. (2000)).

n70. See, e.g., FJC Report, *supra* note 12, at 75 app. (Judge JF-2) ("Many of our non-precedential opinions are in pro se appeals by federal employees from decisions of the Merit Systems Protection Board [and b]because these cases are often poorly briefed, it is easy to miss potentially important legal issues or to make statements in opinions that, with better briefing, would likely not be made.").

n71. In Bartleby's plangent phrase.

N72. Judith Resnik notes that "the collective life-tenured judiciary did not mount an aggressive effort (parallel to that made in response to restrictions proposed on their civil case processing discretion) when legislation limiting access in immigration and prisoner litigation was pending." Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 *Geo. L.J.* 2589, 2595 (1998).

n73. See Law, *supra* note 8, at 1.

n74. Cohen, *supra* note 24, at 66-69.

n75. See *id.* at 69.

n76. Apparently referring to chambers-produced unpublished opinions, one Ninth Circuit Judge wrote, "most of our judges share bench memos [apparently produced by clerks], which tend to be fairly long. Often the bench memos are converted into unpublished dispositions without much change. Obviously, they would have to be pared down substantially if they were to become citable." FJC Report, *supra* note 12, at 73 app. (quoting Judge J9-19).

n77. One judge surveyed by the Federal Judicial Center protested that "simply because we issue an unpublished disposition does not mean that we do not spend considerable time reviewing the record and reviewing the case," *Id.* at 70 app. (Judge J9-1). However, it seems unlikely that perhaps any, or at least any thorough, judicial reviewing of the record occurs in screened cases, given the process the Ninth Circuit has adopted in this class of matters.

n78. See *infra* note 212 and accompanying text, indicating that in the mid-1980s, when the Ninth Circuit's caseload was much lower than it currently is, most judges on screening panels did not routinely read the record.

n79. Cohen, *supra* note 24, at 69. Thompson and Oakley identify one result of screening by court staff as "preargument prejudgment." See Robert S. Thompson & John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 Ariz. St. L.J. 1, 27 (1986).

n80. Cohen, *supra* note 24, at 69.

n81. Kozinski, *Propriety*, *supra* note 62, at 19.

n82. FJC Report, *supra* note 12, at 75 app. (quoting Judge JF-2) (emphasis added).

n83. See, e.g., *United States v. Rivas*, 111 Fed. App'x 505 (9th Cir. 2004) (affirming a criminal conviction in five signally unilluminating sentences).

n84. FJC Report, *supra* note 12, at 72 app. (quoting Judge J9-9).

n85. *Id.* at 65-66 app. (quoting Judge J2-1).

n86. *Id.* at 69 app. (quoting Judge J7-2).

n87. *Id.* at 68 app. (quoting Judge J7-1).

n88. *Id.* at 66 app. (quoting Judge J2-1).

n89. See, e.g., *supra* note 82 and accompanying text.

n90. Pether, *Injunctions*, *supra* note 8, at 1504-07.

n91. William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, *U.S. News & World Rep.*, Dec. 13, 1957, at 74.

n92. See generally *Law*, *supra* note 8.

n93. See FJC Report, *supra* note 12; see also Joe Cecil & Donna Stienstra, *Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals*, Fed. Judicial Ctr., (1985) available at 1985 WL 71557 [hereinafter Cecil 1985] (Westlaw does not paginate this Report and so page references will be to the printout on file with the author); Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals*, Fed. Judicial Ctr., available at 1987 WL 123661 [hereinafter Cecil 1987] (Westlaw does not paginate this Report and so page references will be to the printout on file with the author); Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals*, Fed. Judicial.Ctr., (1985) at 11-12, available at 1985 WL 71560 (Westlaw does not paginate this Report and so page references will be to the printout on file with the author).

n94. Cohen, *supra* note 24, at 215-16.

n95. Baker, *supra* note 48, at 164.

n96. See Pether, *Injunctions*, *supra* note 8, at 1436-37 ("Unpublication ... makes the opinion difficult to find [and] limits or destroys [its] precedential value.").

n97. *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001) ("An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts.").

n98. See *Kozinski Letter*, *supra* note 3 at 5, 7.

n99. See *Hangley*, *supra* note 17, at 651.

n100. See, e.g., *supra* notes 69-70 and accompanying text.

n101. See generally Pether, Injunctions, *supra* note 8.

n102. *Id.* at 1465 n.139.

n103. See *id.* at 1507-08.

n104. See, e.g., FJC Report, *supra* note 12, at 70 app. (Judge J9-2), 72 app. (Judge J9-9).

n105. Pether, Epistemology, *supra* note 40, at 1590 n.238.

n106. *Id.* at 1590 & n.237.

n107. See Lauren K. Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L. Rev. 940, 956-58 (1989) (discussing specifically how government litigants take advantage of unpublished decisions).

n108. *Id.* at 958.

n109. See Davies, *supra* note 27, at 376 (differentiating between the caseload crisis and the perception of workload crisis). I should note that in the interests of clarity in the context of my argument I am selectively inverting his use of the terms "caseload" and "workload."

n110. Richard A. Posner, The Federal Courts: Crisis and Reform 61 tbl.3.1 (1985) (excluding local jurisdiction appeals).

n111. Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, 2000 Report of the Director (2000).

n112. See generally Baker, *supra* note 48; see Jones, *supra* note 2, at 1485-86 (discussing Professor Baker's work).

n113. See generally Davies, *supra* note 27.

n114. See, e.g., Baker, *supra* note 48, at 139 ("Screening techniques today are more refined and have developed more judicial confidence than settlement programs.").

n115. Cohen, *supra* note 24, at 3.

n116. *Id.* at 10.

n117. Kozinski, Propriety, *supra* note 62, at 19.

n118. FJC Report, *supra* note 12, at 76 (Judge JF-7).

n119. See, e.g., *id.*; Cecil 1987, *supra* note 93, at 12.

n120. See Unpublished Judicial Opinions: Hearing Before the H. Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 107th Cong. 100, 105-06 (2002) (statement of Judge Alex Kozinski, United States Court of Appeals for the Ninth Circuit); Richman, *Much Ado*, supra note 21, at 1727-28. See generally Richman & Reynolds, *Elitism*, supra note 21.

n121. See generally Richman & Reynolds, *Elitism*, supra note 21.

n122. *Id.* at 336 (alteration in original) (quoting Judge Rubin in Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 *Notre Dame L. Rev.* 648, 657 (1980)).

n123. *Id.* (quoting Judge King in Carolyn Dineen King, *Comment, A Matter of Conscience*, 28 *Hous. L. Rev.* 955, 959 (1991)).

n124. *Id.* at 338 (quoting Justice Scalia in Stuart Taylor, *Scalia Proposes Major Overhaul of United States Courts of Appeals*, *N.Y. Times*, Feb. 16, 1987 at 1).

n125. *Id.*

n126. Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, 79 *A.B.A. J.*, Jan. 1993, at 52.

n127. Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 *Tex. L. Rev.* 1505, 1513 (1995).

n128. See, e.g., Kozinski & Reinhardt, supra note 8, at 43-44 (noting that judges on the Ninth Circuit write an average of twenty published opinions a year).

n129. See Pether, *Epistemology*, supra note 40, at 1567-75 (analyzing Judge Kozinski's discourse on precedent in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001)).

n130. David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 *Wash. & Lee L. Rev.* 1667, 1668 (2005) (providing a partial etymology of the term).

n131. *Kozinski Letter*, supra note 3, at 9. This revelation produced in the author a profound and visceral agreement with the Ninth Circuit Judge who wrote, albeit for rather different reasons, in frustrated italics, "The time for restructuring [the Ninth Circuit] is now." See *FJC Report*, supra note 12, at 71 (quoting Judge J9-6).

n132. Pether, *Injunctions*, supra note 8, at 1522.

n133. Dragich, supra note 41, at 28-30, 35, 46-47.

n134. *Id.* at 28.

n135. *Id.*

n136. Cohen is a supporter of the federal appellate courts "continuing the slow structural evolution that has enabled judges to decide cases fairly and efficiently in the face of their burgeoning dockets." Cohen, supra note 24, at 222. This is at least in part because he perceives the federal appellate courts as unlikely to adopt other than "minor evolutionary changes" in procedures unless they are forced to by Congress. *Id.* at 220.

n137. Cohen is a former Ninth Circuit clerk. *Id.* at 18.

n138. *Id.* at 219. These home-grown innovations comprise clerks producing one bench memo per panel rather than one per judge, and convening en banc consisting of ten judges rather than all those on the circuit, rather than the types of "managed judging" that have been used by other common law court systems to meet increasing demands for dispute resolution services. See *id.* at 94-95.

n139. *Id.* at 162.

n140. FJC Report, *supra* note 12, at 67 (Judge J2-5).

n141. Cohen, *supra* note 24, at 5.

n142. *Id.* at 181.

n143. *Id.* at 90-93.

n144. *Id.* at 141; see also *id.* at 109.

n145. Unpublished opinions often lack headnotes, see <http://www.westlaw.com> (follow KeySearch hyperlink for any topic; then follow "?" hyperlink at "Cases Without West Headnotes" (last visited October 26, 2006) (explaining that "West attorney-editors have created queries that retrieve cases without headnotes, including slip opinions and some unreported cases in KeySearch. The results you retrieve using these queries closely approximates the results you would retrieve using the queries that retrieve cases with headnotes. These searches will retrieve only cases that have no editorial enhancements, whether the cases are newly added to Westlaw (slip opinions) or cases that are published only online (unreported cases)"); additionally, some digest-like online finding tools may not be programmed to find them, see John W. Barker, Jr., *The Benefits of Automated Citation-Checking*, *Res Gestae*, Aug. 1996, at 12, 15 (noting that Shepard's PreView (developed by Lexis and Westlaw) "does not include citing references from opinions published in a specialty reporter but which are officially not designated for publication").

n146. 44 U.S.C. §3501 note (Supp. 2005) (sec. 205(a)(5)).

n147. See, e.g., Pether, *Epistemology*, supra note 40, at 1590 n.233; see also Ian Gallacher, *Cite Unseen: How Neutral Citation Can Cure America's Strange Devotion to Bibliographical Orthodoxy and The Constriction of Open and Equal Access to the Law*, 70 *Alb. L. Rev.* 491, 517-18 (2007) (noting that some federal courts use PACER to comply with the legislation, which has numerous "rhetorical roadblocks" to accessing opinions and is "not truly full text searchable").

n148. FJC Report, supra note 12, at 23.

n149. See E-Government Act of 2002, Pub. L. No. 107-347 (codified at 44 U.S.C. §§3501-3521 (Supp. 2005)).

n150. Pether, *Epistemology*, supra note 40, at 1590 & n.232. The Ninth Circuit is not alone in posting unpublished opinions for a limited time. See FJC Report, supra note 12, at 23 n.39.

n151. . Cohen, supra note 24, at 97.

n152. See, e.g., Cecil 1987, supra note 93, at 7, 12, 37-38.

n153. See, e.g., *id.* at 12-13.

n154. Richman & Reynolds, *Elitism*, supra note 21, at 336.

n155. *Id.*

n156. *Id.*; see also Robert G. Doumar, Prisoner Cases: Feeding the Monster in the Judicial Closet, 14 St. Louis U. Pub. L. Rev. 21, 27-29 (1994).

n157. See, e.g., Davies, *supra* note 27, at 395; Richman & Reynolds, *Elitism*, *supra* note 21, at 336.

n158. Richman & Reynolds, *Elitism*, *supra* note 21, at 280, 296.

n159. *Id.* at 275-76, 280.

n160. See generally Colker, *supra* note 37.

n161. Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 111-12 (2001).

n162. Richman & Reynolds, *Elitism*, *supra* note 21, at 295.

n163. *Id.* at 275.

n164. *Id.* at 295.

n165. *Id.* at 296.

n166. Id. at 275.

n167. Id. at 277.

n168. Davies, *supra* note 27, at 372. Davies' hypothesis, based on his survey of the literature, that attractiveness rather than legal merit explained the greater allocation of appellate court resources to civil cases in the wake of the "due process revolution," was borne out *prima facie* by his case study of a California appellate court. His conclusion is that beyond that court, "given the present state of knowledge, the organizational perspective has as good a claim to being 'true' as the prevailing perspective." Id. at 398.

n169. . Cohen, *supra* note 24, at 24 (quoting Davies, *supra* note 27, at 401-03).

n170. Davies, *supra* note 27, at 373.

n171. Id. at 372.

n172. Id. at 380-83 (discussing the quantitative section of his analysis, which tested his thesis and the findings of earlier scholars in the context of a California State Appellate Court).

n173. Echoed in the discourse of Baker's study of rationed justice. See Baker, *supra* note 48, at 139 (describing "the decades of the 1960s and 1970s, when dockets exploded," and indicating that clerks and staff attorneys "represent the first line of defense against oppressive dockets").

n174. See generally Davies, *supra* note 27.

n175. Id. at 374.

n176. Warren E. Burger, Annual Report to the American Bar Association by the Chief Justice of the United States, A.B.A. J., Mar. 1981, at 292.

n177. Davies, *supra* note 27, at 375.

n178. Id.

n179. Id.

n180. Id. at 376.

n181. Id. at 383.

n182. Id. at 376.

n183. Id.

n184. Id. at 379.

n185. Id.

n186. Id.

n187. Id.

n188. Id. at 380-81.

n189. Id. at 381.

n190. Id.

n191. Id.

n192. Id. at 383.

n193. Id. at 397. A fortiori when the appeal is pro se and the staff attorney is "representing" the appellant as well as exercising the judicial power of the court.

n194. Id.

n195. Id. at 396.

n196. Id.

n197. Id. at 397.

n198. See, e.g., FJC Report, *supra* note 12, at 76 app. (Judge JF-7).

n199. Cecil 1985, *supra* note 93, at 5.

n200. Cecil 1987, *supra* note 93, at 15-16.

n201. Cecil 1985, *supra* note 93, at 8. In 1985 Ninth Circuit staff attorneys "considered two factors in addition to case characteristics" in making the screening decision: whether the case is "simple and straightforward enough that a judge can read the briefs and bench memoranda and reach a decision in a relatively short time" and the "ceiling of approximately fifty-six nonargument cases each month" (set "because the number of staff law clerks available for preparation of the bench memoranda is limited"). Id. It seems unlikely, given the current caseload of the Ninth Circuit and the fact that approximately forty percent of its caseload is screened, that these limitations still apply. See Kozinsky & Reinhardt, *supra* note 8, at 44. It does, however, suggest that, if in quieter times for the federal courts, judges on screening panels read the briefs and bench memorandum prepared by the staff attorneys, it is unlikely that they read more than that today. The evidence in the Ninth Circuit responses to the Federal Judicial Center Survey on proposed FRAP 32.1 included one judge's protest, as reported by the Federal Judicial Center, that "simply because we issue an unpublished disposition does not mean that we do not spend considerable time reviewing the record and reviewing the case," FJC Report, *supra* note 12, at 70 app. (quoting Judge J9-1). The judge may be referring to individual judicial practice in chambers cases. However, it seems unlikely that perhaps any, or at least any thorough, judicial reviewing of the record occurs in screened cases, in light of both the screening process the Ninth Circuit adopted before the Ninth Circuit's workload was anything like its current level, and the data available on the monthly meetings between the screening panel and staff attorneys. There is some information in the responses to the Federal Judicial Center survey that indicates that even in chambers-produced unpublished opinions, bench memoranda may be the principle source of data for judicial review of a clerk's work product. Apparently referring to chambers-produced unpublished opinions, one Ninth Circuit judge wrote, "most of our judges share bench memos (evidently produced by clerks), which tend to be fairly long. Often the bench memos are converted into unpublished dispositions without much change. Obviously they would have to be pared down substantially if they were to become citable." Id. at 73 app. (quoting Judge J9-19).

n202. Cecil 1985, supra note 93, at 6.

n203. See generally Cecil 1987, supra note 93; Cecil 1985, supra note 93; Stienstra, supra note 93.

n204. Cecil 1985, supra note 93, at 7.

n205. Id.

n206. Cecil 1987, supra note 93, at 12.

n207. Cecil 1985, supra note 93, at 5.

n208. Id.

n209. FJC Report, supra note 12, at 73 app. (quoting Judge J9-21).

n210. See supra note 64 and accompanying text.

n211. See supra notes 63, 65-67 and accompanying text.

n212. Cecil 1987, *supra* note 93, at 39.

n213. Kozinski, *Propriety*, *supra* note 62, at 19-20. A former clerk of a Ninth Circuit judge who reputedly has a view of the permissibility and propriety of delegation of judicial function radically different from that of Judge Kozinski, tells me that in that judge's chambers an enormous amount of clerical and judicial effort went in to reviewing the documents in screening cases before the screening conference with staff attorneys, so that the judge was in a position to ask searching questions during those conferences, but that the judge's level of preparedness and informed skepticism was anomalous. Law's research reveals that that judge's record on asylum appeals tends strongly to that end of the spectrum of Ninth Circuit judges who favor asylum seekers, rather than the government.

n214. See *supra* notes 54-64 and accompanying text.

n215. Kozinski, *Propriety*, *supra* note 62, at 19-20.

n216. Reynolds & Richman, *Certiorari*, *supra* note 21. See also Oakley, *supra* note 32, at 126-27 (questioning "whether modern federal courts of appeals have become so concerned with preserving their precedent-making function that they are neglecting their error-correction function," and registering the "fear that ... tracking and screening systems have instituted what is, in effect, a gloss of discretionary appellate jurisdiction for the appeal as of right to which federal litigants are statutorily entitled").

n217. These cases are effectively appeals denied certiorari by the circuit courts, because, as Martha Dragich has noted, they have effectively abandoned their role as an error-correcting court. See Dragich, *supra* note 41, at 29-32.

n218. FJC Report, *supra* note 12, at 72 app. (quoting Judge J9-11).

N219. *Id.* at 73 app. (quoting Judge J9-21).

n220. Hanglely, *supra* note 17, at 651.

n221. See, e.g., John Bilyeu Oakley & Robert S. Thompson, *Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts* 37, 93-97 (1980) (providing an account of this model).

n222. Charles H. Sheldon, *Law Clerking with a State Supreme Court: Views from the Perspective of the Personal Assistants to the Judges*, 6 *Just. Sys. J.* 346, 351-52 (1981).

n223. See Cohen, *supra* note 24, at 29.

n224. See, e.g., *id.* at 10; Tinsley E. Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* 304 (1992) (quoting a former Warren clerk to the effect that Harlan "understood the theory of delegation, of pushing as much responsibility as possible down the ladder"); Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 *Geo. L.J.* 2109, 2111-12 (noting that Justice Thurgood Marshall delegated producing final opinions to law clerks and, in a defense of criticisms of Thurgood Marshall's delegation of judicial work to law clerks, that "ideological critics such as Terry Eastland, who served as a speech writer in the Department of Justice during the Reagan Administration, criticized Marshall and some of his colleagues for their heavy use of law clerks, saying that "relying on clerks is a cheat on democratic government").

n225. See Cohen, *supra* note 24, at 213.

n226. See Anne M. Coughlin, *In Memoriam: Writing for Justice Powell*, 99 *Colum. L. Rev.* 541, 542 (1999).

n227. Tushnet acknowledges this, at least by inference, in his defense of the justice whom he served as an elbow clerk, Thurgood Marshall. Allegations that Marshall did not make his own decisions but left them to his clerks (which Tushnet calls "perhaps racist,") were the basis of charges that he was lazy and incompetent. See Tushnet, *supra* note 224, at 2109-10.

n228. See generally Caudill, *supra* note 3; Schiltz, *Much Ado*, *supra* note 10.

n229. 1 Federal Courts Study Comm., Working Papers and Subcommittee Reports 31, at 72, 74 (1990).

n230. The title of judicial opinions, called "judgments" in shorthand, in the Australian courts.

n231. John G. Kester, The Law Clerks Explosion, 9 Litig. 20, 24 (1983).

n232. Wald, Rhetoric, supra note 17, at 1374-75 (1995).

n233. Coughlin, supra note 226, at 541-42.

n234. Posner, supra note 110, at 107-11. Judge Posner has more recently modified this latter view. See Richard Posner, The Federal Courts: Challenge and Reform 150-52 (1996).

n235. See, e.g., Coughlin, supra note 226, at 542; Tushnet, supra note 224, at 2110.

n236. Tushnet, supra note 224, at 2111-12 (footnotes omitted).

n237. Trenton H. Norris, The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform, 81 Cal. L. Rev. 765, 771 (1993).

n238. . Cohen, supra note 24, at 146-52.

n239. Id. at 150.

n240. Id. at 148.

n241. Id.

n242. Id. at 111.

n243. On Mar. 7, 2006, National Public Radio ran an item on U.S. judges' comparative ignorance of international law. One of the suggestions to remedy the problem was to make sure clerks knew international law on graduation, so they could educate judges. Legal Profession Goes Global (NPR radio broadcast Mar. 7, 2006).

n244. See supra notes 105-107 and accompanying text.

n245. See supra notes 145-149 and accompanying text.

n246. See supra note 44 and accompanying text

n247. See supra note 45 and accompanying text.

n248. Davies, *supra* note 27, at 395-97; Merritt & Brudney, *supra* note 161, at 74, 86 (noting that social security and habeas cases are "frequently decided without published opinion," as are prisoner appeals).

n249. See, e.g., Cohen, *supra* note 24, at 89, 93, 148.

n250. Richman & Reynolds, *Elitism*, *supra* note 21, at 284.

n251. A phenomenon registered by Robel, who concluded in a study of the Ninth Circuit's immigration jurisprudence that the fact that more than fifty percent of reversals of Board of Immigration Appeals decisions were unpublished meant that attorneys unaware of the unpublished decisions might "assess ... an appeal" differently. Robel, *supra* note 107, at 947.

n252. See, e.g., FJC Report, *supra* note 12, at 74 app. (Judge J9-25).

n253. See Colker, *supra* note 37, at 105 (noting that in the appellate labor law cases she studied, twelve percent of the affirmances have no reasoning at all, and twenty percent of affirmances have reasoning that is not in the official reporter or on Westlaw).

n254. See *supra* notes 52-54 and accompanying text.

n255. Law, *supra* note 8, at 836-43.

n256. *Id.* at 862-64.

n257. *Id.* at 863-64.

n258. Id. at 864.

n259. Id. at 861.

n260. Davies, *supra* note 27, at 373-76.

n261. Law, *supra* note 8, at 838.

n262. I have in mind that school of conservative thought which imagines "liberals" as essentially ethically compromised. See, e.g., Media Matters for America, Gingrich, Noonan Argue People Expect Corruption from Democrats, Not GOP, <http://mediamatters.org/items/printable/200601060001> (last visited Jan. 21, 2007).

n263. Kozinski & Reinhardt, *supra* note 8, at 44; see also notes 56-57 and accompanying text.

n264. See, e.g., FJC Report, *supra* note 12, at 72 app. (Judge J9-11).

n265. Kozinski & Reinhardt, *supra* note 8, at 44.

n266. Law, *supra* note 8, at 838 n.102.

n267. See supra note 56-57 and accompanying text.

n268. See, e.g., notes 62-68 and accompanying text.

n269. Law, supra note 8, at 828, 843.

n270. Id. at 836 n.95. Merritt and Brudney reached similar conclusions. See Merritt & Brudney, supra note 161, at 116.

n271. Law, supra note 8, at 825-26.

n272. Id. at 843.

n273. Id. at 844 fig.2, 846 fig.4

n274. Id. at 843, 845 fig.3, 847 fig.5.

n275. See supra note 260 and accompanying text.

n276. Robel, supra note 107, at 954 (footnote omitted); see also Mary Lou Stow and Harold J. Spaeth, Centralized Research Staff: Is There a Monster in the Judicial Closet?, 75 *Judicature* 216, 220 (1992) (finding that staff attorney recommendations about decisions of the Michigan Court of Appeals were usually followed).

n277. Law, *supra* note 8, at 820. Safe conclusions about what produces their patterns of asylum jurisprudence could only be made if data was available from the circuit about which of its unpublished opinions are chambers work and which are written by staff attorneys, data which for obvious reasons is extremely unlikely ever to be made available. Such conclusions could also be made if researchers could conduct ethnographic studies of the work practices of judges, clerks, and staff attorneys.

n278. *Id.* at 830 (citing a telephone interview with former immigration Judge Joe Vail, Dec. 5, 2003).

n279. *Id.* at 831.

n280. Colker, *supra* note 37, at 105.

n281. *Id.* at 100 (footnotes omitted). She identifies earlier research showing that only 14 percent of prisoner civil rights cases in a 1978-85 study were successful, versus 53 percent of voting rights cases. *Id.* at 100 n.10.

n282. *Id.* at 105 (noting that the "pro-plaintiff bias" in her database produced by various aspects of unpublication could be "as much as thirty-two percent.")

n283. *Id.* at 104.

n284. See Merritt & Brudney, *supra* note 161, at 117. Merritt and Brudney also established that older judges in their study tend to find in favor of unions in published decisions, and against them in unpublished decisions. *Id.* at 100. My interpretation of Law's data may also hold good for Merritt and Brudney's data on the divergent voting patterns of older judges in unfair labor practice claims under the NLRA in Federal Courts of Appeals. Colker also hypothesizes that there has been a historical shift away from pro-individual decisions as compared with section 504 of the Rehabilitation Act of 1973 prior to the enactment of the ADA. Colker, *supra* note 37, at 160-61. It may be that her thesis is also open to suggesting that things have become worse for "have-nots" since clerks and staff attorneys started doing more of the work of deciding their appeals. Davies also notes that reversal rates in criminal appeals in the first district in California and in the Fifth Circuit Court of Appeals dropped after the introduction of staff processing. Davies, *supra* note 27, at 399-400. Similarly, Law's conclusion that Democratic appointees moved historically in the direction of "publishing a greater proportion of their pro-asylum decisions" in the 1992-2001 period might plausibly be explained by an increasing use of staff attorneys to decide asylum cases over that span of years. See

Law, *supra* note 8, at 862-63.

n285. Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 *How. L.J.* 473, 482 (2004) (footnotes omitted).

n286. A law clerk "becomes part of the judge's extended family, a disciple, an ally, quite possibly a friend." Alex Kozinski, *Confessions of a Bad Apple*, 100 *Yale L.J.* 1707, 1708 (1991).

n287. That is, when the clerkship "works." See Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* 18 (1998) ("A good clerkship - full of intellectual exchange and shared respect - can be both a joy and a remarkable education. A bad clerkship, rancorous and distrustful, amounts to a year's sentence in an especially cloistered ring of hell.").

n288. See *id.* at 20.

n289. See, e.g., *id.*

n290. My allusion here is both to the title of Jeannette Winterson's novel and to Pierre Bourdieu's account of the "habitus," the embodied experience that makes us who we are. See generally Jeannette Winterson, *Written on the Body* (1993); Bourdieu, *infra* note 380.

n291. Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 *S.C. L. Rev.* 235, 237 (1998).

n292. Gray had first hired a clerk in 1875 when he was a Justice on the Massachusetts Supreme Court. Cohen, *supra* note 24, at 87.

n293. See, e.g., Linda Greenhouse, *Women Suddenly Scarce Among Justices' Clerks*, N.Y. Times, Aug. 30, 2006, at A1.

n294. James Moliterno, *Lawyer Creeds and Moral Seismography*, 32 Wake Forest L. Rev. 781, 783 (1997).

n295. See, e.g., J. Daniel Mahoney, *Law Clerks: For Better or For Worse?*, 54 Brook. L. Rev. 321, 325-26 (1988); Nadine J. Wichern, *Comment, A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DePaul L. Rev. 621, 624 (1999).

n296. Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 Temp. L. Rev. 117 (1997).

n297. Donald P. Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253, 255 (1980).

n298. See generally Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *The Politics of Law: A Progressive Critique* 54 (David Kairys ed. 1998) (1982).

n299. See generally Lani Guinier et al., *Becoming Gentlemen: Women, Law School, and Institutional Change* (1997).

n300. See generally *id.*; Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. Legal Educ. 313 (2000).

n301. Cohen, *supra* note 24, at 145.

n302. In recent years Harvard appointed (non-tenurable) faculty members to teach legal writing, a move away from the delegating of teaching skills to upper level J.D. students, apparently prompted by perceptions of employers of Harvard graduates that their fundamental skills in legal research and written legal analysis and reasoning were deficient. Daniel J. Hemel, *Law School Votes to Alter Introductory Class*, Harvard Crimson, Apr. 27, 2004, available at <http://www.thecrimson.com/printerfriendly.aspx?ref=501792>. Georgetown has recently

begun a shift from a model that put the prime responsibility for actual classroom teaching in the hands of student "fellows" to a model staffed by (contract, rather than tenured or tenure-track) faculty. Columbia is making a similar change, in their case using adjunct faculty.

n303. See generally Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 *Berkeley Women's L.J.* 3 (2001); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 *Wm. & Mary J. Women & L.* 551 (2001).

n304. There are two divergent schools of thought about whether rhetoric/composition in undergraduate degree programs in the university ought to be taught on the general tertiary literacy model or in a discipline-specific way. The former position is generally adopted by "writing specialists influenced by cognitive psychology" on the one hand and genre studies scholars and rhetoricians - "those advocating social or contextual theories of writing" - on the other.

Most of the scholars discussing this issue at some point acknowledge that there's a false dichotomy at play in the debate. At a common sense level, almost everyone recognizes some value to the general approach combined with discipline-specific instruction. Even the theoretical split is mistaken... . You can teach a general composition course organized around rhetorical principles. And a great deal happens at the level of the delivery of the pedagogy in the individual classroom. Are the writing instructions presented as hard and fast rules? Does the instructor emphasize transfer and shifting contexts? At another register are institutional resources and cultures. Most large institutions choose the general composition approach because it's relatively efficient and because it also supports big graduate programs in English. Cornell's Knight Program is exemplary of the disciplinary approach with small writing-intensive freshman seminars taught by full faculty on their research interests for all entering students.

E-mail from Susan C. Jarrett, Campus Writing Coordinator and Professor of Comparative Literature, Univ. of California-Irvine, to Steven Mailloux, Professor of English and UCI Chancellor's Professor of Rhetoric, Univ. of California-Irvine, and **Penelope Pether**, Professor of Law, Villanova Univ. Sch. of Law (Oct. 21, 2006, 08:23:19 PDT). Thus taking the route of the Knight Program in law schools would involve tenured or senior tenure-line faculty teaching disciplinary literacy to first year law students in small seminars based on their research interests. Because of the hybrid graduate school/professional school nature of law school, staffing this model might involve some thought at elite schools where some faculty members have never practiced law. However, what it means is that the most highly qualified faculty in the institution would educate students in legal literacy, rather than faculty whom the institution is not willing to appoint to tenure-track positions. Such a practice might also encourage recruiting faculty with both Ph.D. qualifications in disciplines like Rhetoric or Literary Studies and law degrees to tenure-line positions within law schools.

n305. See Cohen, *supra* note 24, at 11 n.57.

n306. See Norris, *supra* note 237, at 772.

n307. *Id.* at 773-74.

n308. Id.

n309. Gender Committee, Racial and Ethnic Committee, Report on the Working Committees to the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts (1997), reprinted in 1997 N.Y.U. Ann. Surv. Am. L. 117, 221 (1997).

n310. Id.

n311. See generally Guinier, *supra* note 299.

n312. See, e.g., The United States Court of Appeals for the First Circuit, Annual Report 69 (2002), available at <http://www.ca1.uscourts.gov/circuitexec/2004ANNUALREPORT.pdf> (last visited April 21, 2007). This aggregation of workers, masking the gender and race/ethnicity makeup of the corps of clerks is characteristic of Circuits' annual reports.

n313. See Norris, *supra* note 237, at 774-76.

n314. See, e.g., *id.* at 775-76.

n315. *Id.* at 774, 776.

n316. *Id.* at 765.

n317. *Id.*

n318. *Id.* at 760.

n319. See *id.* at 767-68 (noting, that "for some professions - notably teaching - a clerkship is an important credential for top employers," and, somewhat breathlessly, that "for example, almost two-thirds of Harvard's tenured or tenure-track faculty members once clerked for federal judges"); see also Lazarus, *supra* note 287, at 18 (noting that clerkships are "especially significant first steps for those inclined toward legal academia").

n320. Norris, *supra* note 237, at 767.

n321. Charles Lane, *Former Clerks' Signing Bonuses Rival Salaries on the High Court*, Wash. Post, May 15, 2006, at A15.

n322. Norris, *supra* note 237, at 767.

n323. Norris does not express the comparison; it is evidently to those "outside" (or "below") the echelon of elbow clerks.

n324. Norris, *supra* note 237, at 767.

n325. *Id.* at 768.

n326. *Id.*

n327. Id.

n328. Id. at 769.

n329. The author's spouse, while clerking for a judge on the Fifth Circuit, frequently functioned as his chauffeur.

n330. Lazarus, *supra* note 287, at 18 (recording that "clerks for Judge 'Crazy Eddie' Weinfeld (now deceased) of the Southern District of New York knew they had to be in the office at 7:00 a.m. to cut the judge's morning grapefruit").

n331. Norris, *supra* note 237, at 769 n.23.

n332. Lazarus, *supra* note 287, at 18.

n333. See, e.g., *id.* at 19.

n334. Lazarus describes individuals who possess influence, usually themselves former clerks, as being "'plugged in' to the clerkship network." See *id.*

n335. See, e.g., *id.* at 20.

n336. Richman & Reynolds, *Elitism*, *supra* note 21, at 290.

n337. *Id.*

n338. FJC Report, *supra* note 12, at 73 app. (quoting Judge J9-19).

n339. *Id.* (quoting Judge J9-21).

n340. See, e.g., Mauro, *supra* note 8, at 10 (quoting Judge Kozinski, who characterized unpublished opinions as "sausage ... not safe for human consumption").

n341. See, e.g., Davies, *supra* note 27, at 374.

n342. See Cecil 1987, *supra* note 93, at 34-35.

n343. See *Hart v. Massanari*, 266 F.3d 1155, 1176-77 (9th Cir. 2001).

n344. See Robel, *supra* note 107, at 947-49.

n345. See, e.g., FJC Report, *supra* note 12, at 67 app. (quoting Judge J2-5) ("Sometimes [an unpublished opinion] is indicated because the briefing is so poor that the salient issues are not raised."); *id.* at 71 (quoting Judge J9-2) ("Often we do not call a case for a vote for a rehearing en banc because, although wrongly decided by the panel, it does not involve Rule 35 and Rule 40 issues. And it will only affect the parties.").

n346. See, e.g., Dragich, *supra* note 41, at 22.

n347. See, e.g., FJC Report, *supra* note 12, at 67 app. (quoting Judge J2-5 as noting that unpublished opinions "ordinarily ... say that "the parties are assumed to be familiar with the facts, procedural history, and the appellate issues presented").

n348. One word opinions are frequent; others give extremely brief and circular reasons for judgment, for example, words to the effect of "the rule in question does not apply."

n349. Richman & Reynolds, *Elitism*, *supra* note 21, at 285.

n350. See, e.g., FJC Report, *supra* note 12, at 67, 75 app. (quoting Judges J2-5, JF-2 respectively).

n351. Richman & Reynolds, *Elitism*, *supra* note 21, at 284.

n352. A notoriously euphemistic phrase meaning "conveying an untrue version of events by leaving out the important facts," adapted from Edmund Burke, and used by Sir Robert Armstrong, the then U.K. Cabinet Secretary, in 1986, when he testified in the Australian Spycatcher trial, is as follows: "Lawyer: What is the difference between a misleading impression and a lie? Armstrong: A lie is a straight untruth. Lawyer: What is a misleading impression - a sort of bent untruth? Armstrong: As one person said, it is perhaps being "economical with the truth.'" The Phrase Finder, *Economical with the Truth*, <http://www.phrases.org.uk/meanings/127700.html> (last visited Feb. 10, 2007). An analogous phenomenon might be discerned in the alleged reluctance of Supreme Court clerks to grant petitions for certiorari, fearing that having a petition rejected by the Court as improvidently granted would damage their prestige with the Justices. See Stephanie Francis Ward, *Clerks Avoid Getting Their Digs In: They Just Say No to Cert Petitions, as the Court's Docket Shrinks*, ABA J., Mar. 2007, at 12-13.

n353. See, e.g., Pether, *Epistemology*, *supra* note 40, at 1575, 1587.

n354. *Id.* at 1587-88.

n355. Cf. Donald R. Songer et al., Nonpublication in the Eleventh Circuit: An Empirical Analysis, 16 Fla. St. U. L. Rev. 963, 968 (1989) (concluding after an extensive literature review that "no consensus emerges on whether or the appellate courts are correctly following their guidelines for publication"). Their conclusions cast doubt on the argument that unpublished opinions arise in "routine, trivial appeals with no significance for the explication of precedent that the rules implicate." *Id.* at 984.

n356. Cohen, *supra* note 24, at 8.

n357. *Id.*

n358. See, e.g., Davies, *supra* note 27, at 374, 396. Prisoner civil rights appeals are a subset of matters which judges, clerks, and staff attorneys often characterize as "frivolous." See Pether, *Injunctions*, *supra* note 8, at 1505-06.

n359. See Davies, *supra* note 27, at 374-75. Like Davies, Ruth Colker questions the discourse of frivolity, noting that

The view that most litigation is frivolous, especially appellate litigation, is not particularly plausible given the resources required to litigate and appeal cases as well as the possible sanctions against frivolous litigation. Pro se cases are more likely to be frivolous. Even there, there are strong disincentives to bringing suit, especially at the appellate level where plaintiffs must personally bear costs.

See Colker, *supra* note 37, at 106 n.38.

n360. Chief Judge Howard T. Markey, The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), 128 F.R.D. 409, 419 (1989).

n361. Davies, *supra* note 27, at 399.

n362. See, e.g., Posner, *supra* note 110, at 103-04.

n363. Carpenter, *supra* note 291, at 245.

n364. *Id.*

n365. See, e.g., Cohen, *supra* note 24, at 111 ("By and large, my perception is that [law clerks] are here to keep the judge from doing something that is really stupid."). For this reader, the most egregious aspect of Edward Lazarus' *Closed Chambers* was not its lack of discretion but its author's apparent self-confidence, during his clerkship on the Supreme Court, about his judgment of the quality of the work of Supreme Court Justices, a self-confidence evidently encouraged by the tasks assigned him during his clerkship. See Lazarus, *supra* note 287, at 45-46.

n366. See Robert Marquand, *Junior Scribes of High Court*, *Christian Sci. Monitor*, July 13, 1998, at 1 ("[Supreme Court clerks] are the top of the top [one] percent in law school. Ivy Leaguers, more often than not. Best grades. Best recommendations. Top guns of the emerging generation of legal minds. Constitutional Wunder-kinder, cocky and sure.").

n367. Cecil 1987, *supra* note 93, at 33.

n368. Davies, *supra* note 27, at 401.

n369. See *infra* notes 380-390 and accompanying text.

n370. See *supra* notes 74-80 and accompanying text.

n371. Lazarus, *supra* note 287, at 19-20. Justice Kennedy follows a similar pattern. Serious contenders for Justice Kennedy's clerkships are screened by Judge Kozinski, a former Kennedy (and Burger) clerk himself. *Id.* at 19.

n372. See Alex Kozinski & Fred Bernstein, Clerkship Politics, 2 Green Bag 57, 57-58, 62, (1998), available at [http://www.greenbag.org/Kozinski\\_Dialogue.pdf](http://www.greenbag.org/Kozinski_Dialogue.pdf) (noting that "in my heart of hearts, I know it's a good thing to have dissent in chambers, but sometimes I'd just as soon have an easier year").

n373. Lazarus, *supra* note 287, at 23.

n374. There is, however, some political science research, especially in the Supreme Court context - sometimes reaching contradictory results - on the influence of law clerk ideology on judges and judicial ideology on clerks. See, e.g., Todd C. Peppers & Christopher Zorn, Law Clerk Influence on Supreme Court Decision Making, Social Science Research Network, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=925705](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925705). There is also some evidence, especially in the Supreme Court context, of how what Posner has called the "surprising juvenescence of the legal profession," Richard A. Posner, Goodbye to the Bluebook, 53 U. Chi. L. Rev. 1343, 1349 (1986), and the delegation of opinion-writing to clerks (producing such (conflicting ideological) precedents as *United States v. Carolene Products's* famous footnote 4 and *Schneekloth v. Bustamonte*, see, e.g., Wichern, *supra* note 295, at 641-42,) impact the corpus juris.

n375. To take one example, Stephen Reinhardt, a reputedly "liberal" judge, and a Democratic appointee, used his influence over former law clerks to attempt to have them oppose the passage of FRAP 32.1, just as Judge Kozinski allegedly did in relation to lawyers who appeared before the Ninth Circuit.

n376. Nina Totenberg, The Supreme Court: The Last Plantation, *New York Times*, July 26, 1974, at 26.

n377. FJC Report, *supra* note 12, at 6.

n378. Which may well be a function of the comparative lack of availability and/or searchability of such opinions to or by the "one-shotters" who might want to take advantage of them, or their thinness in the reasoning of many of them, which make them more or less useless to subsequent litigants.

n379. See, e.g., Lazarus, *supra* note 287, at 19 ("Landing one of the better clerkships ... depends on that time-worn combination of merit,

who you know, and blind luck ... . Having a friend in the chambers of a judge to whom you are applying never hurts.").

n380. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L.J.* 814, 817 (Richard Tediman trans., 1987).

n381. **Penelope Pether**, *Critical Discourse Analysis, Rape Law, and the Jury Instruction Simplification Project*, 24 *S. Ill. U. L.J.* 53, 91 (1999) [hereinafter Pether, *Critical Discourse*].

n382. See, e.g., *Bourdieu: A Critical Reader 2* (Richard Shusterman ed., 1999).

n383. Pether, *Epistemology*, supra note 40, at 1555 n.17 (citing Pierre Bourdieu, *The Logic of Practice* 53 (1990)).

n384. Pether, *Critical Discourse*, supra note 381, at 90.

n385. *Id.* at 89-90.

n386. *Id.*

n387. Richard Terdiman, *Translator's Introduction*, to Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field* (Richard Terdiman trans.), 38 *Hastings L.J.* 805, 806 (1987).

n388. Pether, *Critical Discourse*, supra note 381, at 89.

n389. Terdiman, *supra* note 387, at 807.

n390. *Id.*

n391. See Richman & Reynolds, *Elitism*, *supra* note 21, at 335.

n392. See Terdiman, *supra* note 387, at 812 (explaining Bourdieu's terminology); see also Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *Yale L.J.* 1442, 1453 (1983) (concluding that "what I regard as the crucial sentence of [Hannah Arendt's account of a Nazi named Eichmann is] "he merely ... never realized what he was doing"). An alternative account is suggested by Thomson and Oakley: "where surrogates seek to place themselves in the position of others who are required to exercise discretion, there is an incentive to seek an external guide to how the other would react." See Thompson & Oakley, *supra* note 79, at 62.

n393. Terdiman, *supra* note 387, at 813. Bourdieu defines "miscognition" as "induced misunderstanding, the process by which power relations come to be perceived not for what they objectively are, but any form which renders them legitimate in the eyes of those subject to power." *Id.*

n394. *Id.* at 808.

n395. Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 *Am. J. Soc.* 965, 965 (1977).

n396. *Id.* at 971.

n397. *Id.* at 985.

n398. Id. at 986.

n399. Up to fifteen percent. See id. at 966.

n400. See, e.g., id. at 968.

n401. Id. at 975.

n402. Id. at 975 n.4.

n403. Id. at 979.

n404. Id. (citation omitted).

n405. Julius Stone, *Social Dimensions of Law and Justice* 619-21 (1966).

n406. Cohen, *supra* note 24, at 82.

n407. See Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 *Geo. L.J.*

2589, 2595 (1998).

n408. These reform proposals are informed by the author's experience as an administrative lawyer in the New South Wales Ombudsman's Office in Australia.

n409. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified at 44 U.S.C. §3501 Sec. 205(a)(5)).