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JUDICIAL PRIORITIES

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We wish to thank Judge Frank Easterbrook, Lee Epstein, Stavros Gadinis, Scott Hemphill, William Hubbard, Dennis Hutchinson, Rob Jackson, Kate Judge, Louis Kaplow, William Landes, Maggie Lemos, Katerina Linos, Khushali Narechania, Gloria Park, Judge Richard Posner, Chris Robertson, Ben Roin, Aaron Rizkalla, Shayak Sarkar, Steve Shavell, Kate Shaw, Holger Spamann, Jeannie Suk, Julie Suk, and Mark Wu for their insights and comments on earlier drafts. Workshop audiences at the Benjamin N. Cardozo School of Law, Columbia Law School, Harvard Law School, and the University of Chicago Law School, as well as our colleagues and students, also offered helpful suggestions. We thank Amanda Ciaccio of the Supreme Court of Illinois Library for her critical research support; Judge Gino DiVito, Gist Fleshman, John Flood, Judge Sue Myerscough, and Tina Schillaci for informing us about their courts' administrative practices; and Richard Gazon, Johanna Hudgens, Eric Konopka, Ethan Merel, Ethan Weinberg, and Zhou Zhou for excellent research assistance. Finally, we thank Thomson Reuters and Westlaw for providing access to data that enable this ongoing project.

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## INTRODUCTION

Imagine this thought experiment:

A new procedural rule caps the raw number of judicial opinions that an appeals court can publish every year. The new cap is roughly half of what the court was publishing before.

As this court's judges begin to triage their opinion-writing, which types of opinions will they continue publishing? Which will they give up? Will the court more readily forgo publishing its affirmances, which are often "easy cases"? Will it nonetheless strive to continue publishing its reversals, which are often "hard cases"—and which offer the lower courts more urgently needed guidance?

Once the rule takes effect, less case law will be made—but which topics will be most affected? Which subject areas will turn out to be higher or lower priorities for this common law court?

Strange as it might seem, such a policy shock in fact occurred. In an unprecedented move,<sup>1</sup> the Illinois Supreme Court in the mid-1990s imposed hard caps on the state's appeals courts, drastically reducing the number of opinions they could publish,<sup>2</sup> while also narrowing the formal criteria for

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<sup>1</sup> See Randall Samborn, *Judges in Illinois Told To Be Brief*, NAT'L L.J., July 18, 1994, at A6 ("In an effort to stanch the flow of an 'avalanche' of state appellate court opinions, the Illinois Supreme Court has ordered what appears to be unprecedented limits on the number of published opinions and their lengths . . . . Staff members from the . . . National Center for State Courts and the American Bar Association's Judicial Administration Division said they believed the limits are the first of their kind.").

<sup>2</sup> Among the five regional districts of the Illinois intermediate appellate courts, as Part II details, the new caps amounted to cuts ranging from roughly one-third to one-half of prior output. In the aggregate, the five districts' actual reductions amounted to roughly one-half of prior output. For a comparison of these new limits for each of the five districts and their typical prior output, see *infra* Table 1. The accompanying discussion also explains the nonpublication options available to the court and how the criteria for publication changed.

opinions to qualify for publication.<sup>3</sup> As Part I describes, the high court explained that the amendment's purpose was to reduce the "avalanche of opinions emanating from [the] Appellate Court,"<sup>4</sup> which was causing legal research to become "unnecessarily burdensome, difficult and costly."<sup>5</sup>

This unusual and sudden policy shift offers the chance to observe the priorities of a common law court in its production of published opinions. The method we introduce here can be seen as a sort of revealed-preferences approach:<sup>6</sup> when forced to choose, which types of opinions were these courts more likely to continue publishing, and which types were they more likely to abandon?<sup>7</sup>

Our method, which seems straightforward, has turned out to reveal more than we expected: it has uncovered more than the simple priorities raised in the thought experiment above. One especially surprising pattern forces us to develop new theories about how *higher-level* judicial priorities—such as a concern for outward appearances—compete for influence over judicial choices.

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<sup>3</sup> According to the new formal criteria for publishing an opinion, whose implementation coincided with the imposition of the numerical caps, "[a] case may be disposed of by an opinion only when the majority of the panel deciding the case determines that . . . (1) the decision establishes a new rule of law or modifies, explains, or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court." ILL. SUP. CT. R. 23(a). By contrast, the prior criteria had also allowed publication of an opinion when the case was of sufficient public interest, contributed to the legal literature in explaining historical developments, or was accompanied by a concurrence or dissent. This change is discussed further in Part I.

<sup>4</sup> Illinois Supreme Court Administrative Order, M.R. No. 10343 (1994) (Bilandic, C.J., writing in support).

<sup>5</sup> *Id.* (Heiple, J., writing in support).

<sup>6</sup> If one were to spin out the revealed preferences metaphor, one might say that we are observing the impact of a budget shock. To take the metaphor further, one might also imagine that the relative prices of various types of opinions could have changed due to the shift in emphasis in the formal criteria for publication under the new rule. Details about the change in formal criteria are presented below. *See infra* notes 48-51 and accompanying text.

<sup>7</sup> To our knowledge, this is the first study to make use of such an empirical strategy. But, of course, the general literature on judges' publication decisions is vast, ranging from firsthand judicial accounts to empirical studies, which even include empirical studies conducted by judges themselves. For a small sampling of such work, see generally FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 154-80 (1994); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 75-82 (1996); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want?: An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518 (2012); Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & CONTEMP. PROBS. 157 (1998); Carl Tobias, Anastasoff, *Unpublished Opinions, and Federal Appellate Justice*, 25 HARV. J.L. & PUB. POL'Y 1171 (2002); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667 (2005).

We began by constructing two datasets. As Part II explains, the first dataset contains all cases available on Westlaw from the five districts of the Illinois appeals courts in the time period selected for study.<sup>8</sup> Second, to reduce concerns about possible effects of the changing composition of the courts over time, we identified a stable sample of judges who were members of these courts for at least three years before the policy change and who continued to sit for at least three years afterwards—that is, for the entirety of the study period. Our second dataset consists only of opinions authored by these judges.<sup>9</sup>

The new opinion-writing constraints hit these courts hard. All five districts immediately complied, dropping below their respective caps. Figures 1 through 10 show these dramatic drops both in the aggregate and in each district.<sup>10</sup> This sudden curtailment of publication is also clearly seen in our stable sample of judges.<sup>11</sup> To see which types of cases the judges prioritized for publication, we divided the data between civil and criminal cases, as well as between reversals and affirmances,<sup>12</sup> and compared the numbers and rates of published opinions among the resulting groups.<sup>13</sup>

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<sup>8</sup> These Westlaw cases contain both those that were officially designated for publication by the courts and those that were not. (Virtually all of the latter are entries in “tables” of the reporter or very short descriptions of a case outcome.) Our data are more fully described in Part II.

<sup>9</sup> See *infra* Part II. Our use of this stable sample of judges reduces—but, of course, does not eliminate—the possible influence of the courts’ changing composition. These judges decided cases in panels and were surely influenced by each other’s work in other ways as well. Still, we find the close similarity of the results in our full sample and in this more selective sample reassuring.

<sup>10</sup> In reporting our principal findings, we emphasize those patterns that seem to be common across districts, despite their many differences. But we also take care to identify those districts whose reactions have unique characteristics—keeping in mind that the districts vary in their case compositions, baseline reversal and publication rates, administrative practices, and so forth.

<sup>11</sup> See *infra* Figures 3, 5. As with variations among districts, of course, variations among judges’ reactions to the new rules and caps were also to be expected. Consider one federal judge’s rather sharp comment that “[s]ome appellate judges like to see their own deathless prose in published format, while others much prefer the unpublished mode, and are perfectly happy with assignments to put out decisions for nonpublication by the dozens.” Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909, 924 (1986). But the aggregate patterns in this stable sample of judges are strikingly similar to those in the full population.

<sup>12</sup> Other breakdowns or categories are of course possible. This initial study, however, focuses on these fundamental binaries. For an example of the finer categories that may be identifiable based on textual parsing of the opinions, consider the data we present about a special set of government agency cases (roughly speaking, workers’ compensation cases) in Appendix Figure 4. We discuss these cases in Part III.

<sup>13</sup> That is, we divided the datasets into the four categories of criminal reversals, criminal affirmances, civil affirmances, and civil reversals. The impact of the policy shock on publications, broken down into these four categories, can be seen in Figure 4, as well as in Table 2 and Appendix Table 2. Part II provides further detail regarding how we identified the categories.

We observe first that as these courts were forced to triage, they seemed to favor civil cases over criminal cases—cutting back the publication of opinions less among civil cases than among criminal cases. Although the districts varied in their reactions,<sup>14</sup> the decline in the number of published criminal opinions (a sixty-three percent drop) was greater in the aggregate than for civil opinions (a forty-four percent drop).<sup>15</sup> A natural interpretation is that a greater share of criminal than of civil opinions were deemed sufficiently low priority to be dropped from publication: as the bar for publication was raised—whether by the caps, by the new formal criteria, or by both—the share of formerly publishable opinions disqualified by this higher bar was greater among criminal than among civil cases.<sup>16</sup>

One might have guessed to the contrary (as we did) that these courts would instead favor criminal cases for publication,<sup>17</sup> given the importance of public reasoning in decisions about criminal punishment.<sup>18</sup> But predicting the opposite would also have been sensible: criminal appeals may raise

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<sup>14</sup> One worry of the Illinois bench and bar about the new opinion-writing limits was that different judicial districts might favor or abandon different categories of cases: “What if the judges in the Fourth and Fifth Districts decided that the only cases which would presumptively merit opinion would be in the areas of product liability or [the Federal Employers Liability Act?] If the Second District, likewise, decided that [eminent domain cases] . . . would have presumptive priority, what happens to the remainder? Practicing attorneys could easily see all of the law in a particular area coming from one part of the state.” David R. Parkinson, *More Comments on the Recent Page and Rule 23 Ordered Opinions*, ILL. ST. B. ASS’N CRIM. JUST. NEWSL. (Ill. State Bar Ass’n, Springfield, Ill.), Dec. 1994, at 2, 3. Of course, the districts’ reactions might also vary simply due to the differing natures of both the criminal and civil dockets that one might expect between a densely populated urban district such as the First District, which covers much of Chicago, and a more rural district such as the Fifth District.

<sup>15</sup> See *infra* Table 2, which reports the criminal–civil comparison for all five districts combined, as well as for each individual district. The two most populous districts—the First District and Second District, which together cover much of Chicago and its northern suburbs—showed a large gap between criminal and civil opinions in terms of percentage drops in opinions, with criminal opinions dropping more than civil. So did the Fifth District, which is one of the three smaller districts. But the remaining two—the Third District and the Fourth District—showed small gaps. None of the districts showed a gap in favor of criminal opinions.

<sup>16</sup> Our further analysis will complicate this seemingly simple interpretation, and a more subtle and refined account is offered in the Conclusion.

<sup>17</sup> Such an expectation would also align with the formal precedence that criminal appeals are often afforded in the internal procedures of appellate courts, such as in scheduling or in the granting of oral argument. Indeed, Illinois adheres to such a rule. See ILL. SUP. CT. R. 611(a) (stating that in the “sequence and manner of calling cases for oral argument . . . priority shall be given to appeals in criminal cases over appeals in civil cases”).

<sup>18</sup> Consider Judge Patricia Wald’s complaint two decades ago: “When I came onto the D.C. Circuit in 1979, we rarely if ever disposed of a criminal appeal without an opinion; now we handle 72% that way.” Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995). Her comment suggests both that criminal appeals were once thought to be inherently publication-worthy and that these practices or habits can change dramatically over time.

similar or repetitive issues, while the civil docket consists of a more varied portfolio of areas of law, each needing an independent body of precedent.<sup>19</sup> Also, there may have been a wider range of acceptable reasons to publish criminal opinions *before* the rule change than after the new rules narrowed the official criteria for publication.<sup>20</sup>

We encountered something more puzzling, however, in our comparisons of reversals and affirmances. As one might have expected, these courts seemed to favor reversals over affirmances; we observed greater drops in the publication of opinions affirming lower court decisions than of opinions reversing the lower court.<sup>21</sup> By virtually any account, reversals should be more deserving of publication: they often raise harder issues (in fact, different judges have already disagreed), and they address issues on which the lower courts evidently need guidance.<sup>22</sup> No doubt many affirmances also lay down useful precedent, and some reversals fix fact-bound errors of little interest to case law.<sup>23</sup> But it would not have surprised us to see the number

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<sup>19</sup> The view that criminal appeals tend not to raise precedent-worthy issues has been echoed by at least one federal appellate judge. See Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 178 (1999) ("Roughly twenty-five percent of the cases on the Sixth Circuit docket are federal criminal cases of some sort, and another thirty percent are various forms of federal and state prisoner petitions. What can we add on these subjects that is new and worthwhile?" (footnote omitted)).

<sup>20</sup> We emphasize that the data do not help us distinguish between two possible (and perhaps coexisting or complementary) reasons for a court to cut back on publication in a given category of cases. First, some opinions may no longer merit publication due to the generally higher bar. Second, some specific opinions may no longer merit publication because the new criteria now exclude the rationale that would have supported publication before. For instance, the public importance of the case was a reason for publication recognized under the old Rule 23 but not under the new Rule 23.

<sup>21</sup> To be clear, the findings described here are about *published* reversals and affirmances—that is, about the number of reversals and affirmances chosen for publication before and after the policy shock. These statements are not about the overall rates of reversal and affirmance, which the data show not to be systematically affected by the rule changes. We discuss the implications of this contrast below and in Part III.

<sup>22</sup> While not universal, the presumption that reversals should be published is common among appellate courts. In fact, reversal is sometimes listed as a formal criterion for publication. See, e.g., D.C. CIR. R. 36(c)(2)(F) (stating that a decision will be published if, among other reasons, "it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion"). Yet as one federal appellate judge has observed, "[w]hatever the rules say, the proportion of reversed decisions left unpublished ought to be and usually is small. However, some circuits seem to take joy in not publishing a very high proportion of their reversals, notably the Sixth." Nichols, *supra* note 11, at 926. Judge Nichols's view of the Sixth Circuit may be outdated, however, or at least contested. See Martin, *supra* note 19, at 186-87 ("Whether a decision is a reversal does weigh into the calculus, and we produce a relatively low number of unpublished reversals . . . . It is fair to say that reversals or opinions with dissents are almost always published.").

<sup>23</sup> Cf. Frank M. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399, 401 (1989) ("If ways could be found to identify, with economy, which cases present merely

of published reversals barely budge and thereby see most of the policy's impact fall on affirmances. Instead, the data show a sizeable drop in the publication of reversals: in the five districts taken together, less than thirty percent of reversals were published after the policy change, compared to over fifty percent before.

Looking into this question further led us to notice a striking and surprising pattern, one that is found in each of the five districts, and in both the civil and criminal dockets. Before the policy shock, published affirmances greatly outnumbered published reversals<sup>24</sup>—yet when both collapsed under the new constraints, *they tended to land at virtually the same level*.<sup>25</sup> Moreover, the volume of published reversals and of published affirmances remained roughly similar thereafter, often as if tracking each other. This pattern is evident in Figures 2 through 10.

This unexpected pattern, which appears across districts and across categories of cases, invites hypothesis. One possibility is that the new rules led these courts to limit publication to mainly the “hard cases”—cases in which the law is indeterminate—and that such cases might be expected to fall roughly half as reversals and half as affirmances. Closer analysis of the content of these published opinions, in future work, may shed more light on this theory.

But a rough balance is not all that we see: Figures 2 through 10 show in many time periods—across districts, across case types, and even among individual judges—what looks like actively managed numerical matching of published reversals and affirmances. And tellingly, when published affirmances and reversals are not tracking each other, affirmances outnumber reversals among published opinions much more often than the other way around. And so the “hard cases” theory cannot be a complete explanation, given these additional patterns.<sup>26</sup>

The story that seems most plausible is that these courts, in choosing which opinions to publish, did so with an eye toward appearances: even as

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issues of error correction and which involve ‘lawmaking’ questions, appellate courts could easily assign the former to a summary form of disposition and reserve the latter for extended analysis and discussion.”).

<sup>24</sup> The only exception was in the Fifth District, which began with affirmances already very close to the number of reversals. *See* Section III.C (discussing data from the Fifth District). Indeed, the number of affirmances closely tracked the number of reversals even before the policy shock.

<sup>25</sup> The drop in affirmances varied greatly among the districts, as one might have expected, thus making the regularity of the post-shock matching landings (of the number of published reversals and affirmances) all the more remarkable. *See* Figures 6-10.

<sup>26</sup> Even if some version of a “hard cases” account might allow for more affirmances than reversals to result (among published opinions), it is not obvious how such a story would also generate the periods of close tracking that we do observe.

they were forced to cut back on publishing affirmances, they did not want to publish noticeably more reversals than affirmances. They were seeking to avoid creating the impression that the trial courts were getting it wrong more often than right.<sup>27</sup>

In fact, by managing the balance of visible reversals and affirmances, the appellate courts were actually *countering* a misimpression. The true reversal rate was lower than what outside observers might infer based on only the published opinions. The trial courts were in fact doing a better job than it might have publicly seemed.

We thus suspect that we are seeing a sort of higher-order preference, or super-priority, at work. In Part IV, we elaborate on possible motivations, including managing perceptions of the quality of the state's trial courts and avoiding undue embarrassment for the trial bench. While it is by now a familiar insight that trial judges may be reversal-averse, here we may be seeing an appellate court show a sort of a reciprocal concern: reproach-aversion.<sup>28</sup>

The data suggest not only the presence of such a super-priority for these courts,<sup>29</sup> but also how this concern for appearances interacts with their other higher-order concerns. A hierarchy among super-priorities becomes evident when we compare the patterns of outcomes among all cases (published or not) with the patterns among only the published opinions. The data show that the *overall* reversal and affirmance numbers remain stable despite the policy shock, even when the numbers of *published* reversals and affirmances change dramatically. Compare Figure 2 with Appendix Figure 2. This contrast is notable because, in theory, these courts could have managed appearances in a different and troubling way: by changing the outcomes of some cases slated for publication from reversal to affirmance. Instead, it seems that these courts chose simply to publish more of the affirmances.

To fix ideas, imagine a contest among three stylized super-priorities: first, reaching the desired substantive outcomes, or "accuracy" for short; second, "appearances," as already described; and third, "selectivity," or publishing only opinions useful for the case law (as the Illinois Supreme Court instructed the appeals courts to do). The data suggest that these

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<sup>27</sup> It is common among observers to assess the quality of a court's work by its apparent performance on appellate review, even if such inferences have obvious shortcomings. See *infra* note 134.

<sup>28</sup> One might see this as a vertical cousin of horizontal "dissent aversion." See generally Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011) (describing "dissent aversion" among appeals judges). On "reversal aversion" among trial judges, see generally Choi et al., *supra* note 7.

<sup>29</sup> One cannot infer, of course, that any other courts—or even these same courts at a different time—would hold this same super-priority or give it the same weight.



courts valued accuracy and appearances over selectivity. And they sustained the first two by sacrificing the third.

One upshot of this ordering is that there may have been spillovers among the cases in these courts, a possibility that the Conclusion explores. In brief, a court's decision to publish a reversal may have depended on which opinions it had already published so far that year, and on whether more affirmances can be published—concerns unrelated to the true publication-worthiness of the case at hand.

A further lesson emerges in addressing a critical question about our assumptions: why should outward appearances be assumed to depend mainly on *published* opinions? The short answer is that a vast gap in visibility existed between published and unpublished decisions from the Illinois appeals courts during the time period that we studied (quite unlike today's easy access to so-called unpublished opinions).<sup>30</sup> Neither the name of the trial court judge nor the reasoning of the appeals court was reported publicly in unpublished decisions; the bound reporters and electronic services generally stated little more than the case name and the disposition, usually in a one-line table entry.<sup>31</sup> This format not only obscured the nature of the error leading to a reversal or remand, but also gave outside observers practically no reason to consult those tables in the first place.<sup>32</sup>

Such barebones reporting of unpublished decisions virtually ensured that outside perceptions would be based mainly on published opinions.<sup>33</sup>

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<sup>30</sup> An asymmetry in salience between published and unpublished opinions may persist even in an era in which unpublished decisions are more readily accessible. Consider a recent episode in which the U.S. Court of Appeals for the Seventh Circuit reversed several decisions of the Social Security Administration (SSA) by published opinion while diverting its affirmances of SSA decisions to unpublished dispositions. This lopsidedness apparently affected public perception of the SSA's work. Debra Cassens Weiss, *Posner Opinion Takes Aim at Denial of Disability Benefits; Is It a 7th Circuit Trend?*, A.B.A. J. (Aug. 21, 2014), available at [http://www.abajournal.com/news/article/posner\\_opinion\\_takes\\_aim\\_at\\_denial\\_of\\_disability\\_benefits\\_is\\_it\\_a\\_7th\\_circu](http://www.abajournal.com/news/article/posner_opinion_takes_aim_at_denial_of_disability_benefits_is_it_a_7th_circu).

<sup>31</sup> Other courts, including the U.S. Court of Appeals for the Third Circuit, have used different forms of such truly unpublished opinions. See Gulati & McCauliff, *supra* note 7, at 162 (describing the Third Circuit's "Judgment Order," which is also termed "without-comment disposition").

<sup>32</sup> For these reasons, moreover, we think that our context also departs from the folk wisdom about federal courts today that it can be more embarrassing for a judge to be reversed in an unpublished decision than in a published opinion. A combination of factors about the unpublished decisions in our context—particularly not naming the trial judge and not inviting interest from observers—probably meant that the Illinois trial judges may well have preferred an *unpublished* reversal. We discuss such collegiality concerns more fully in Section III.D.

<sup>33</sup> It is possible, of course, that some sophisticated observers would recognize that little can be learned about overall reversal rates (save perhaps an upper bound) from observing only the published opinions; our appearances-based account supposes that there are nonetheless important

Meanwhile, the true reversal rate, including unpublished decisions, remained obscure.<sup>34</sup> It was thanks to this strong asymmetry of salience between published and unpublished decisions that these courts could manage outward appearances without also distorting the actual outcomes of cases. It is common for researchers to note that published opinions are not representative of the population of cases—but remarkably, in this episode, the courts themselves seem to be making use of that fact.

In other words, what we may be seeing are common law courts using the principal “medium” of judicial expression—the production of texts of varying formats and visibilities—to convey information beyond the content of individual opinions. The judicial medium may thus be better understood more broadly, as allowing courts to signal to multiple audiences (with signals of varying shades) also through the macro characteristics of the corpus of its decisions.

## I. THE POLICY SHOCK

Before turning to a closer examination of the effects of the Illinois Supreme Court’s unprecedented limitations on the state’s appellate courts, a brief history of the Illinois rules concerning the publication of judicial opinions helps set the stage.

### A. *Earlier Forms of Decision*

Since 1972, the disposition of appellate cases in Illinois’s state judiciary has been governed by various versions of Illinois Supreme Court Rule 23. As originally promulgated, Rule 23 provided the appellate courts with two options for the disposition of cases: a circuit court could publish a traditional precedential opinion, or for a small set of cases that were easily affirmed,<sup>35</sup> a nonprecedential “memorandum opinion” could suffice. But

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audiences (as perceived by the appeals judges) who might not so fully discount (or who the judges think might not discount) the informational value of the visible evidence.

<sup>34</sup> As noted above and evident in the Appendix, the overall reversal rate is stable throughout the time period of our study and was unaffected by the policy shock.

<sup>35</sup> Memorandum opinions could be used for cases in which no error of law appears, an opinion would have no precedential value, and one or more of the following circumstances exists: (a) a judgment in a civil case is not against the manifest weight of the evidence; (b) a judgment in a civil case entered upon allowance of a motion for directed verdict should be affirmed because all of the evidence, when viewed in the light most favorable to the appellant, so overwhelmingly favors the appellee that no contrary verdict based on that evidence could ever stand; (c) in a criminal case the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant’s guilt; or (d) the decision of an administrative body or agency reviewed under the provisions of the

even for those cases where the rule might apply, memorandum opinions (known colloquially as Rule 23 orders) were rarely issued, and so the court amended the rule in 1975 to encourage greater use of the alternative form.<sup>36</sup>

The 1975 amendment left the two disposition forms intact, but “broaden[ed] considerably the power of the appellate courts to dispose of cases without opinion.”<sup>37</sup> Under the revised rules, opinions were reserved for cases that met one of five outlined criteria;<sup>38</sup> in cases that did not meet this standard, the court was to issue a written order that “succinctly state[d] the facts, the contentions of the parties, the reasons for the decision, the disposition, and the names of the participating judges.”<sup>39</sup> These short-form dispositions were explicitly deemed “not precedential” and were not to be published.<sup>40</sup>

This second iteration of the Illinois rule was consistent with similar rules that governed the vast majority of state appellate courts<sup>41</sup> and that were embroiled in a controversy regarding the propriety of such nonprecedential dispositions.<sup>42</sup> In Illinois, that controversy came to a head in 1983, when the Illinois State Bar Association, lamenting the loss of

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Administrative Review Act and confirmed by the circuit court is not against the manifest weight of the evidence. ILL. SUP. CT. R. 23 (Committee Comments).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> The five criteria were (1) the case involves an important new legal issue or modifies or questions an existing rule of law; (2) the decision considers a conflict or apparent conflict of authority within the appellate court; (3) the decision is of substantial public interest; (4) the opinion constitutes a significant contribution to legal literature by either an historical review of law or by describing legislative history; or (5) the case included a concurring or dissenting opinion (unless the panel unanimously decided to forgo publication). ILL. SUP. CT. R. 23 (Historical and Statutory Notes).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See generally Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001) (explaining and analyzing “the basic guidelines for publishing opinions and citing unpublished opinions in the federal courts of appeals and the appellate courts of the fifty states and the District of Columbia”). See also Keith H. Beyler & Clarold L. Britton, *Supreme Court Rule 23: An Empirical Study*, 76 ILL. B.J. 324, 324 (1988) (explaining that “[t]he great majority of states having intermediate appellate courts have adopted rules that limit the publication and use of the decisions of those courts”).

<sup>42</sup> 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, 768-80 (1995) (arguing for the importance of opinion publication); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 128-145 (1994) (same). For later work on the matter, see, for example, Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2D 17, 23 (2000) (arguing that the contemporary controversy surrounding unpublished opinions is rooted in a failure to distinguish between two kinds of precedent in opinions: analogical and rule-setting).

precedent, called for the repeal of Rule 23.<sup>43</sup> Responding to such public criticism of the increased use of Rule 23 orders, the courts pulled back after 1983.<sup>44</sup> Despite the courts' adjustments to their practice, the controversy persisted, and in 1988, the Illinois State Bar Association called on the state's supreme court to amend the rule to expand the categories of cases for which opinions were appropriate and to increase the utility of memorandum dispositions.<sup>45</sup> Although little came of those proposed amendments, the Illinois Supreme Court did decide to enact far-reaching changes to Rule 23 six years later, on June 27, 1994.<sup>46</sup>

### B. *The New Constraints*

The resulting amendment took Rule 23 in precisely the opposite direction of the amendments proposed by the Illinois State Bar Association six years earlier. The 1994 amendment—which in effect “rewrote the rule”<sup>47</sup>—enacted two main substantive changes. First, the amendment strengthened the “presumption against disposing of Appellate Court cases by full, published opinions” by significantly constraining (and not expanding, as had been hoped) the range of criteria for publication.<sup>48</sup>

Second, the revised rule created a new form of nonprecedential opinion. In addition to the familiar Rule 23 orders, the court invented an even shorter disposition form: the “summary order.”<sup>49</sup> The class of cases for which summary orders were appropriate was analogous to (but larger than)

<sup>43</sup> Beyler & Britton, *supra* note 41, at 325 n.3 (noting Res. of Ill. St. Bar Ass'n, 1983 Annual Meeting (June 24, 1983) (Agenda Item IX.A)).

<sup>44</sup> *Id.* at 326 chart 3.

<sup>45</sup> *See id.* at 332 (noting the text of the proposed amendments). The proposed amendments would have expanded the categories of cases for which publication was appropriate, made unpublished decisions reviewable by the Illinois Supreme Court, and allowed parties to seek publication of a decision. *Id.* The only part of this proposal that seems to have been adopted is the provision allowing a party to move the court to designate a decision for publication. *See* ILL. SUP. CT. R. 23 (Historical and Statutory Notes).

<sup>46</sup> *Id.* (Historical Notes); Illinois Supreme Court Administrative Order, M.R. No. 10343 (1994).

<sup>47</sup> ILL. SUP. CT. R. 23 (Historical Notes).

<sup>48</sup> *Id.* (Committee Comments). The amendment removed three of the five categories of opinions that the rule had deemed suitable for publication. (Recall that the Illinois State Bar Association had proposed expanding the criteria to include seven categories of opinions.) The amended rule provided that

[a] case may be disposed of by an opinion only when a majority of the panel deciding the case determines that . . . (1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.

ILL. SUP. CT. R. 23(a).

<sup>49</sup> ILL. SUP. CT. R. 23(c).

the set of cases for which Rule 23 orders were originally designated in the 1972 version of the rule.<sup>50</sup> These summary orders were to consist only of “a statement describing the nature of the case and the dispositive issues *without* a discussion of the facts,” “a citation to controlling precedent” and a single statement announcing the judgment of the court.<sup>51</sup>

The Supreme Court saved its most inventive—and most jarring—procedural changes not for the amended text of Rule 23 but for an accompanying administrative order known as M.R. No. 10343. Invoking its “general administrative and supervisory authority” over the state’s lower courts,<sup>52</sup> the Supreme Court imposed two new limits on the Illinois appellate courts that “raised eyebrows” and provoked “nationwide” debate.<sup>53</sup>

First, the administrative order restricted the maximum length of any published opinion.<sup>54</sup> In addition to encouraging shorter non-precedential dispositions through the introduction of summary orders, the new order mandated that published “[o]pinions shall not exceed 20 pages in length, excluding any concurring or dissenting opinions, which shall not exceed 5 pages in length,” and included concomitant page, margin, and font size restrictions.<sup>55</sup>

More strikingly, the administrative order buttressed the presumption against publication through first-of-their-kind caps on published opinions.<sup>56</sup>

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<sup>50</sup> The 1994 amended rule provided that

[a] summary order may be utilized when: (1) the Appellate Court lacks jurisdiction; (2) the disposition is clearly controlled by case law precedent, statute, or rules of court; (3) the appeal is moot; (4) the issues involve no more than an application of well-settled rules to recurring fact situations; (5) the opinion or findings of fact and conclusions of law of the trial court or agency adequately explain the decision; (6) no error of law appears on the record; (7) the trial court or agency did not abuse its discretion; or (8) the record does not demonstrate that the decision of the trier of fact is against the manifest weight of the evidence.

*Id.* By contrast, see the 1972 version of Rule 23, which is quoted *supra* note 35.

<sup>51</sup> ILL. SUP. CT. R. 23(c)(i)-(iii) (emphasis added).

<sup>52</sup> Illinois Supreme Court Administrative Order, M.R. No. 10343 (1994).

<sup>53</sup> Beth C. Boggs, *Survey of Illinois Law: Civil Procedure*, 19 S. ILL. U. L.J. 683, 699-700 (1995).

<sup>54</sup> Illinois Supreme Court Administrative Order, M.R. No. 10343 (1994). These page limits should have no first-order effect on the interpretation of our observations in the present study, which are based on the *quantity* limits. However, because we find the imposition of page limits to be a fascinating and unusual policy shock in its own right—and also because we recognize the possibility of secondary interactions with the quantity limits studied here—we are exploring the impact of these page limits in separate work.

<sup>55</sup> *Id.*

<sup>56</sup> See Samborn, *supra* note 1 (stating that the Illinois Supreme Court’s order sets “what appears to be unprecedented limits on the number of published opinions and their lengths”); see also Mark Hansen, *Illinois Caps Appellate Opinions*, 80 A.B.A. J. 36, 36 (Dec. 1994) (explaining that Illinois’s cap on opinions is “the only measure of its kind in the nation”).

Beginning July 1, 1994, each of Illinois's five appellate districts faced a limit on the number of opinions it could publish annually.<sup>57</sup> The Fourth District, for example, was limited to publishing only 150 precedential opinions<sup>58</sup> (compared to the 297 opinions it published in the 1993 calendar year). Table 1 provides this comparison for each of the five appellate districts.<sup>59</sup> In total, the new limits capped the judicial output of the Illinois appellate courts at less than two-thirds of the number of opinions published in 1993.

Table 1: 1993 Opinions and Opinion Limits, All Districts

	Published Opinions in CY1993	Annual Limit Beginning July 1, 1994
1st District	1011	750
2nd District	430	250
3rd District	272	150
4th District	297	150
5th District	186	150

The severity of the cuts was no accident. A desire for drastic reductions in the number of published opinions in fact motivated the new restrictions. Writing in support of the amended rule and new limits, Illinois Supreme Court Justice Heiple noted that “[i]n 1993, the Appellate Courts of Illinois published 2,195 opinions. Many of these published opinions were redundant and lacking in precedential value.”<sup>60</sup> Chief Justice Bilandic noted that this “avalanche of opinions emanating from our Appellate Court has taxed the capacity of the members of that court to read the opinions filed in all of the

<sup>57</sup> Illinois Supreme Court Administrative Order, M.R. No. 10343 (1994). While the new limits applied on an annual basis, they do not appear to have aligned to the calendar-year reporting periods used by the Administrative Office of the Illinois Courts. *See id.* (“[T]he districts of the Appellate Court shall be limited in the number of opinions each may file annually commencing July 1, 1994 . . .”).

<sup>58</sup> *Id.*

<sup>59</sup> The figures for the first column in Table 1 are drawn from ADMIN. OFFICE OF THE ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY—1993 [hereinafter 1993 ANNUAL REPORT].

<sup>60</sup> Illinois Supreme Court Administrative Order, M.R. No. 10343 (1994) (Heiple, J., writing in support). While Justice Heiple stated that the appellate courts issued 2195 opinions in 1993, the summed total of the first column of Table 1 yields 2196 opinions. This is due to a discrepancy in the numbers reported in the 1993 ANNUAL REPORT, *supra* note 59. One table in that report shows a total of 1010 opinions in the First District for that year, whereas another table shows a total of 1011 opinions in the First District. *Id.* at 108-09. We rely on the latter table because it provides more detailed information.

appellate districts.”<sup>61</sup> Justice Heiple further added that this volume was making legal research “unnecessarily burdensome” for lawyers, contributing to increased litigation expenses.<sup>62</sup> In the view of the supporting justices, “[t]he new Supreme Court Rule 23 and [its] accompanying order [we]re modest efforts to curtail the publication of unnecessary opinions and to render those opinions that are published to be of readable length” in order to “benefit the general public and the practicing bar” and to “elevate the significance of . . . the appellate court.”<sup>63</sup>

Reactions to these changes, however, were not universally sanguine. Two justices dissented from the new limits promulgated.<sup>64</sup> Although they concurred in the addition of the summary order disposition form, Justice Miller, joined by Justice McMorro, referred to the limits contained in M.R. No. 10343 as a “mechanical, arbitrary exercise” that was “demeaning to the appellate court, and to the public it serves.”<sup>65</sup>

Appellate judges themselves were similarly split. On the matter of the length restrictions, some found “the page limit demeaning and chafe[d] under the restriction.”<sup>66</sup> Judge Dom Rizzi of Illinois’s First District, for example, said flatly, “I don’t like it.”<sup>67</sup> But Judge Anthony Scariano, also of the First District, suggested that the rule “may be just what we need” to ensure concise opinion writing.<sup>68</sup> And Judge Calvin C. Campbell of the First District expressed similar sentiments, noting that “[b]revity is a virtue.”<sup>69</sup>

Some judges were optimistic that the revised rule and the opinion limits would “aid the court in disposing of the many [pending] appeals.”<sup>70</sup> Judge William A. Lewis of the Fifth District, for example, suggested the courts

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<sup>61</sup> Illinois Supreme Court Administrative Order, M.R. No. 10343 (1994) (Bilandic, C.J., writing in support).

The interaction between the new restrictions on the appellate courts and the selection of cases by the Illinois Supreme Court, which has discretionary jurisdiction over the majority of its docket, presents another substantively interesting set of questions that we are exploring in separate work.

<sup>62</sup> *Id.* (Heiple, J., writing in support).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (Miller, J., dissenting).

<sup>66</sup> Michael T. Reagan, *Supreme Court Rule 23: The Terrain of the Debate and a Proposed Revision*, 90 ILL. B.J. 180, 182 (2002).

<sup>67</sup> Hansen, *supra* note 56, at 36 (“I don’t like it, but if the supreme court passes a rule, I’m going to follow it.”).

<sup>68</sup> *Id.*

<sup>69</sup> David Heckelman, *Court Limits Published Appellate Opinions by Number, Size*, CHI. DAILY L. BULL., June 27, 1994, at 1.

<sup>70</sup> *Id.* (quoting Judge Calvin C. Campbell of the First District).

would be able to use the new summary order form to dispose of cases “right after hearing oral arguments.”<sup>71</sup>

But other appellate judges worried about the potential for disproportionate impact on different areas of law. Importantly, the new limits did not distinguish between categories of cases. That is, beyond the revised formal criteria for publication, the supreme court provided no further signal as to the types of cases to prioritize, even though the appellate docket is widely varied and appeals have a variety of origins.<sup>72</sup> As Judge Parkinson put it,

What if the judges in the Fourth and Fifth Districts decided that the only cases which would presumptively merit opinion would be in the areas of product liability or [the Federal Employers Liability Act?] If the Second District, likewise, decided that [eminent domain cases] . . . would have presumptive priority, what happens to the remainder? Practicing attorneys could easily see all of the law in a particular area coming from one part of the state.<sup>73</sup>

The local bar was also less hopeful, expressing similar concerns. The Chicago Council of Lawyers, a public-interest bar association, petitioned the Supreme Court of Illinois to reconsider the limits, contending that the rule would “stifle the development of the law.”<sup>74</sup> That request was promptly denied, less than two weeks after it was filed.<sup>75</sup>

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<sup>71</sup> *Id.* (quoting Judge William A. Lewis of the Fifth District).

<sup>72</sup> Some appeals are routed through special “divisions” created within the existing structure of some of the trial courts. *See, e.g.*, ILL. 19TH J. CIR. CT. R. 1.03 (“The Chief Judge may designate such divisions as he, from time to time, deems necessary . . .”). Similar provisions exist in the local rules of various other trial circuits in Illinois, but not all of them have exercised this authority. Meanwhile, other appeals, such as those from claims for workers’ compensation benefits, begin as administrative matters. *See, e.g.*, James W. Chipman, *The Impact of Rule 23 on Administrative Law: One Agency’s Perspective*, 87 ILL. B.J. 428, 428-29 (1999) (noting two possible routes for appeals from the Property Tax Appeal Board).

<sup>73</sup> Parkinson, *supra* note 14, at 3. Judge Parkinson’s concerns echo arguments favoring the “percolation” of legal issues across jurisdictions. SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT’S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 47 (1986).

<sup>74</sup> Hansen, *supra* note 56, at 36.

<sup>75</sup> David Bailey, *Court Stands Fast on Opinion Limits*, CHI. DAILY L. BULL., Sept. 15, 1994, at 1 (explaining that a petition asking for the Illinois Supreme Court to hear public comment on the new limits was filed by several bar associations on September 2, 1994, and denied by the court on September 14 of the same year).



### C. Implementing the Change

Despite reservations regarding the amendments, the new rules and the limits went into effect only three days after they were officially promulgated.<sup>76</sup>

To learn how each district implemented these drastic changes, we sought information from representatives from each district. While we discovered that much of the relevant institutional memory has faded in the intervening twenty years, we have also been able to discern some broad contours of the various districts' implementation strategies.

Several districts employed a centralized mechanism for ensuring compliance with the revised rules. The Fourth and Fifth Districts, for example, employed a central "research division" to track progress toward the district's annual limit on a regular basis (e.g., monthly or quarterly).<sup>77</sup> As Judge Myerscough of the Fourth District explained, "[t]he central monitoring of the opinions was done by our research clerk."<sup>78</sup>

The First District likewise employed a central research division that held a fair amount of influence over the decision to publish an opinion in a given case.<sup>79</sup> There, the research division was the first to examine the open appellate docket and identify cases that might not be suitable for publication.<sup>80</sup> A randomly assigned judge, serving as case manager, could also deem a case unsuitable for publication.<sup>81</sup> Such cases would, with the approval of the associated panel, be decided by a nonprecedential order.<sup>82</sup> But any panel member could request to publish an opinion instead (and such requests seem to have been generally respected by the other panel members).<sup>83</sup>

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<sup>76</sup> That is not to say that the changes came as a complete surprise. The Third District, for example, seems to have anticipated the amendments. "Prior to the supreme court's amendment of Rule 23, our court had already scrutinized the rule's publication requirement. As a result, we reduced the number of opinions filed by our district from 349 in 1992 to 272 in 1993." Michael R. McCuskey, *Supreme Court Rule 23—Brief Comments on the New Changes*, ILL. ST. B. ASS'N CRIM. JUST. NEWSL. (Ill. State Bar Ass'n, Springfield, Ill.), Dec. 1994, at 3, 4.

<sup>77</sup> E-mail from Hon. Sue Myerscough, Ill. Appellate Court, Fourth Dist., to Johanna Hudgens (Apr. 30, 2014, 3:45 PM) (on file with authors); Telephone Interview by Ethan Weinberg with John Flood, Clerk of Court, Ill. Appellate Court, Fifth Dist. (Oct. 16, 2013).

<sup>78</sup> E-mail from Hon. Sue Myerscough, *supra* note 77.

<sup>79</sup> Telephone Interview by Johanna Hudgens with Gino L. DiVito, Former Judge, Ill. Appellate Court, First Dist. (Apr. 10, 2014).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

In contrast to the early determinations made by the research division or a randomly assigned judge in the First District, the Fourth District would decide whether to publish an opinion only after a panel had reached a decision on the merits or even only after the circulation of a draft opinion.<sup>84</sup> The Fourth District's research division would occasionally suggest that a decision be published, although the ultimate decision whether to publish was controlled by the authoring judge and the appellate panel.<sup>85</sup>

Unlike those districts that used a centralized office, the Third District divided its annual allotment of opinions among its judges, giving each an individual cap and making each responsible for ensuring he or she did not exceed the threshold.<sup>86</sup> The chief judge apparently monitored each judge's output.<sup>87</sup>

Despite these varied approaches, it seems that all districts were conservative in their publication decisions relative to the new limits. That is, each district "over-complied" with the new caps by publishing fewer opinions than permitted. For instance, the First District undershot its annual cap of 750 opinions by publishing roughly 550 to 600 opinions per year. The Second District faced a cap of 250 opinions, but published only about 160 per year at first—before creeping up to approximately 200 opinions after three years. The district that stands out is the Fourth District. Like the Third and the Fifth Districts, the Fourth faced a cap of 150 opinions; unlike the other two, however, it did not markedly over-comply. Rather, it hovered in the range of 130 opinions per year. This might suggest that the Fourth District was closer to being bound by its cap than the other districts were by theirs.<sup>88</sup>

One possible explanation for the general over-compliance is that, in learning how to work with the new limits on publication, the districts initially erred on the safe side.<sup>89</sup> A complementary hypothesis might be that the judges quickly internalized the newly narrowed criteria for publication and applied it conservatively, perhaps with an eye on the caps, resulting in a number of publications below the arbitrary limits set out in M.R. No. 10343. But regardless of the underlying motivation, given what we have

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<sup>84</sup> E-mail from Hon. Sue Myerscough, *supra* note 77.

<sup>85</sup> *Id.*

<sup>86</sup> Telephone Interview by Ethan Weinberg with Gist Flesman, Clerk of Court, Ill. Appellate Court, Third Dist. (Oct. 16, 2013).

<sup>87</sup> *Id.*

<sup>88</sup> But for an alternative explanation, see *infra* text accompanying note 133.

<sup>89</sup> One might see the Second District's upward crawl over time as an indication that it was learning how to properly manage the publication limit. But it may also be telling that the First, Third, and Fifth Districts did not show such a pattern.

learned from court officials about each district's implementation protocol, there is no obvious relation between the method of implementation and the degree of over-compliance.

## II. CONSTRUCTING THE DATA

To examine the effects of the amendments to Illinois Supreme Court Rule 23 and the accompanying administrative order, we constructed two primary datasets. The first includes all available decisions from all five districts during our entire study period (three years before and three years after the July 1, 1994 policy shock). The second includes only the opinions of the judges who sat on the court for our entire study period; there were twenty-five such judges in this stable sample.

First, with the permission and assistance of Thomson Reuters, we downloaded all dispositions issued by the Illinois appellate courts during our study period and available on Westlaw. We analyzed these text files using a custom parser that collected select characteristics from each disposition, including case type, disposition type, caption, citation, date of decision, authoring judge, and outcome. This Westlaw data formed the basis for our two primary datasets.

A check on the completeness of the Westlaw data is offered by the composite statistical data available in the Annual Reports of the Illinois Courts, which are prepared by the Administrative Office of the Illinois Courts.<sup>90</sup> Most notably, charts of corresponding statistics drawn from the Annual Reports (though not reported here) mirror our own findings described below.<sup>91</sup>

The comparison with the Annual Reports also shows that the cases available on Westlaw (and thus in our primary data) represent a fairly comprehensive subset of the total dispositions issued by Illinois's appellate courts. For example, the 1991 Annual Report of the Illinois Courts notes that 2284 cases were decided by written opinion and 3380 cases were

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<sup>90</sup> See 1993 ANNUAL REPORT, *supra* note 59, at 104-13 (separate statistical summary); ADMIN. OFFICE OF THE ILL. COURTS, 1992 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE TO THE SUPREME COURT OF ILLINOIS 83-88 (contained within annual report).

<sup>91</sup> One advantage of using our database is that in the Annual Reports, the statistics for the year 1994 commingle data from before the effective date of the policy change, July 1, 1994, with data from afterwards. See generally ADMIN. OFFICE OF THE ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY—1994. More generally, our data allow us to use finer time periods (such as half years), whereas the Annual Reports only offer yearly data. And, of course, our data allow finer breakdowns along other critical dimensions, such as by individual judge.

decided by Rule 23 order.<sup>92</sup> Thus, the appellate courts decided a total of 5664 dispositions in 1991. The Westlaw data for that year include a total of 5330 dispositions, or 94.1% of the courts' self-reported total. Of those, 2007 cases were decided by opinion (87.9% of the 2284 total opinions reported by the courts), and table decisions comprise the remaining 3323 dispositions (or 98.3% of the court reported total of 3380).<sup>93</sup> Appendix Table 1 provides a full comparison of these sources of data across the calendar years relevant for our study period. In total, the Westlaw data include 40,301 coded dispositions out of 43,262 registered in the Annual Reports, or 93.1% of the reported total.<sup>94</sup>

Because the amendment to Rule 23 took effect on July 1, 1994, we used the date of each disposition to divide our Westlaw data into half-year periods and examined the three years on either side of the amendment.<sup>95</sup> Thus, we examined all available dispositions issued between July 1, 1991, and June 30, 1997.

In addition to relying on the complete data for all available cases in all districts, we also created a second dataset. This dataset, which comprises only those opinions that were issued by a "stable" sample of judges, is a subset of our Westlaw data. In our analysis of each opinion downloaded via Westlaw, we recorded the date of the decision and the authoring judge.<sup>96</sup> Using this information, we were able to determine which judges were active during our entire study period.<sup>97</sup> We identified twenty-five judges who issued opinions throughout our full study period<sup>98</sup>—that is, who issued at

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<sup>92</sup> ADMIN. OFFICE OF THE ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS—1991, at 71.

<sup>93</sup> The Westlaw dataset treats Rule 23 orders and summary orders equivalently. We use the term "table decision" to refer to both collectively, because the outcome is recorded in the table by the reporter.

<sup>94</sup> Although we obtained 40,301 total dispositions from Westlaw, our net sample consists of 34,446 dispositions, because we excluded dispositions issued outside of the three years immediately before the policy change and the three years immediately after. That is, the net sample excludes the first and last six months of data for the years at issue.

<sup>95</sup> By contrast, the Annual Reports provide aggregate statistics only on a calendar-year basis. As a result, the 1994 Report commingles data that predate the amendments with data that post-date them. Our figures report 1994 data predating the amendments as 1994H1 and data post-dating them as 1994H2 (and we use similar H1 and H2 notation for all half-year intervals during our study period).

<sup>96</sup> Authoring judge information was available only for opinions, and not for unpublished dispositions.

<sup>97</sup> Using this stable sample of judges reduces concerns about composition effects due to changing membership on the Illinois appellate courts, including shifts in the political compositions of these courts (although we recognize, of course, that even the stable set of judges would be sitting on panels with new colleagues).

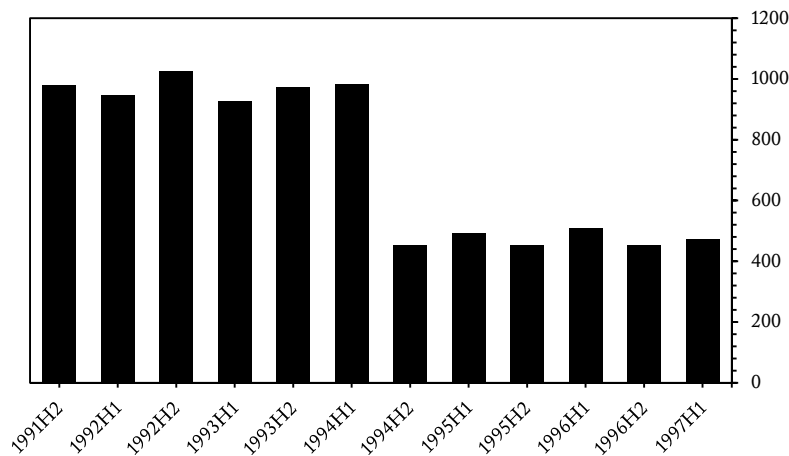
<sup>98</sup> Out of a total of 101 judges.

least one opinion in each of the six half-year periods prior to the rule change *and* in each of the six half-year periods after the change. We then cross-checked this list against the lists of active judges in the Annual Reports to verify our inferences. We were thus able to construct a second dataset consisting of the 4350 opinions that were authored by judges whose tenures encompass our entire study period.<sup>99</sup>

### III. REVEALING PRIORITIES

Changing the rules for the publication of decisions had an immediate effect. Figure 1 shows that all the districts in Illinois, combined, published 983 opinions in the first half of 1994. In the second half of that year, that number was cut by more than half—to 453 opinions.<sup>100</sup>

Figure 1: Number of Published Opinions, All Districts



This stark drop in the number of published opinions was not due to an overall decline in cases decided, a number which actually increased slightly after the rule change.<sup>101</sup> Nor could it be due to changes in the rate at which

<sup>99</sup> This is slightly more than fifty percent of the 8659 total opinions that were issued during our study period.

<sup>100</sup> We obtain similar results using data from our stable sample of judges, as well as the Annual Reports of the Illinois Courts.

<sup>101</sup> See *infra* Appendix Figure 1. One can imagine reasons why: for example, opinions are costly to write; thus, as judges began to write fewer and shorter opinions after the rule change, they may have had additional time to address more cases.

trial court decisions were appealed, given that these rates of appeal remained stable during the study period.<sup>102</sup>

The rule change also does not appear to have had any noticeable impact in the merits outcomes of cases. That is, the overall rate of reversals and rate of affirmances remained steady (counting both published and unpublished decisions), with no indication of any disruption at the time of the policy shock.<sup>103</sup> The rates of *published* reversals and affirmances are, however, an entirely different story.

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<sup>102</sup> The rate of civil appeals was essentially unchanged; the rate of criminal appeals declined very slightly over the study period, but did so steadily, without any unusual deviations at the time of the policy change.

<sup>103</sup> See Appendix Figure 2. Here and throughout our findings, a reversal refers to any change to the trial court's decision, including remands and reversals-in-part. See Jon O. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 632 (1992) (using the same approach in a quantitative study by a federal appeals judge).

Table 2: Change in Published Opinions by Case Type

		Before	After	Changes
All Districts	Criminal	2154	790	-63.3%
	Civil	3677	2038	-44.6%
1st District	Criminal	956	372	-61.1%
	Civil	1613	1093	-32.2%
2nd District	Criminal	436	143	-67.2%
	Civil	653	344	-47.3%
3rd District	Criminal	291	91	-68.7%
	Civil	457	174	-61.9%
4th District	Criminal	284	129	-54.6%
	Civil	540	250	-53.7%
5th District	Criminal	187	55	-70.6%
	Civil	414	177	-57.2%

A. *Civil or Criminal?*

Our basic strategy for unveiling judicial priorities is straightforward: observe the triage.<sup>104</sup> Which kinds of cases tended to be cut from publication? Which kinds of cases tended to continue to be published? Although other breakdowns of the data are possible, we chose in this initial inquiry to examine two basic cuts: opinions in criminal versus civil cases, and opinions that affirmed as opposed to those that reversed the lower court. The simpler story, and where our discussion begins, is the comparison between criminal and civil cases.

As the Introduction explains, we had predicted that the importance of public reasoning in criminal cases would lead judges to favor those cases when deciding which opinions to protect from the cuts. Yet, as Table 2 shows, *no district* sought to preserve publication in criminal cases more than in civil cases. In the Third and Fourth Districts, the difference was small. But the other districts cut criminal opinions by considerably *more* than civil opinions. The First District (which includes Chicago) slashed criminal

<sup>104</sup> We borrow the metaphor of triage from COFFIN, *supra* note 7, and Vladeck & Gulati, *supra* note 7.

opinions by nearly thirty percentage points more than it did for civil opinions. (A former judge of the First District explained that its research division would often handle criminal appeals.)<sup>105</sup> The Second District, which includes some of suburban Chicago, similarly cut criminal opinions by twenty more percentage points than it did for civil opinions.

Overall, these courts seemed more willing to rein in publication in their criminal dockets than in their civil dockets. There are at least two possible, and compatible, explanations for this contrast.<sup>106</sup> It may be that, as the formal criteria for publication were narrowed by the amendments to Rule 23 (which emphasized precedential value, to the exclusion of other factors such as the public importance of the case or the presence of a dissent), a larger fraction of formerly publishable criminal opinions than of civil opinions was now disqualified from publication. Or it may be that the rule change and opinion limits caused the courts to internalize a generally higher bar for publication, and the share of opinions that no longer qualified under this new sense of publication-worthiness was greater among criminal cases than among civil cases. Either way, during the triage, a larger share of criminal cases than of civil cases was deemed sufficiently low-priority to be dropped from publication.

#### B. *Reversals or Affirmances?*

The most striking pattern in the data emerges from our analysis of the changes in the publication of affirmances and reversals. Figure 2 shows this pattern clearly in the aggregate data, but it can also be seen in breakdowns both by districts and by subject matter categories.

Before the rule change, there was a clear, wide gap between the number of published affirmances and reversals: many more affirming opinions were being published. The number of opinions published then fell precipitously between the first and second halves of 1994 due to the policy shock. Figure 2 shows that the rule change hit affirmances especially hard.<sup>107</sup>

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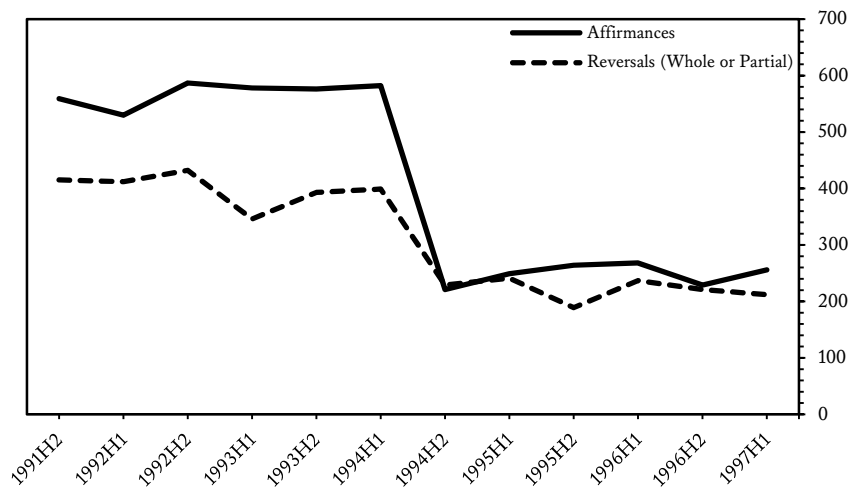
<sup>105</sup> Telephone Interview by Johanna Hudgens with Gino L. DiVito, *supra* note 79.

<sup>106</sup> These theories and others are considered in greater detail *infra* Section III.D.

<sup>107</sup> See also *infra* Appendix Table 2 (showing that, by contrast, the overall ratio of all affirmances to all reversals remained largely unchanged).



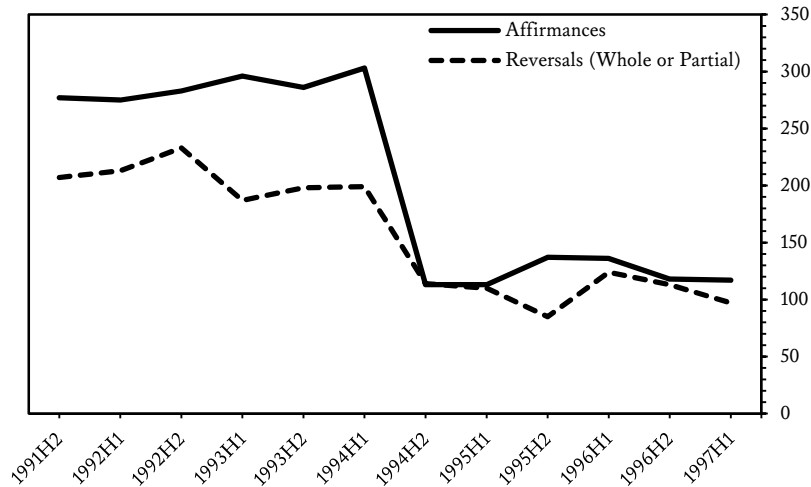
Figure 2: Number of Published Opinions by Outcome,  
All Districts



But just how far did the affirmances fall? No matter their starting points, immediately after the shock, affirmances and reversals tended to land at almost the same levels. Moreover, from that point forward, the number of affirmances often closely tracks the number of reversals.<sup>108</sup> Notably, during the times when they diverged, affirmances tended to outpace reversals, rather than the other way around.

<sup>108</sup> It is worth repeating that our findings here concern the publication of decisions that affirm and decisions that reverse (and we are not making claims that merits outcomes changed, as the data suggest that this did not occur).

Figure 3: Number of Published Opinions by Outcome,  
Stable Sample of Judges



Similar results are seen in the choices of our stable sample of judges. In the first half of 1994, this set of judges issued fifty percent more affirmances than reversals. In the second half of 1994, they issued virtually the same number of each. And in each successive period, the number of affirmances exceeded but remained close to the number of reversals.

These findings are unsurprising in one sense: one ought to expect affirmances to fall more than reversals. After all, an affirmation indicates that the lower court handled the case correctly, suggesting little need for guidance on the matter.<sup>109</sup>

But what is surprising is that the numbers of affirmances and reversals, once they fell, would land so close to each other. This is especially notable because they started off at such different quantities. This finding is no accident of aggregation, nor is it a quirk of the twenty-five judges in our subsample. Rather, it appears across districts as well as in our subject matter breakdowns.

<sup>109</sup> See *supra* note 48 (noting that key criteria for publication under the amended rule were whether the opinion established a new rule of law or modified an existing rule).

Figure 4: Number of Published Opinions by Type and Outcome, All Districts

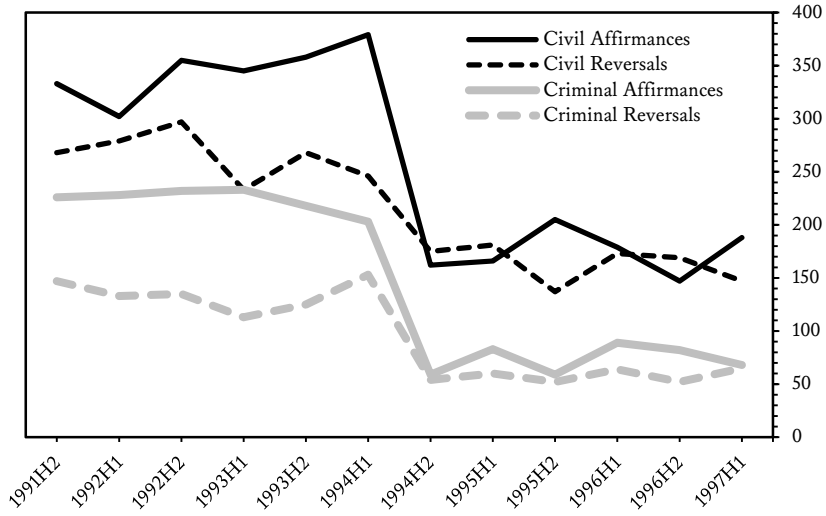
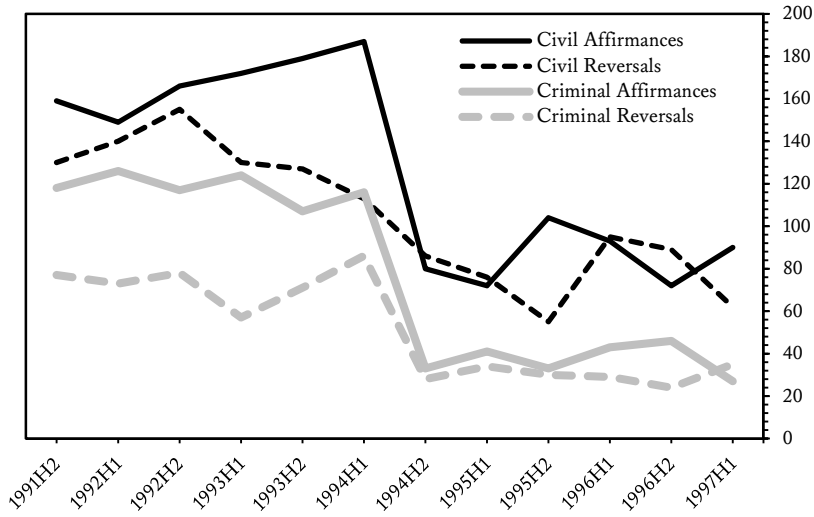


Figure 5: Number of Published Opinions by Type and Outcome, Stable Sample of Judges



Figures 4 and 5 correspond to Figures 2 and 3, respectively, showing changes within the distinct sets of civil and criminal cases. Evidently, the tendency of the courts to keep the volume of published affirmances in line with those of published reversals operates not only at the level of their total output, but also within both the criminal and the civil dockets.<sup>110</sup>

The data thus reveal an unanticipated constraint—a sort of super-priority—that seems to have operated not only at the aggregate level, but also within distinct categories of cases (and, as we will see, geographies). Why this seeming super-priority is so potent is the central mystery raised by this study. But its presence could clear up another puzzle: given the premise that the Illinois Supreme Court’s new criteria would drive the selection of opinions for publication, one might not have expected to see so many affirmances survive the cut while reversals were allowed to drop as far as they did. Reversals address issues on which appellate guidance is usually necessary and over which judges have already reached contradictory conclusions. Wouldn’t an appeals court, prioritizing this form of “selectivity,” naturally protect the publication of such opinions and instead choose not to publish affirmances?<sup>111</sup>

The possibility of a super-priority helps explain why this intuitive expectation did not fully materialize: due to some external motivation, the volume of published affirmances was inflated to stay close to, or above, the volume of published reversals.

We emphasize here the possibility that affirmances were inflated, and not that reversals were suppressed, because four of the five districts remained under the official publication limits for most of the post-shock study period. There was thus no formal pressure from these caps requiring the suppression of either published affirmances or reversals (with the possible exception of the Fourth District, where the official cap seemed relatively closer to binding). It does remain theoretically possible, however, to imagine that reversals were suppressed; for example, if one supposes that the courts were setting an implicit cap for themselves only as to the publication of affirmances, then our data could be read as showing that the courts were then suppressing reversals to stay close to, or under, that number.

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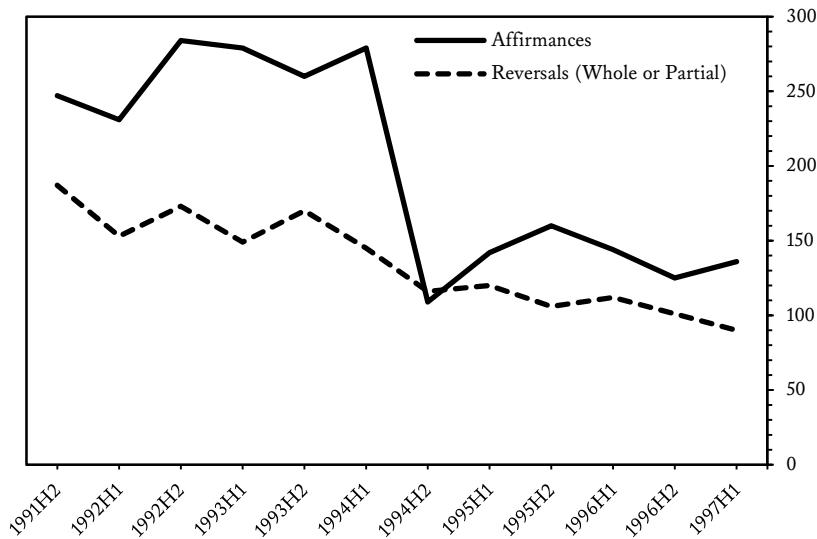
<sup>110</sup> As we discuss below, focusing only on opinions reviewing decisions of the Industrial Commission (which operates the state’s system for workers’ compensation claims) shows a similar pattern. See *infra* Appendix Figure 4.

<sup>111</sup> It is true that some affirmances also address difficult questions and that some reversals simply correct factual errors that have little precedential value. Even so, one might have expected, as a general matter, that published affirmances would be the first thing to go.

### C. The Five Districts

Because the five judicial districts in Illinois varied in their starting points before the policy shock, in the caps assigned to them,<sup>112</sup> and in other characteristics such as population and case composition, we also broke down the data by district. Aside from our desire to see how regularly this pattern occurred from court to court, we were also concerned that the patterns observed in the aggregate might have been unduly influenced by a single dominant district (such as the First District, which includes Chicago) or by a set of similar districts (such as the Fourth and Fifth Districts, which include more rural portions of southern Illinois). In fact, the pattern persisted across all the districts and, in some cases, even operated at the level of individual judges.<sup>113</sup>

Figure 6: Number of Published Opinions by Outcome, First District

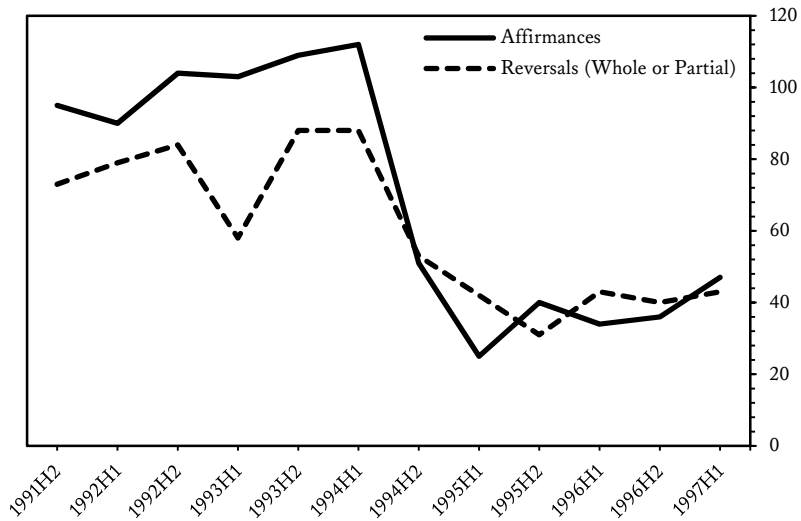


<sup>112</sup> See *supra* Table 1 (listing the number of opinions published in each district in 1993 and the caps that they were assigned in 1994).

<sup>113</sup> See *infra* Appendix Figures 5A-5D (charting results of individual judges in the Fifth District).

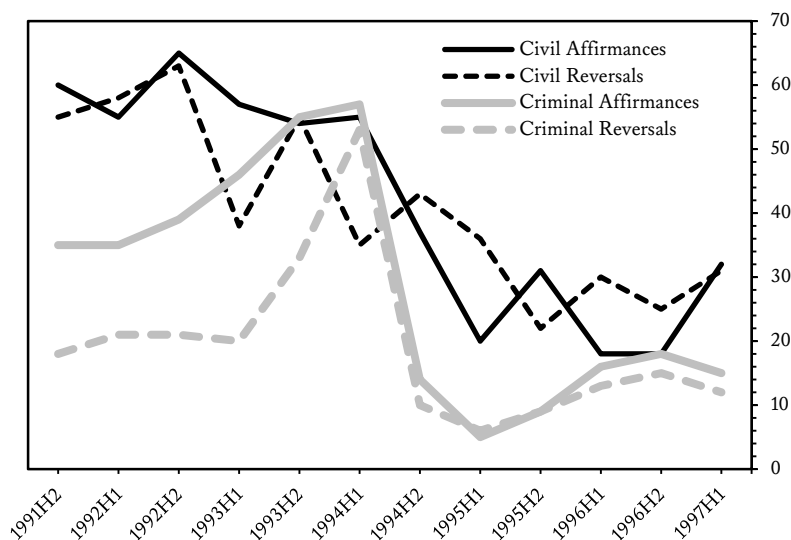
The First District, the largest of all five districts, showed a pattern that largely mirrored our aggregate results: a wide gap between published reversals and affirmances in each case category prior to the rule change, followed by a precipitous drop in published affirmances but falling only to the level of published reversals (which also fell, but not as sharply).

Figure 7: Number of Published Opinions by Outcome,  
Second District



In the Second District, as in our aggregate results, the gap between published affirmances and reversals narrowed after the rule change, but the two categories alternated in outpacing each other.

Figure 7A: Number of Published Opinions by Type and Outcome, Second District



A further breakdown of the Second District's data into criminal and civil dockets more clearly reveals what was happening. Figure 7A shows that, in the Second District's *criminal* cases, the number of published affirmances closely tracks the number of published reversals in each six-month period following the rule change. It is only in the civil docket that the court seemed more willing to allow the number of published reversals to noticeably exceed affirmances in some periods.

Figure 8: Number of Published Opinions by Outcome, Third District

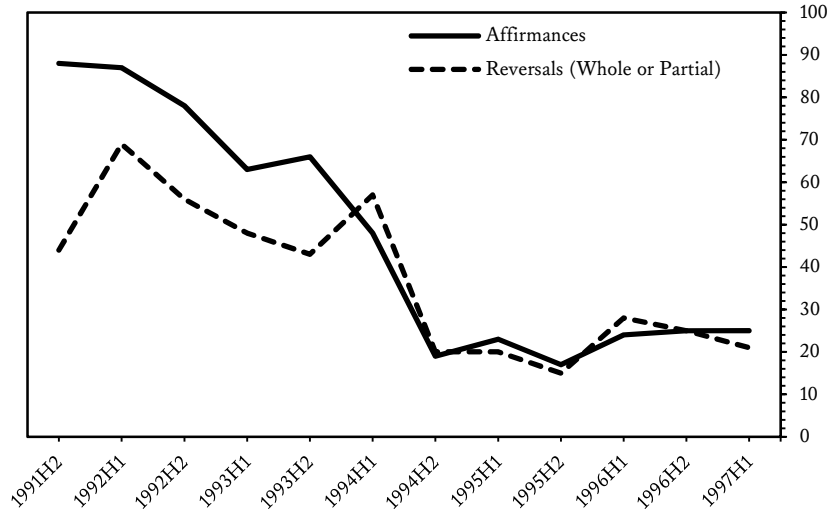
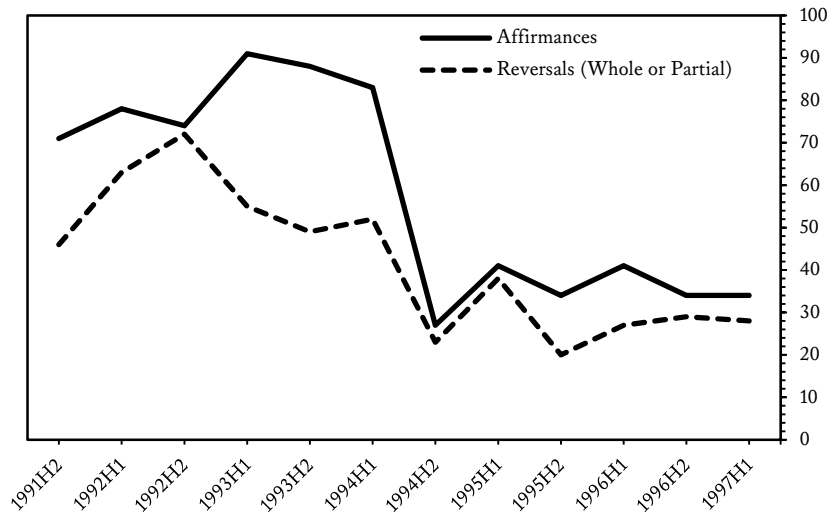


Figure 9: Number of Published Opinions by Outcome, Fourth District

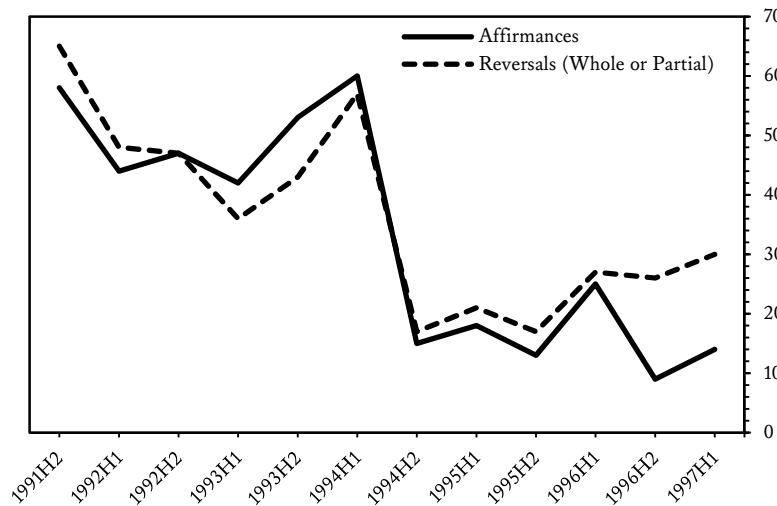




Figures 8 and 9 show that the Third and Fourth Districts also exhibited patterns consistent with the hypothesized super-priority. In the Third District, published affirmances were already declining before the policy shock. The decline was apparently intentional, as this court seems to have anticipated the changes to Rule 23.<sup>114</sup> Nonetheless, both affirmances and reversals dropped sharply at the moment of the policy shock. What is notable here is not the anticipatory decline of published affirmances, but that quantity's sudden leveling and mirroring of the post-shock levels of published reversals.

The results in the Fourth District also reflect key characteristics of the dominant pattern. First, there is a sharp fall in both reversals and affirmances at the point of the policy shock that closes the original gap between them. Beyond that point, the number of published affirmances tended to stay close to, or else to exceed by a small margin, the number of published reversals.

Figure 10: Number of Published Opinions by Outcome, Fifth District



<sup>114</sup> The Third District seems to have anticipated at least the change in Rule 23, if not the caps and page limits in M.R. No. 10343. As Judge McCuskey of that district put it, “[p]rior to the supreme court’s amendment of Rule 23, our court had already scrutinized the rule’s publication requirement. As a result, we reduced the number of opinions filed by our district from 349 in 1992 to 272 in 1993.” See McCuskey, *supra* note 76, at 4. He also noted, however, that “a further reduction to 150 published opinions may appear drastic.” *Id.*

Like the other districts, the number of published affirmances in the Fifth District tracks the number of published reversals. But the Fifth District differs from its counterparts in one notable aspect: The “tracking” behavior is not limited to the time period following the rule change. Rather, the Fifth District seemed to have kept a fairly even balance of published affirmances and published reversals even *before* the policy shock. This close tracking throughout the study period is evident even in the publication patterns of certain individual judges.<sup>115</sup> By the end of the study period, however, the close tracking seen in the Fifth District falls apart; at that point, more than any other district, the Fifth District no longer held published affirmances at approximately the level of published reversals.

#### D. Interpretations and Implications

Our observations of how the Illinois appellate courts triaged their opinion-writing reveal not only which types of opinions the courts prioritized for publication but also suggest what these courts saw as being at stake in their publication choices. Our findings also suggest that these courts understood that their “medium” of judicial expression was not confined to the immediate content of their written opinions—but rather extended to the visible corpus of their decisions taken as a whole.

##### 1. Observing the Triage

Consider first the basic criminal–civil comparison. Our data show that the share of criminal opinions deemed sufficiently low-priority to be cut from publication under the new rules was greater than the share of civil opinions.<sup>116</sup> This differential ran against our original expectations; we had predicted that the importance of public reasoning about criminal punishment would lead the courts to more avidly protect the publication of those opinions.<sup>117</sup> But there were also good reasons, as noted above, to

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<sup>115</sup> See *infra* Appendix Figures 5A–5D (showing data for the four judges in the Fifth District who sat during the entire study period). We must emphasize that the tracking pattern is not evident for *every* individual judge—even in districts such as the Fifth District where the aggregate numbers show a close balance throughout. (That is, idiosyncratic variations among the judges in such a district averaged out into a clearer overall tracking pattern.) And it goes without saying that we are not claiming that these four judges are a representative sample of the Fifth District (much less of any other district).

<sup>116</sup> For a refinement of this interpretation, see the discussion in the Conclusion.

<sup>117</sup> We also knew that the Illinois courts already accorded precedence to criminal cases in procedural matters, such as in scheduling oral arguments. See ILL. SUP. CT. R. 611 (noting that in the “sequence and manner of calling cases for oral argument[,] . . . priority shall be given to appeals in criminal cases over appeals in civil cases”). While precedence in procedural handling

expect that these courts might instead favor civil opinions for preservation: These criminal appeals may have raised repetitive issues or turned on factual matters subject to high levels of deference, whereas the civil docket may have been more varied and thus may have raised more new or unsettled legal issues requiring appellate explication.

It is a more obvious case that reversals should have been favored over affirmances for protection from the publication cuts, as was observed: Reversals present cases in which judicial colleagues have already disagreed and on matters in which the lower courts evidently require further guidance. Thus, reversals seem naturally more likely to survive under the more selective standards for publication, which focus on precedential value.<sup>118</sup>

What such a simple story of priorities among types of cases cannot easily explain, however, is the pattern seen in Figures 2 to 10: Across districts and across categories, immediately after the policy change, the number of published affirmances and reversals each fell from different levels and yet landed at virtually the same place, and then stayed roughly balanced. What could account for this unexpected, persistent pattern?

One explanation might be that such a balance is a natural byproduct of the newly selective criteria for publication: these courts began to limit publication to mainly “hard cases,”<sup>119</sup> which one might expect to fall roughly half as reversals and half as affirmances.<sup>120</sup> We find this possibility

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need not translate into selection of published opinions, we also speculated that the former might be a proxy for a deeper priority that would so translate. For additional examples of precedence for criminal cases in appellate procedure, see U.S. COURT OF APPEALS, FIFTH CIRCUIT, PLAN FOR EXPEDITING CRIMINAL APPEALS 3 (2008) (“This court gives criminal appeals the highest priority in screening, calendaring, and decision.”); *id.* (“By court policy, each judge must give direct criminal cases priority in the preparation and publication of opinions over all other cases except previously submitted direct criminal cases.”). *Cf.* 28 U.S.C. § 2102 (2012) (“Criminal cases on review from the States courts shall have priority, on the docket of the Supreme Court, over all cases except cases to which the United States is a party and such other cases as the court may decide to be of public importance.”); FED. R. APP. P. 45(b)(2) (“In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.”).

<sup>118</sup> The rule change limited publication primarily to those cases which “establishe[d] a new rule of law or modifie[d], explain[ed] or criticize[d] an existing rule of law.” ILL. SUP. CT. R. 23(a).

<sup>119</sup> We use the terms “easy” and “hard” cases in the familiar sense. For a recent critical analysis of the terminology, see Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013). For classic expositions, see Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887 (1987).

<sup>120</sup> The emergence of this balance might bring the Priest–Klein hypothesis to mind. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1,

intriguing, but it cannot be a complete account of our observations.<sup>121</sup> The reason is that our findings reflect *more* than a rough balance between affirmances and reversals. What we seem to see, in many time periods—across districts, case types, and even some individual judges—is a tight tracking pattern, suggesting the active, continuous management of the balance. Furthermore, under a basic hard cases explanation, we should also expect deviations due to noise to favor reversals as often as affirmances—but instead, the data show that where they diverge, affirmances outpace reversals much more often than the other way around.

It remains possible, of course, that these courts began by largely limiting their publications to hard cases—but also actively sought to prevent the volume of published affirmances from falling noticeably below the volume of published reversals. Although future work more closely analyzing the content of these published opinions may shed more light on the extent to which these courts were publishing mainly the hard cases,<sup>122</sup> some further clues from our current data also suggest that the hard cases explanation is not the whole story.<sup>123</sup> One might assume, for instance, that the presence of

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19-20 (1984) (explaining that as the number of cases selected for trial approaches zero, a plaintiff's rate of success approaches fifty percent). In our setting, what is being selected is opinions for publication, rather than cases for trial. The analogous intuition here is more easily and suitably expressed as the possibility that what is left (after the policy shock) are the "hard cases," which tend to fall half as reversals and half as affirmances.

<sup>121</sup> One might imagine other such even-split stories involving more complex mechanisms, including strategic behavior or bargaining, but the evaluation of such hypotheses is beyond the reach of this study. *See, e.g.*, Wald, *supra* note 18, at 1374 ("I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.").

<sup>122</sup> We note that such a pattern is not generally evident in other contexts in which one might expect it to operate, such as other appeals courts. *See, e.g.*, *Caseload Highlights*, CT. STAT. PROJECT (Nat'l Ctr. for State Courts, Williamsburg, Va.), March 2007, available at <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Appellate-justice.aspx> (showing an overall thirty percent reversal rate for decisions made by state intermediate appellate courts).

<sup>123</sup> In addition to the incidence of separate opinions (i.e., concurrences and dissents), as explained in the text, one might imagine several other indicators of the difficulty of a case. These include opinion length (in words) and the number of citations contained within an opinion. Both of these measures, however, are likely confounded by the new limits on opinion length imposed by M.R. No. 10343. *See supra* notes 54-55 and accompanying text. Yet another proxy for such hard cases, or for cases that present questions of precedential value, may be the standard of review used by the appellate court—but our review of a sample of published opinions suggests that the standard is not consistently reported.

We also considered using oral argument as a signal of the relative importance or difficulty of the legal issues at stake in a case. Unlike other jurisdictions, however, the decisions of Illinois's appellate courts, as reported by Westlaw, did not indicate whether oral argument was held. We likewise considered future citations to a given opinion, but such observations would have been confounded by the overall reduction in available citable precedent (due to the policy shock).

a concurrence or dissent serves as a signal of a hard case.<sup>124</sup> We found a greater incidence of such separate opinions among reversals than we did among affirmances—not the roughly equal incidence that one might have expected based on a hard cases explanation alone.<sup>125</sup> More tellingly, although we generally found increases in the share of opinions with a concurrence or dissent, these increases did not occur in the pattern that a hard-cases mechanism operating alone would have implied.<sup>126</sup>

## 2. Concerning Appearances

A further theory is thus needed. We interpret the unusual and persistent pattern observed as suggesting that these appeals courts were acting on a super-priority—manifest in the aim of publishing at least as many affirmances as reversals—while they also sought to limit the number of opinions published altogether. The result of these competing pressures was that published affirmances and published reversals often closely tracked

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<sup>124</sup> See Wald, *supra* note 18, at 1412-15 (describing the motivations of judges to write concurring or dissenting opinions); see also Diane P. Wood, *When to Hold, When to Fold, When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1451-57 (2012) (noting the considerations that prompt judges to publish separate opinions).

<sup>125</sup> It is possible, of course, that concurrences and dissents are more likely to be written in reversals rather than affirmances. For instance, the existence of the lower court's opinion may make the authorship of a separate opinion less costly; or, the collegiality costs of a separate opinion may be lower because a dissent in a reversal agrees with the trial judge unlike a dissent in an affirmance. If there is such a differential, then it is hard to draw conclusions based on the first clue noted in the text. The following analysis, however, which focuses on *changes* across the policy shock rather than absolute levels, is more robust to this potential confounding factor.

<sup>126</sup> Specifically, the increases in the shares of published opinions that include a concurrence, a dissent, or both should be greater for affirmances than for reversals, given how much farther affirmances fell. (That is, the denominator, or the total number of affirmances or reversals published, fell farther for affirmances than for reversals; meanwhile, the numerators for each, or the number of published decisions including a separate opinion, presumably should not have changed as much, if the hard cases were being preserved for publication.) But we found no noteworthy difference between the increase for affirmances and the increase for reversals.

On this point, however, it is worth noting that before the rule change, any case for which a concurrence or dissent was written was presumptively publishable. The 1994 amendments eliminated this presumption. Given that the presence of a concurrence or dissent no longer equates to automatic publication, then the increased frequency we have observed may be understating the increase in the incidence of "hard cases" in the body of published opinions after the shock as compared to before. Note that such a distortion *could* in theory undermine the conclusion we are drawing from our comparisons of this metric among reversals and among affirmances—but only if this distortion were for some reason stronger for affirmances than for reversals (so that our comparison understates the change in average incidence of "hard cases" among affirmances *more* than among reversals).

each other in number. (As noted above, we take care not to overstate the rigidity of this heuristic.)<sup>127</sup>

To the extent that these appeals courts were influenced by a general reluctance to allow the volume of affirmances to fall below the volume of reversals in their visible corpus of published opinions, we speculate that this aim was likely motivated by institutional concerns for signaling judicial quality and a desire to preserve collegiality—a set of motivations one might call reproach-aversion.<sup>128</sup>

If published opinions were lopsided in favor of reversals, they might have created a perception that the trial courts were not getting the job done.<sup>129</sup> The “collective reputation” of the judiciary would suffer and so might the relations between the appeals judges and the trial judges.<sup>130</sup>

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<sup>127</sup> Indeed, as we have already noted, the careful balance between publishing reversals and publishing affirmances that existed in the Fifth District for much of our study period seems to have unraveled by the end. *See supra* Figure 10. And in the Second District, although the tracking of affirmances and reversals is extremely tight in the criminal docket, it is quite loose in the civil docket. *See supra* Figure 7A. As also noted, we have observed this tracking pattern for some individual judges (and to varying degrees), but not for others.

<sup>128</sup> *See supra* note 28 and accompanying text.

<sup>129</sup> Court observers routinely use reversal rates only among published opinions to measure the quality of a particular court. *See, e.g.*, JUDICIAL COUNCIL OF CAL., STATEWIDE CASELOAD TRENDS: 2013 COURT STATISTICS REPORT, 2002–2003 THROUGH 2011–2012, at xvi–xvii (2013) (tracking reversal rates only among cases disposed of by written opinion); Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE, Jan.–Feb. 2010, at 8, 8 (using reversal rates among Supreme Court opinions to “grade” the federal circuit courts); Brad Pauley, *The California Supreme Court’s 2010 Affirmance Rates in Civil Cases Reveal Change and Continuity*, AT LECTERN: PRACTICING BEFORE CAL. SUP. CT. (Apr. 28, 2011, 8:35 PM), <http://www.atthelectern.com/the-california-supreme-courts-2010-affirmance-rates-in-civil-cases-reveal-change-and-continuity>, archived at <http://perma.cc/3YKF-ANVJ> (discussing the California Supreme Court’s affirmance rates on review of civil cases from the various intermediate appellate courts in 2010).

To be clear, we do not mean to endorse such statistics as measures of quality. For example, the typical focus on reversal rates in published Supreme Court opinions ignores factors such as certiorari procedures and other selective processes that precede the Court’s decisions. But regardless of the *accuracy* of such measures, we hypothesize that it is the *salience* of the published opinions that drives our suggested super-priority in the case of the Illinois appeals courts.

<sup>130</sup> *See* Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT’L L. 451, 453 (2009) (explaining “collective reputation” in terms of “a judiciary that operates effectively [and thus earns] respect as a unit within its own political system”); *id.* at 455 (“Each individual judge cares about his reputation with the relevant audiences, but also about the reputation of the group as a whole . . . with external constituencies. Collective reputation determines the status of the judiciary within the relevant audience . . .”); *id.* at 459 (“These constituencies might include the bar, academic commentators, other branches of government, as well as political parties and others . . .”). In our context, we are describing the possibility that an appeals court might actively play a role in influencing the collective reputation of the trial courts it oversees.

Consider the unenviable position of those Illinois appeals judges who sought to avoid creating such a perception of a weak trial bench. The true affirmance rate was relatively high—above seventy percent.<sup>131</sup> Yet this true rate was obscured by the use of unpublished decisions, which at the time were practically inaccessible to anyone not involved in the case itself (in contrast to today's easy online access to so-called unpublished opinions).

The frequency of affirmances among *published* opinions was thus far more salient. But it was also likely to be lower than the (virtually invisible) true affirmance rate because the criteria for publication tended to favor reversals. Before the rule change, the appeals courts could nevertheless signal the quality of the lower courts by choosing to publish—and thus make visible—a large number of affirmances. Under the new rules, however, the appeals courts became more limited in their ability to continue in this practice. Still, at the very least, they could try to avoid the appearance that trial court decisions were wrong more often than right. That is, the appeals courts could still publish enough affirmances, as a sort of “filler,” so as to prevent the number of published affirmances from falling below the number of published reversals.<sup>132</sup> One might even speculate that the caps imposed

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<sup>131</sup> Note that, in some quarters, even an 86% affirmance rate might be seen as a bad signal about the quality of the trial bench. As Judge Jon Newman noted in the context of the federal Second Circuit in the 1990s, “[a] district judge expressed the view that the reported rate of appellate reversals, most recently said to be about 14%, demonstrated that something was seriously wrong. As he put it, either the district judges are not doing their jobs properly (by making too many errors) or the circuit judges are not doing their jobs properly (by reversing too many decisions that are not erroneous).” Newman, *supra* note 103, at 630-31.

<sup>132</sup> Such publication of extra opinions as “filler” would, of course, tend to undermine the rationale for the rule change in the first place. Recall that a primary justification offered by members of Illinois Supreme Court for the 1994 rule change was that the “avalanche of opinions” taxed the capacity of the bar and imposed real costs in terms of legal research. Illinois Supreme Court Administrative Order, M.R. No. 10343 (1994) (Bilandic, C.J., writing in support); *id.* (Heiple, J., writing in support).

The costs of over-publication may be familiar to readers from the controversy over the citation of unpublished decisions in the federal courts. Judge Kozinski, for instance, has lamented the publication (for citation) of decisions that may not have received the same care and attention as other published opinions. In addition to echoing the concerns raised by the Illinois Supreme Court, he notes that such opinions, which are “often drafted entirely by law clerks and staff attorneys” or “converted bench memo[s],” can be “highly misleading source[s] of authority.” Letter from Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Samuel A. Alito, Jr., Circuit Judge, U.S. Court of Appeals for the Third Circuit 4-6, 9-10, 11-13 (Jan. 16, 2004), available at <http://www.nonpublication.com/kozinskiletter.pdf> (citing, among other things, Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Opinions*, CAL. LAW., June 2000, at 43, 44 and *Unpublished Judicial Opinions: Hearing Before the H.R. Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 12-13 (2002) (prepared statement of Hon. Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit)).

by M.R. No. 10343 gave the appeals courts an implicit sense of license to publish extra affirmances up to the numerical cap.<sup>133</sup>

Notably, such a perception-management account may help explain why the super-priority appears to have operated with greater force in the criminal docket, at least in the Second District. If a court cared more about perceptions of quality of the criminal justice machinery, then it might have given greater care to matching the volume of affirmances to reversals among published opinions in the criminal docket.

More generally, the tending of appearances in this way may have served, in part, a legitimizing function that would otherwise have been served more directly by actually publishing opinions—that is, by public reasoning—a preferred method that had become more constrained under the amended regime.<sup>134</sup> If so, one might interpret such a substitution as a pragmatic adaptation in judicial expression, a shift from substance toward form.

### 3. Collegiality and the Judicial Audience

A closely related set of further motivations may be grouped under the heading of “collegiality.”<sup>135</sup> Trial judges do not like being reversed,<sup>136</sup> and they surely like it even less when a reversal comes in the form of a published opinion that names them individually and spells out their mistakes in detail.<sup>137</sup> How much more vexing it would be for the trial judges if most of the opinions chosen for publication were reversals—while

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<sup>133</sup> Recall that these courts generally published significantly fewer opinions than the caps set by the Illinois Supreme Court. *See supra* Section I.C.

<sup>134</sup> *Cf.* Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1364-66 (1988) (describing the varied audiences to and purposes for which judges write).

<sup>135</sup> We do not mean to imply that these are competing or mutually exclusive explanations. To the contrary, these explanations are closely intertwined and together form the “appearances” super-priority that we have described above.

<sup>136</sup> Such “reversal aversion” has been widely studied in the context of the federal courts. *See* Choi et al., *supra* note 7, at 519-25 (surveying literature on what they term “reversal aversion” among trial judges); *id.* at 518-19 (“Reversal is also potentially embarrassing and detrimental to a trial judge’s prospects of promotion to the appeals courts.”).

<sup>137</sup> Notably, in the tables listing unpublished decisions during the period we study, the trial judge is not identified. A trial judge’s potential sensitivity to being reversed by name is reflected in what Judge Patricia Wald described a “prevailing decorum” early in her career as a federal appeals judge: “[I]f we upheld a trial judge, we referred to her by name; if we reversed the judge, we left him anonymous.” Wald, *supra* note 18, at 1382. More generally, on the risk to collegiality between appeals and trial judges due to reversals, see, for example, Newman, *supra* note 103, at 629 (“There is . . . an undeniable basis for some tension between judges of trial and appellate courts, borne of the structural relationship in which they both function. Appellate judges have jurisdiction to reverse the judgments entered by trial judges. When that authority is exercised, the potential arises for some strain upon the normally cordial relationships between trial and appellate judges.”).



affirmances (which are in fact the vast majority of decisions) were hidden in unpublished dispositions. Further motivating the aim of at least matching published affirmances to published reversals, then, might be a concern for preserving collegial relations between the trial and appellate judges in each judicial district.<sup>138</sup>

Such collegiality-based motivations may also help explain why the tracking pattern persists within certain breakdowns: These categories might also map onto distinct “audiences” of judicial colleagues. That is, the appeals court may be seeking to reassure specific groups of colleagues that they are managing appearances in a way that promotes positive public perceptions of each of those groups.<sup>139</sup>

For example, consider the subset of appeals that come from decisions of the Industrial Commission, Illinois’s workers’ compensation system. Rather than speaking to the trial courts, these appellate opinions speak directly to the Industrial Commission—a distinct “audience.” And indeed, this small

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<sup>138</sup> Implied in this account is the perceived possibility of a “collegial cost” to an appeals court that publishes reversals too frequently relative to affirmances (a cost to vertical collegiality between the appellate and trial judges), as other scholars have studied about dissenting (a cost to horizontal collegiality among appellate judges). *See generally* Epstein et al., *supra* note 29, at 103 (describing such a “collegial cost” from dissenting that manifests as “dissent aversion” among appeals judges).

One might also imagine further variations of such a perceived cost to making trial judges look bad through infelicitous publication choices. For example, the fact that the judges of the trial and appellate courts in Illinois are elected might raise the stakes for managing perceptions of the trial bench or of particular trial judges or for maintaining collegiality among judges. The influence of such electoral politics may be dampened, however, by the fact that retention elections for these judges (which happen every six years for the trial judges and every ten years for the appeals judges) are uncontested and are generally understood to be of little risk for the incumbent. *See* ILL. CONST. art. VI, § 12(d); Larry Aspin, *Judicial Retention Election Trends: 1964–2006*, 90 JUDICATURE 208, 209 tbl. 1 (2007). Future work that includes data on the party affiliations of the trial and appellate judges during this period may be able to test for same- and cross-party effects. It is, however, telling that the super-priority we generally observe can also specifically be seen in the subsample of cases appealed from rulings of the Industrial Commission, whose members are appointed and not elected. *See infra* note 140 and accompanying text.

<sup>139</sup> Our account thus engages both “internal” and “external” audiences, or what one might call “primary” and “secondary” audiences: the appeals court wishes to be seen by their trial court colleagues (an internal or primary audience) as managing outward appearances (as perceived by external or secondary audiences such as the bar or even the broader public). *See* Ruggiero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 17–20 (2009) (describing an appellate court’s “primary” audiences as the parties and the trial court involved in a reviewed case, and “secondary” audiences as potentially the broader judiciary, other political institutions, the bar, academia, and the public); Garoupa & Ginsburg, *supra* note 130, at 453 (describing “internal” audiences as “within the judiciary itself” and “external” as including “lawyers, the media, or the general public”).

subset of appellate opinions exhibits a similar pattern, suggesting that the super-priority is at work here too.<sup>140</sup>

Likewise, for our criminal–civil distinction: Some of the trial-court circuits employ a system in which criminal cases are directed to one set of trial judges, and civil cases to another set.<sup>141</sup> The distinction is formalized in some trial-court circuits through the creation of a particular “criminal division” of trial judges.<sup>142</sup> In others, the separation is more informal, with some trial judges hearing only one class of cases.<sup>143</sup> But regardless of its form, such division of cases creates distinct audiences of trial judges for the appeals courts to consider when weighing collegiality concerns.<sup>144</sup> The existence of distinct audiences may thus help explain why the super-priority seems to hold within our two major categories, as well as why we observe the pattern repeated district by district.

#### CONCLUSION: SPILLOVERS IN JUDICIAL CHOICES

Our study suggests that for the sake of appearances the Illinois appellate courts sought to balance their publication of reversals and of affirmances. If so, then the choice to publish a given decision may have depended not only on the qualities of that case alone, but also on which other cases had already been published and, specifically, on how many were reversals and how many were affirmances. The appearances super-priority thus implies spillover effects among the courts’ publication choices in otherwise unrelated cases.<sup>145</sup>

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<sup>140</sup> See Appendix Figure 4. In fact, appeals from the Industrial Commission are heard by a panel of diverse judges chosen from across the districts. That is, such a case might be heard by a panel comprised of a First, Third, and Fourth District judge, for example. This structure suggests one possible mechanism by which the super-priority described above might have spread across the districts.

<sup>141</sup> See, e.g., STATE OF ILL., CIRCUIT COURT OF COOK COUNTY, *Judges Information*, <http://www.cookcountycourt.org/aboutthecourt/JudgesInformation.aspx> (last visited May 11, 2015), archived at <http://perma.cc/AP9M-KBLW> (noting several “divisions” and the related assignment of judges).

<sup>142</sup> See, e.g., *id.* (showing a criminal division in the Circuit Court of Cook County).

<sup>143</sup> See, e.g., STATE OF ILLINOIS, FOURTH JUDICIAL CIRCUIT, SECOND AMENDED ADMINISTRATIVE ORDER, available at <http://www.fourthcircuitil.com/news/10-1.php> (providing judicial assignments and noting the types of cases assigned to each judge). Note that the Fourth Circuit of trial courts is distinct from the Fourth District of the appeals courts.

<sup>144</sup> One might also imagine that the courts are monitoring this norm within only one category (say, criminal) as well as for the total corpus of opinions. This approach could generate a similar pattern in the remaining (civil) category. If so, however, we might expect to see the latter category (civil) occasionally having more reversals than affirmances, as it can absorb the occasional excess of affirmances created by the first category. But we have not noticed this alternative pattern in the data.

<sup>145</sup> Two further forms of such interdependency are more obvious than the one revealed in this study. First, that time constraints mean that the time spent on one opinion cannot be spent on

Such a spillover would alter how we interpret the judicial choices we observe. In fact, it would unsettle our own earlier conclusions in this study. Recall our original finding that more criminal cases than civil cases appear to have been deemed low-priority for publication under the new rules.<sup>146</sup> But now consider the possible influence of the super-priority: what if the number of opinions we observed being published were inflated by the inclusion of affirmances serving only as filler? What really should be compared as between criminal and civil cases, then, would be the publication of *reversals* only.<sup>147</sup> Through that more refined lens, we would see that in all districts the publication of criminal reversals does in fact drop disproportionately relative to that of civil reversals.<sup>148</sup>

But the implications of such a spillover go beyond matters of interpretation. Whenever published reversals began to outnumber published affirmances, these courts faced an unpalatable choice. At that point, these courts could either dilute the case law with more affirmances and thereby subvert the high court's command to be selective about publication, or they could suppress the publication of further reversals and thereby create an artificial drag on the development of case law.

Either choice may have been preferable, however, to the more troubling spillover effect suggested in the Introduction. These courts could have satisfied their higher-level priorities of selectivity and of appearances by sacrificing accuracy instead—that is, by publishing only case-law-worthy opinions, while switching some of those reversals to affirmances. The reason these courts could hold fast to the super-priority of accuracy, and avoid managing appearances by distorting actual outcomes among the cases set for publication, is the strong asymmetry of visibility that existed at the time between published and unpublished decisions of these courts. The truly unavailable nature of the unpublished opinions allowed these courts to decouple accuracy from appearances, in deploying the judicial medium. By contrast, today's so-called unpublished opinions are widely available in the

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another; and second, that if one opinion on a given legal issue is published, then a second case addressing the *same* issue may become redundant.

<sup>146</sup> Or more precisely, that a larger share of opinions in criminal cases were disqualified by the higher bar for publication.

<sup>147</sup> The reason is that the super-priority implies that observing the number of published affirmances may not be informative about the relative publication-worthiness of civil versus criminal cases.

<sup>148</sup> This conclusion would be narrower because we would no longer be drawing conclusions about affirmances, and thus, no longer about the priorities put on criminal versus civil opinions as a whole. One exception should be noted, however, in the Fourth District: to the extent that its formal cap actually constrained its publication choices, then this shift of attention to data solely about the reversals would not be necessary.

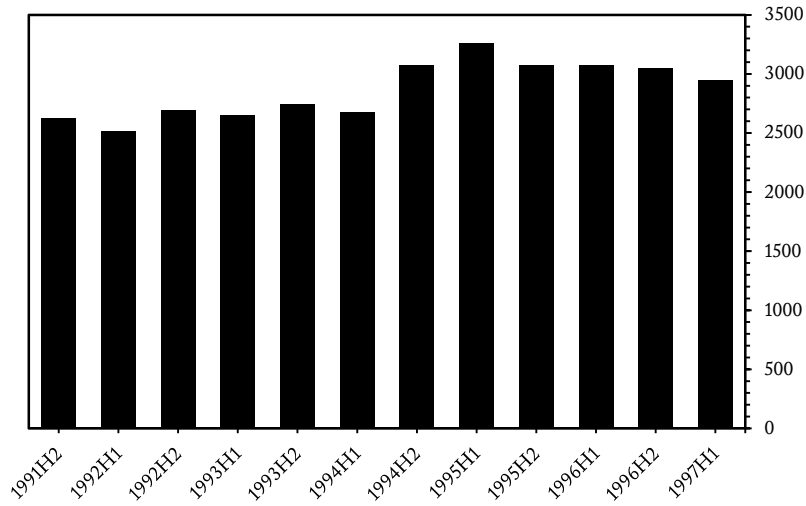
federal courts and in many state courts. Such universal visibility may have its advantages, but in theory it may also force the tradeoff between accuracy and appearances—implying the possibility of spillovers across the actual outcomes of cases.

## Appendix

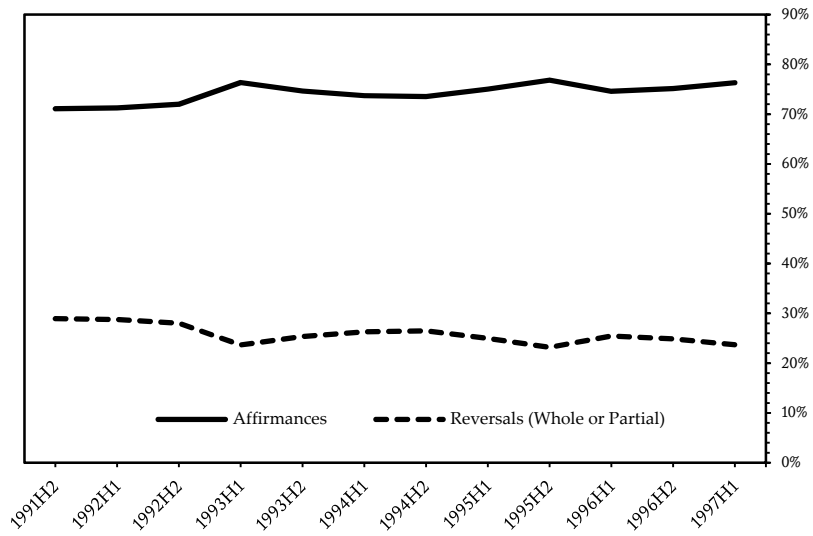
Appendix Table 1: Annual Reports of the Illinois Courts and Westlaw Data, 1991–1997

		1991	1992	1993	1994	1995	1996	1997
Annual Reports of the Illinois Courts	Opinions	2284	2234	2196	1678	1070	1098	1006
	Rule 23 Orders	3380	3331	3592	4558	4696	4421	4805
	Summary Orders	—	—	—	—	992	1105	816
	Total	5664	5565	5788	6236	6758	6624	6627
Westlaw Dataset	Opinions	2007	1971	1899	1436	946	958	885
	Table Decisions	3323	3245	3499	4318	5392	5165	5257
	Total	5330	5216	5398	5754	6338	6123	6142
Westlaw Total as a Percent of Reported Total		94.1	93.7	93.3	92.3	93.8	92.4	92.7

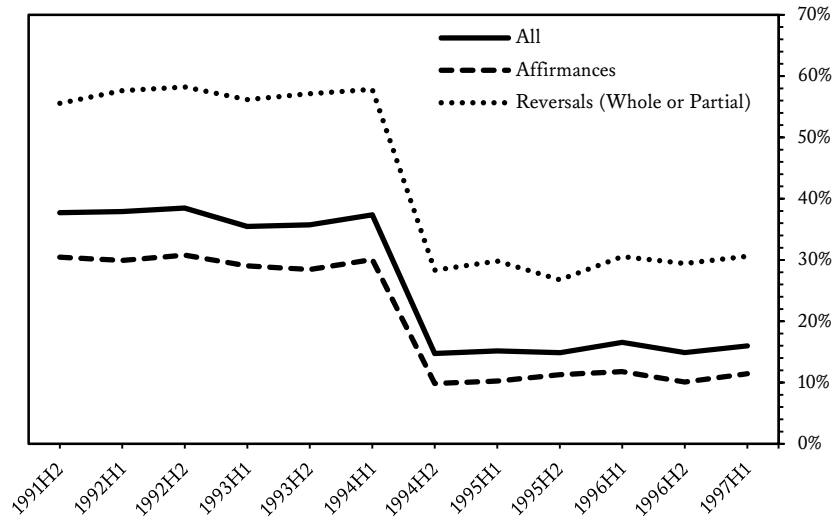
Appendix Figure 1: Number of Total Dispositions,  
All Districts



Appendix Figure 2: Dispositions by Outcome (as Percent of Total),  
All Districts



Appendix Figure 3: Publication Rate (by Outcome),  
All Districts



Appendix Table 2: Change in Published Opinions by Outcome

		Before	After	Changes
All Districts	Affirmances	3412	1487	-56.4%
	Reversals (Whole or Partial)	2394	1329	-44.6%
1st District	Affirmances	1580	816	-48.4%
	Reversals (Whole or Partial)	977	645	-34.0%
2nd District	Affirmances	613	233	-62.0%
	Reversals (Whole or Partial)	470	252	-46.4%
3rd District	Affirmances	430	133	-69.1%
	Reversals (Whole or Partial)	317	129	-59.3%
4th District	Affirmances	485	211	-56.5%
	Reversals (Whole or Partial)	337	165	-51.0%
5th District	Affirmances	304	94	-69.1%
	Reversals (Whole or Partial)	296	138	-53.4%



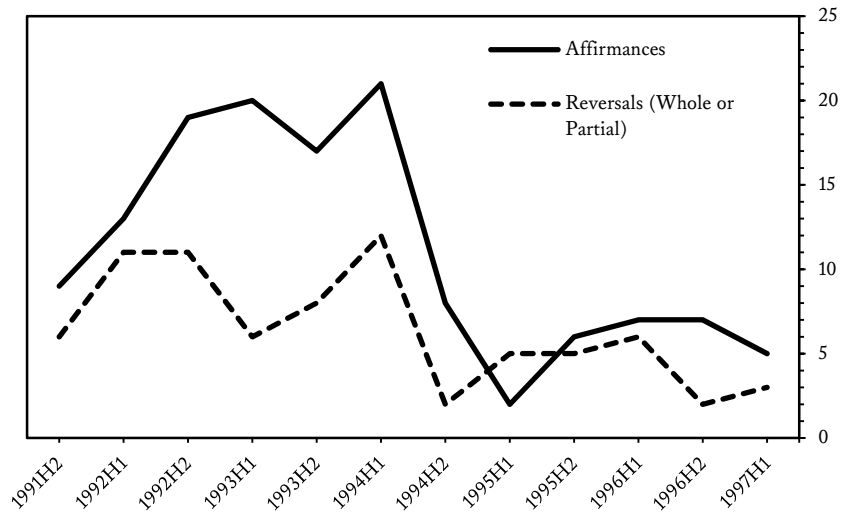
Appendix Table 3: Change in Published Affirmances by Case Type

	Affirmance Type	Before	After	Changes
All Districts	Criminal	1340	440	-67.2%
	Civil	2072	1047	-49.5%
1st District	Criminal	640	208	-67.5%
	Civil	940	608	-35.3%
2nd District	Criminal	267	77	-71.2%
	Civil	346	156	-54.9%
3rd District	Criminal	167	47	-71.9%
	Civil	263	86	-67.3%
4th District	Criminal	163	86	-47.2%
	Civil	322	125	-61.2%
5th District	Criminal	103	22	-78.6%
	Civil	201	72	-64.2%

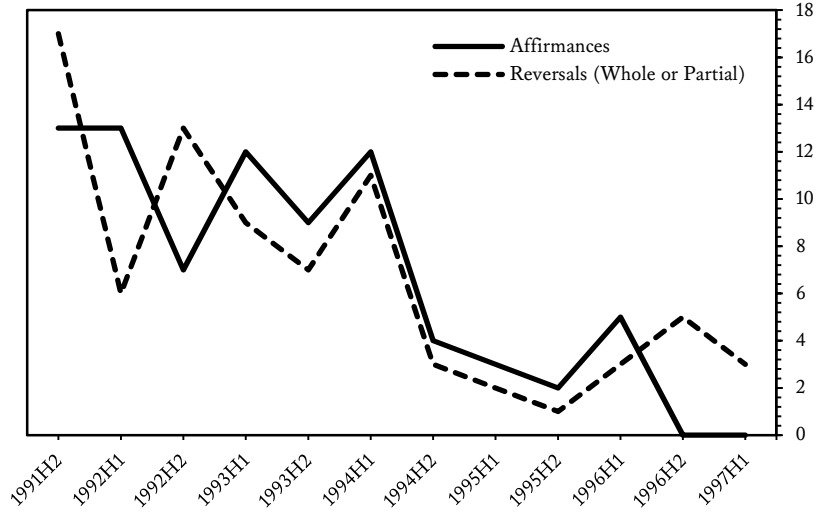
Appendix Table 4: Change in Published Reversals by Case Type

	Reversal Type	Before	After	Changes
All Districts	Criminal	806	347	-56.9%
	Civil	1591	982	-38.3%
1st District	Criminal	313	163	-47.9%
	Civil	664	482	-27.4%
2nd District	Criminal	166	65	-60.8%
	Civil	304	187	-38.5%
3rd District	Criminal	123	43	-65.0%
	Civil	194	86	-55.7%
4th District	Criminal	120	43	-64.2%
	Civil	217	122	-43.8%
5th District	Criminal	84	33	-60.7%
	Civil	212	105	-50.5%

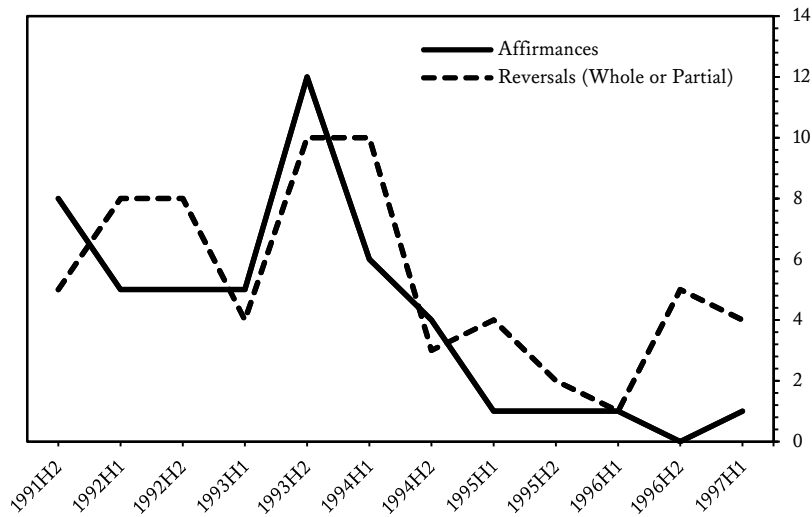
Appendix Figure 4: Number of Published Opinions by Outcome, Appeals from the Industrial Commission



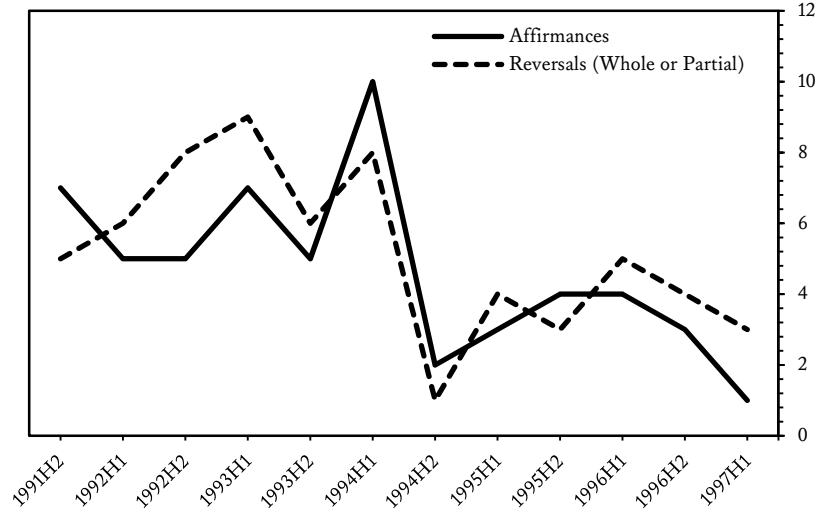
Appendix Figure 5A: Number of Published Opinions by Outcome, Judge A (Fifth District)



Appendix Figure 5B: Number of Published Opinions by Outcome, Judge B (Fifth District)



Appendix Figure 5C: Number of Published Opinions by Outcome, Judge C (Fifth District)



Appendix Figure 5D: Number of Published Opinions by Outcome, Judge D (Fifth District)

