

Articles

INVISIBLE EXECUTIONS: A PRELIMINARY ANALYSIS OF PUBLICATION RATES IN DEATH PENALTY CASES IN SELECTED JURISDICTIONS

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I. INTRODUCTION

“This court is an institution defined by the reasoned exercise of power. [Its silence] signals disregard for the public.” *United States v. McFarland*, 311 F.3d 376, 420 (5th Cir. 2002) (Jones, J., dissenting).

“Federal appellate courts’ twin duties are to decide appeals and to articulate the law. Writing reasoned opinions, especially in important cases, is critical to the responsible performance of these duties.” *Id.* at 417.

Executions in America are typically invisible. High profile executions are the exceptions that demonstrate the rule. When a particularly infamous murderer is put to death, such as Timothy McVeigh or Ted Bundy, the execution receives significant attention. Yet, in nearly all other cases, executions are banal. For example, just two days after the media circus that was McVeigh’s execution, John Wheat was executed in Texas.¹ A day after that, Jay Scott was executed in Ohio.² Yet no one paid attention to Wheat or Scott. Occasionally a reporter from the local paper where the murderer or murder victim grew up might file a story, but the story is minor and the coverage local.

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¹ Death Penalty Information Center, *Executions in the U.S. in 2001*, at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=463> (last visited Sept. 8, 2003).

² *Id.*

Infamous murderers and milestone executions (like the three-hundredth execution in Texas) garner coverage. All others occur in darkness.

For example, just thirty-six hours before the United States invaded Iraq in Operation Iraqi Freedom, the United States executed Louis Jones. Jones had served in Iraq when the United States conducted Operation Desert Storm over ten years earlier. The pre-eminent American newspaper, *The New York Times*, which had given significant coverage only days earlier to the fact that Jones was seeking executive clemency based on his exposure to sarin gas during the first Gulf War,³ barely covered the execution. The *Times* sent no reporter to witness the execution, relying instead on a short, three-paragraph story from wire services.⁴ While it is possible to explain the lack of interest in the Jones execution by suggesting that the commencement of armed conflict in Iraq sucked all the oxygen from other news stories, the war cannot explain why no one paid attention when Juan Raul Garza was executed on June 19, 2001.⁵ Garza was the first federal execution since Timothy McVeigh, who was executed on June 11.⁶

The haphazard coverage given to executions by the national media caused us to wonder whether the treatment of death penalty cases by state and federal appellate courts has been similarly haphazard. We decided to explore this question by examining the various stages of a death penalty case to ascertain how state and federal courts dispose of the cases. Death penalty cases typically involve three appeals: the direct appeal, the state habeas proceeding, and the federal habeas appeal. We examined these three stages of appeals in California, Florida, Georgia, Oklahoma, Texas, and Virginia. We chose these states because they either have significant death row populations, carry out a significant number of executions, or both. Our methodology is discussed below. In short, we have analyzed the frequency of publication in direct appeal opinions, state habeas opinions, and federal habeas appeals at the appellate level.⁷

We were interested in examining publication rates for two different reasons. First, although in recent months there has been significant media interest in the general issue of capital punishment—owing largely to evidence of death row exonerations, as well as Governor George Ryan's decision to commute 167 death sentences to life in prison, and the decisions in several other states to impose

³ Adam Liptak, *Condemned Killer Exposed to Nerve Gas Seeks Mercy*, N.Y. TIMES, Mar. 16, 2003, at A20.

⁴ *U.S. Executes Gulf War Veteran Who Raped and Killed a Soldier*, N.Y. TIMES, Mar. 19, 2003, at A23.

⁵ Death Penalty Information Center, *supra* note 1.

⁶ Death Penalty Information Center, *supra* note 1.

⁷ We have not examined publication rates at the district court level in federal habeas proceedings, largely because the publication rate is exceedingly low in all jurisdictions.

moratoria on executions—there has been little attention paid to executions individually. Much as Rousseau loved mankind while hating man, the current media interest in the death penalty has focused on general themes while ignoring individual cases. Death penalty opinions, however, necessarily pertain to a particular case. Accordingly, a high number of unpublished opinions would be consistent with a general lack of interest in particular cases.

Second, and more important, the issuance of unpublished death penalty opinions has an impact on death penalty litigation. Opinions that are unpublished, especially state court opinions, are at times difficult to locate. Furthermore, even when unpublished opinions are available electronically, as is the case with opinions from most federal courts of appeals, death penalty lawyers are required to finesse Byzantine and inconsistent rules concerning the permissibility of citing these unpublished cases. In some jurisdictions, unpublished opinions may be cited and are authoritative; elsewhere, unpublished opinions may be cited, but are not authoritative; in still other circuits, unpublished opinions may not be cited, and lawyers who violate this “no citation” rule are subject to sanction.

Where lawyers are literally unaware of the existence of unpublished opinions, or where they are cognizant that certain opinions exist but are restrained from citing them, arbitrary injustice may result. If an unpublished opinion is favorable to a death row inmate, a lawyer who does not have access to the appellate court’s reasoning, or who is precluded from citing to it, may be unable to press a similar argument in the case of his or her client. If the lawyer’s client does not prevail on habeas under facts that are arguably indistinguishable from the case that went unpublished, then arbitrariness results.

The debate over unpublished opinions has been ongoing for a number of years. In one famous case, Judge Richard Arnold argued that unpublished appellate decisions violate Article III of the United States Constitution.⁸ His argument prompted Ninth Circuit Judge Alex Kozinski to defend the constitutionality, as well as the wisdom, of unpublished opinions.⁹ Whatever the merits of unpublished opinions in the typical case, death penalty cases are different. This is true not only as a philosophical proposition and doctrinal matter,¹⁰ but in a more practical

⁸ *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1084 (8th Cir. 2000).

⁹ *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). It seems fair, however, to say that the judges who have expressed themselves on this issue favor Judge Arnold’s position. See, e.g., *Symbol Techs, Inc. v. Lemelson Med., Educ., & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002) (Newman, J., dissenting); *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001), *pet. for reh’g en banc denied*, 256 F.3d 260 (5th Cir. 2001) (Smith, Jones, & DeMoss, JJ., dissenting). The debate is nicely analyzed in Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix*, 4 J. APP. PRAC. & PROCESS 1 (2002).

¹⁰ See *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

sense as well. In every context other than the death penalty, the parties to the litigation can widely disseminate the opinion. An insurance company aggrieved, or gladdened, by an unpublished opinion can call attention to it in communications with others of similar interest. For example, when the Fourth Circuit held in an unpublished opinion that a hotel that had been damaged by Hurricane Hugo could not recover projected lost earnings from its insurer,¹¹ the insurance company alerted other insurers to the opinion by publishing it in a trade journal.¹² Other companies then used the decision as a basis to deny similar claims following a subsequent hurricane.¹³ In the context we have examined, the person aggrieved by the unpublished opinion has been executed. To be sure, the inmate's lawyer or family members may call attention to the opinion denying relief, but the person with the most direct incentive to do so is dead. Courts can write tendentious, sloppy opinions because there is no one left alive who has an interest in holding them up to shame.

The debate over unpublished opinions has continued for a number of years precisely because a significant number of appellate decisions are not published. In the federal courts of appeals, approximately eighty percent are unpublished.¹⁴ Unpublished opinions appear in two forms: those that are denominated "not for publication" but are nevertheless distributed to companies that publish them electronically (like Westlaw or Lexis); and those that are not published at all, either electronically or in official reporters.

Of the thirteen federal courts of appeals, eleven of them make their unpublished opinions available to Westlaw and Lexis.¹⁵ As a result, unpublished opinions from eleven of the thirteen circuits are accessible, both to other lawyers and to the public generally. Whether these unpublished opinions may be cited by counsel is an issue that varies from circuit to circuit. For example, the D.C. Circuit permits all opinions to be cited as authority, whereas the First, Second, Seventh, Ninth, and Federal circuits prohibit citation to unpublished opinions.¹⁶ The remaining circuits discourage citation to these opinions but do not forbid it.¹⁷ Astonishingly, the Ninth Circuit rules provide that an appellate lawyer who calls a court's attention to an unpublished opinion may be

¹¹ See *Prudential LMI Commercial Ins. Co. v. Colleton Enters., Inc.*, No. 91-1757, 1992 U.S. App. LEXIS 25719 (4th Cir. Oct. 5, 1992).

¹² See Eron Berg, *Unpublished Decisions: Routine Cases or Shadow Precedents?*, WASH. STATE BAR NEWS, Dec. 2000, available at <http://www.wsba.org/media/publications/barnews/archives/2000/dec-00-unpublished.htm> (last visited Sept. 8, 2003).

¹³ *Id.*

¹⁴ This percentage was calculated from information found at www.uscourts.gov/courtsofappeals.html (last visited Sept. 8, 2003).

¹⁵ Barnett, *supra* note 9, at 2.

¹⁶ *Id.* at 4.

¹⁷ *Id.*

sanctioned.¹⁸ These arguable violations of the lawyer's First Amendment guarantee, as well as the litigants' Fourteenth Amendment rights, however, are not our present concern.

In both the Fifth and Eleventh Circuits, unpublished opinions are not distributed to Westlaw or Lexis. These opinions, therefore, are truly invisible. A copy of an unpublished decision may, of course, be requested by contacting the office of the court clerk, but the opinions are not electronically searchable, meaning that lawyers must know exactly what case they are seeking. An opinion must be requested by case name or number, and then someone must pay for a copy of the opinion.¹⁹ In the Fifth Circuit, lawyers may freely cite unpublished opinions. The problem is that the lawyers must first locate the desired opinion. And even if found, citations may be ineffective since the Fifth Circuit, like the Eighth, denies unpublished opinions the status of "precedent."²⁰

State court rules regarding citation are more difficult to locate. The publication rates of state courts, however, can be ascertained exactly as are the rates for the federal courts.

II. METHODOLOGY

To date, no study has specifically examined the use of unpublished opinions in death penalty cases. Publication rates in general are known, and there have been studies of publication rates in specific types of cases.²¹ We therefore identified the three states with the largest death row population, Florida, California, and Texas, as well as three other states that have carried out a significant number of executions, Georgia, Oklahoma, and Virginia. We began by identifying the most recent executions in each of these jurisdictions. Several of the states maintain web sites that provide this information, and the Death Penalty Information Center maintains a site that includes information for each of the states.²²

We had some concern that the enactment of the Anti-terrorism and Effective Death Penalty Act (AEDPA) may have altered publication

¹⁸ See 9TH CIR. R. 36-3; Barnett, *supra* note 9, at 9.

¹⁹ The difficulty of obtaining unpublished opinions from the Fifth and Eleventh Circuits is something that is not known even to judges on other courts of appeals. Thus, for example, Judge Arnold, who is critical of the practice of nonpublication, claimed that "unpublished" does not mean "secret" because "anyone may gain computer access to any opinion." Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS, 219, 219-20 (1999). Judge Arnold's confidence is misplaced with respect to opinions in the Fifth Circuit, where computer access is not possible, and obtaining opinions is not costless.

²⁰ Fifth Circuit Rule 47.5.4 provides that unpublished opinions issued after January 1, 1996, are "not precedent" but are considered "persuasive"; see Barnett, *supra* note 11, at 12.

²¹ See, e.g., Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Court of Appeals*, 54 VAND. L. REV. 71 (2001) (examining decisions in unfair labor practices cases).

²² Death Penalty Information Center, *State by State Death Penalty Information*, at <http://www.deathpenaltyinfo.org/article.php?did=121&scid=11> (last visited Sept. 8, 2003).

rates. Consequently, we supplemented the most recent executions by augmenting the list of cases with five executions, selected at random, that occurred between 1990 and 1995, prior to the enactment of the AEDPA. Once we had created a list of names, we searched in each jurisdiction, in Westlaw and Lexis, for reported decisions. We searched for direct appeal opinions, state habeas dispositions, and federal habeas opinions. When an opinion could not be located, we would contact the relevant court clerk, and request a copy of the opinion, if any existed.

With respect to our computation of page length, because both published as well as unpublished opinions are available on Westlaw for all federal jurisdictions, other than the Fifth and Eleventh Circuits, comparing published and unpublished opinions presents no difficulty. Because unpublished opinions from the Fifth and Eleventh Circuits, as well as the Texas Court of Criminal Appeals, are not electronically available (and are available only in type-draft) we performed an additional calculation; thus, we calculated the approximate words per page on an electronic versus a type-draft opinion in order to reach conclusions about the length of unpublished opinions issued by those courts. The mechanics of this calculation are set out in a footnote,²³ and while we believe the estimates to be accurate, they are still estimates.

III. DATA

Data from the individual states are reflected in the following tables. The first table in each jurisdiction reflects the most recent executions; the second table reflects the executions in a random period prior to enactment of the AEDPA. The third table in each jurisdiction summarizes the publication data from that jurisdiction. The first section of data therefore comprises eighteen tables. In addition, to place this data in context, some more general statistics may be useful. These general data are provided below in Tables 19 and 20.

²³ Instead of showing the pages per opinion, we have opted for showing the word length of opinions. The reason for this choice is that a significant number of opinions are a sentence or two long; they would therefore count as a page in length, when in truth they are substantially shorter. By performing both manual and electronic counts, we determined that a dual column page contains approximately 644–855 words per page. The disparity is attributable to different margins used for footnotes; a page with many footnotes contains fewer words than a page with none. We similarly determined that a single column printout contains 228–341 words per page. Accordingly, for calculation purposes, we assumed that the average single column printed page contains 230 words, and that the average dual column printed page contains 700 words. These numbers are conservative, and the actual word length of the printed opinions is probably slightly higher than our table indicates. For example, the direct appeal in the Calvin King case occupies 8 dual column pages. At 700 words per page, we conclude that the direct appeal comprises 5,600 words.

A. Pre and Post-AEDPA Data from Selected Jurisdictions in Death Penalty Cases

1. *California*

i. *Table 1. California: Ten Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|--|---------------|---------------------------|----------------|
| Stephen Anderson 1/29/02 | Published | Unpublished ²⁴ | Published |
| Robert Massie 3/27/01 | Published | Unpublished | Published |
| Darrell Rich 3/15/00 | Published | Unpublished | Published |
| Manuel Babbitt 5/4/99 | Published | Published ²⁵ | Published |
| Jaturun Siripongs 2/9/99 | Published | Unpublished | Published |
| Kelvin Malone ²⁶ 1/13/99 | Published | Published | Published |
| Thomas Thompson 7/14/98 | Published | Unpublished | Published |
| Keith Williams 5/3/96 | Published | Published ²⁷ | Published |
| William Bonin 2/23/96 | Published | Unpublished | Published |
| David Mason 8/24/93 | Published | Unpublished | Published |

ii. *Table 2. California: Pre-AEDPA Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|----------------------------|---------------|--------------|----------------|
| Robert Harris 4/21/92 | Published | Unpublished | Published |
| Aaron Mitchell 4/8/67 | Published | Unpublished | Unpublished |
| Elizabeth Duncan 8/8/62 | Published | Unpublished | Published |

²⁴ This case was not reported in the Pacific Reporter but is only available on Westlaw.

²⁵ The state habeas was consolidated with the direct appeal; this practice no longer occurs.

²⁶ Kevin Malone was executed in Texas.

²⁷ The state habeas was consolidated with the direct appeal; this practice no longer occurs.

iii. *Table 3. California: Totals*

| Number of Cases | Direct Appeal Published | State Habeas Published | Federal Habeas Published |
|-----------------|-------------------------|------------------------|--------------------------|
| 13 | 13 | 3 ²⁸ | 12 |

2. *Florida*i. *Table 4. Florida: Ten Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|---|---------------|--------------|----------------|
| Linroy Bottoson 12/9/02 | Published | Published | Published |
| Aileen Wuornos 10/9/02 | Published | Unpublished | Unpublished |
| Rigoberto Sanchez-Velasco 10/2/02 | Published | Unpublished | Published |
| Robert Glock 1/11/01 | Published | Published | Published |
| Edward Castro 12/7/00 | Published | Unpublished | Unpublished |
| Dan Hauser 8/25/00 | Published | Unpublished | Published |
| Thomas Provenzano 6/21/00 | Published | Published | Published |
| Bennie Demps 6/7/00 | Published | Published | Published |
| Anthony Bryan 2/23/00 | Published | Published | Published |
| Terry Sims 2/24/00 | Published | Published | Published |

ii. *Table 5. Florida: Pre-AEDPA Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|-----------------------------|---------------|--------------|----------------|
| Jerry White 12/5/95 | Published | Published | Published |
| Phillip Atkins 12/4/95 | Published | Published | Published |
| Bernard Bolender 7/18/95 | Published | Published | Published |

²⁸ This figure is actually misleadingly high, because two of the three state court habeas opinions are consolidated direct appeal opinions; only one pure habeas opinion is published.

ii. *Table 5. Florida: Pre-AEDPA Executions (cont.)*

| | Direct Appeal | State Habeas | Federal Habeas |
|-----------------------------|---------------|--------------|----------------|
| Roy Stewart 4/22/94 | Published | Published | Published |
| Michael Durocher 8/25/93 | Published | Unpublished | Waived |

iii. *Table 6. Florida: Totals*

| Number of Cases | Direct Appeal Published | State Habeas Published | Federal Habeas Published |
|-----------------|----------------------------|---------------------------|-----------------------------|
| 15 | 15 | 10 | 12 ²⁹ |

3. *Georgia*i. *Table 7. Georgia: Seven Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|---------------------------|---------------|---------------------------|----------------|
| Wallace Fugate 8/16/02 | Published | Unpublished ³⁰ | Published |
| Tracey Housel 3/12/02 | Published | Unpublished ³¹ | Published |
| Ronald Spivey 1/24/02 | Published | Unpublished ³² | Published |
| Byron Parker 12/11/01 | Published | Unpublished ³³ | Published |
| Fred Gilreath 11/14/01 | Published | Unpublished ³⁴ | Published |
| Jose High 11/6/01 | Published | Published | Published |
| Terry Mincey 10/25/01 | Published | Unpublished ³⁵ | Published |

ii. *Table 8. Georgia: Pre-AEDPA Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|---------------------------|---------------|--------------|----------------|
| Darrell Devier 5/17/95 | Published | Unpublished | Published |

²⁹ One inmate waived his appeal, so publication was not possible.

³⁰ See *Fugate v. Head*, 261 F.3d 1206, 1213 (11th Cir. 2001).

³¹ See *Housel v. Head*, 238 F.3d 1289, 1293 (11th Cir. 2001).

³² See *Spivey v. Head*, 207 F.3d 1263, 1268 (11th Cir. 2000).

³³ See *Parker v. Head*, 244 F.3d 831, 833 (11th Cir. 2001).

³⁴ See *Gilreath v. Head*, 234 F.3d 547, 548 (11th Cir. 2000).

³⁵ See *Mincey v. Head*, 206 F.3d 1106, 1122-23 (11th Cir. 2000).

ii. *Table 8. Georgia: Pre-AEDPA Executions (cont.)*

| | Direct Appeal | State Habeas | Federal Habeas |
|-------------------------------|---------------|--------------|----------------|
| Nicholas Ingram 4/7/95 | Published | Unpublished | Published |
| William Hance 3/31/94 | Published | Published | Published |
| Christopher Burger 12/2/93 | Published | Unpublished | Published |
| Thomas Stevens 6/29/93 | Published | Published | Published |

iii. *Table 9. Georgia: Totals*

| Number of Cases | Direct Appeal Published | State Habeas Published | Federal Habeas Published |
|-----------------|----------------------------|---------------------------|-----------------------------|
| 12 | 12 | 3 | 12 |

4. *Oklahoma*i. *Table 10. Oklahoma: Ten Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|-------------------------------------|---------------|--------------|--------------------------------|
| Bobby Joe Fields 2/13/03 | Published | Published | Published |
| Daniel Revilla 1/16/03 | Published | Published | Published |
| Ernest Carter 12/17/02 | Published | Published | Unpublished (but available) |
| Jay Neill 12/12/02 | Published | Published | Published |
| Jerry Lynn McCracken 12/10/02 | Published | Published | Published |
| Earl Frederick, Sr. 7/30/02 | Published | Waived | Waived |
| Randall Cannon 7/23/02 | Published | Published | Published |
| David Woodruff 1/31/02 | Published | Published | Published |
| John Romano 1/29/02 | Published | Published | Published |
| Sahib Al-Mosawi 12/6/01 | Published | Published | Unpublished (but available) |

ii. *Table 11. Oklahoma: Pre-AEDPA Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|--|---------------|--------------|----------------|
| Robert Brecheen 8/11/95 | Published | Published | Published |
| Roger Stafford 7/01/95 | Published | Published | Unpublished |
| Thomas Grasso ³⁶ 3/20/95 | Published | Waived | Waived |
| Olan Robison 3/13/92 | Published | Published | Published |
| Robyn Parks 3/10/92 | Published | Unpublished | Published |

iii. *Table 12. Oklahoma: Totals*

| Number of Cases | Direct Appeal Published | State Habeas Published | Federal Habeas Published |
|-----------------|----------------------------|---------------------------|-----------------------------|
| 15 | 15 | 12 ³⁷ | 10 ³⁸ |

5. *Texas*i. *Table 13. Texas: Twenty Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|------------------------------|---------------|-----------------------------|----------------|
| Samuel Gallamore 1/14/03 | Unpublished | Unpublished | Unpublished |
| James Collier 12/11/02 | Published | Unpublished | Published |
| Leonard Rojas 12/4/02 | Published | Published (one sentence) | Unpublished |
| William Chappell 11/20/02 | Unpublished | Unpublished | Unpublished |
| Craig Ogan 11/19/02 | Unpublished | Unpublished | Published |
| James Powell 10/1/02 | Published | Unpublished | Unpublished |
| Calvin King 9/25/02 | Published | Unpublished | Unpublished |
| Rex Mays 9/24/02 | Unpublished | Unpublished | Unpublished |

³⁶ An attempt was made to move this case to New York.

³⁷ One inmate waived his appeal, so publication was not possible.

³⁸ Two inmates waived their appeals, so publication was not possible.

ii. *Table 13. Texas: Twenty Recent Executions (cont.)*

| | Direct Appeal | State Habeas | Federal Habeas |
|-------------------------------|---------------|--------------|----------------|
| Ron Shamburger 9/18/02 | Unpublished | Unpublished | Unpublished |
| Jessie Patrick 9/17/02 | Published | Published | Unpublished |
| Tony Walker 9/10/02 | Unpublished | Unpublished | Unpublished |
| Toronto Patterson 8/28/02 | Unpublished | Unpublished | Unpublished |
| Gary Etheridge 8/20/02 | Published | Unpublished | Unpublished |
| Javier Medina 8/14/02 | Unpublished | Unpublished | Unpublished |
| T.J. Jones 8/8/02 | Published | Unpublished | Unpublished |
| Richard Kutzner 8/7/02 | Published | Unpublished | Published |
| Jeffery Williams 6/26/02 | Published | Unpublished | Unpublished |
| Robert Coulson 6/25/02 | Unpublished | Unpublished | Unpublished |
| Daniel Rineau 6/13/02 | Unpublished | Unpublished | Unpublished |
| Stanley Baker, Jr. 5/30/02 | Published | Unpublished | Unpublished |

iii. *Table 14. Texas: Pre-AEDPA Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|----------------------------|---------------|--------------|----------------|
| James Smith 6/26/90 | Published | Waived | Waived |
| Mikel Derrick 7/18/90 | Published | Unpublished | Unpublished |
| Lawrence Buxton 2/26/91 | Published | Unpublished | Published |
| Ignacio Cuevas 5/23/91 | Published | Unpublished | Published |
| Jerry Bird 6/18/91 | Published | Unpublished | Published |

iv. *Table 15. Texas: Totals*

| Number of Cases | Direct Appeal Published | State Habeas Published | Federal Habeas Published |
|-----------------|-------------------------|------------------------|--------------------------|
| 25 | 15 ³⁹ | 2 ⁴⁰ | 6 ⁴¹ |

6. *Virginia*i. *Table 16. Virginia: Ten Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|------------------------------|---------------|-------------------------------|----------------|
| James Patterson 3/14/02 | Published | No appeal | No appeal |
| Daniel Zirkle 4/2/02 | Published | No appeal | No appeal |
| Walter Mickens 6/12/02 | Published | Unpublished ⁴² | Published |
| Mir Aimal Kasi 11/14/02 | Published | Unpublished | Published |
| Thomas Akers 3/1/01 | Published | No Appeal | Published |
| Christopher Beck 10/18/01 | Published | Unpublished ⁴³ | Published |
| Douglas Thomas 1/10/00 | Published | Unpublished ⁴⁴ | Published |
| Steve Roach 1/13/00 | Published | Unpublished ⁴⁵ | Published |
| Lonnie Weeks 3/16/00 | Published | Dismissed because untimely | Published |
| Michael Clagett 7/6/00 | Published | Unpublished ⁴⁶ | Published |

³⁹ It is perhaps worth noting that during the pre-AEDPA era, all direct appeals were published, whereas in the post-AEDPA cases we examined, only half were published.

⁴⁰ One inmate waived his state habeas appeal, a practice that may not be possible under current Texas law. *See* TEX. CRIM. PROC. CODE ANN. §11.071 (Vernon 1999). Of the two published state habeas opinions, one is a single sentence long.

⁴¹ In the Fifth Circuit, there is a significant difference in the pre and post-AEDPA cases. Of the pre-AEDPA habeas appeals, one inmate waived his appeal, and the Fifth Circuit published opinions in three of the remaining four (75%); in the post-AEDPA cases, there were no waivers, and only three of twenty opinions (15%) were published. In addition, as is discussed in the final section of the text, the rate of publication in the Fifth Circuit seems to have declined significantly in recent years.

⁴² *See* Mickens v. Greene, 74 F. Supp. 2d 586, 592 (E.D. Va. 1999).

⁴³ *See* Beck v. Angelone, 173 F. Supp. 2d 461 (E.D. Va. 2002).

⁴⁴ *See* Thomas v. Taylor, 170 F.3d 466 (4th Cir. 1999).

⁴⁵ *See* Roach v. Angelone, 176 F.3d 210 (4th Cir. 1999).

⁴⁶ *See* Clagett v. Angelone, 209 F.3d 370 (4th Cir. 2000).

ii. *Table 17. Virginia: Pre-AEDPA Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|-----------------------------|---------------|--------------|----------------|
| Herman Barnes 11/13/95 | Published | Unpublished | Published |
| Mickey Davidson 10/19/95 | Published | N/A | N/A |
| Dennis Stockton 9/27/95 | Published | Unpublished | Published |
| Willie Turner 5/26/95 | Published | Unpublished | Published |
| Dana Edmonds 1/24/95 | Published | Unpublished | Unpublished |

iii. *Table 18. Virginia: Totals*

| Number of Cases | Direct Appeal Published | State Habeas Published | Federal Habeas Published |
|-----------------|----------------------------|---------------------------|-----------------------------|
| 15 | 15 | 0 ⁴⁷ | 11 |

B. Death Penalty Versus Non-Death Penalty Data

i. *Table 19. Summary of Foregoing Data*

| State | Number of Cases | Direct Appeal Published | State Habeas Published | Federal Habeas Published |
|------------|--------------------|-------------------------------|---------------------------|--------------------------------|
| California | 10 | 10 | 1 (4) ⁴⁸ | 10 |
| Florida | 10 | 10 | 6 | 8 ⁴⁹ |
| Georgia | 12 | 12 | 3 | 12 |
| Oklahoma | 7 | 7 | 1 | 7 |
| Texas | 10 | 5 | 1(2) ⁵⁰ | 2 |
| Virginia | 10 | 10 | 0 ⁵¹ | 8 ⁵² |

⁴⁷ In three cases the inmate waived his state habeas appeal.

⁴⁸ There is one true publication. An additional case is available electronically, but is designated as not for publication. Two other cases were published, but they involved a habeas proceeding that was consolidated with the direct appeal, and no extra record claims are addressed.

⁴⁹ In two of the cases where the state habeas opinion was not published, the Eleventh Circuit opinion is also not published. In the other two cases where the state habeas opinion was unpublished, the Eleventh Circuit opinion is published.

⁵⁰ In one published case, the opinion is one sentence long.

⁵¹ In three cases there was no state habeas filed; in one case the appeal was dismissed as untimely; the remaining six cases generated unpublished opinions.

⁵² Of the three cases where no state habeas appeal was pursued, two also resulted in no federal habeas appeal; in one case where no state habeas appeal was filed, a federal appeal was pursued.

ii. *Table 20. Death Versus Non-Death Publication Rates*⁵³

| Court | Number of All Cases | Percent Published | Number of Death Cases Examined | Percent Published |
|-----------------------------|---------------------|-------------------|--------------------------------|-------------------|
| Texas Appellate Courts | N/A | 3 | 75 | 30 |
| California Appellate Courts | N/A | 6 | 39 | 71 |
| Fourth Circuit | 2768 | 8 | 45 | 55 |
| Fifth Circuit | 4152 | 14 | 75 | 30 |
| Tenth Circuit | 1425 | 28 | 45 | 91 |
| Ninth Circuit | 4994 | 18 | 39 | 71 |
| Eleventh Circuit | 4043 | 12 | 81 | 77 |

C. Opinion Length in Death Penalty Cases

1. *California*i. *Table 21. California: Ten Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|--|---------------------------|---------------------------|---------------------------|
| Stephen Anderson 1/29/02 | Published 2,100 words | Unpublished ⁵⁴ | Published 22,400 words |
| Robert Massie 3/27/01 | Published 2,100 words | Unpublished | Published 1,400 words |
| Darrell Rich 3/15/00 | Published 27,300 words | Unpublished | Published 2,100 words |
| Manuel Babbitt 5/4/99 | Published 23,100 words | Published* | Published 5,600 words |
| Jaturun Siripongs 2/9/99 | Published 13,300 words | Unpublished | Published 9,100 words |
| Kelvin Malone ⁵⁵ 1/13/99 | Published 22,400 words | Published 16,800 words | Published 14,000 words |
| Thomas Thompson 7/14/98 | Published 21,700 words | Unpublished | Published 9,100 words |

⁵³ This table covers the period from October 1, 2000 to September 30, 2001; the source is from the Administrative Office of the U.S. Courts at www.uscourts.gov, and the data is summarized in Adam Liptak, *Federal Appeals Court Decisions May Go Public*, N.Y. TIMES, Dec. 25, 2002, at A13; the data has remained virtually unchanged from a decade earlier. See Merritt & Brudney, *supra* note 21, at 86–87 & n.61.

⁵⁴ This opinion is available on Westlaw.

⁵⁵ Kevin Malone was executed in Texas.

i. *Table 21. California: Ten Recent Executions (cont.)*

| | Direct Appeal | State Habeas | Federal Habeas |
|--------------------------|---------------------------|--------------|--------------------------|
| Keith Williams 5/3/96 | Published 35,700 words | Published* | Published 4,200 words |
| William Bonin 2/23/96 | Published 16,800 words | Unpublished | Published 4,900 words |
| David Mason 8/24/93 | Published 21,000 words | Unpublished | Published 3,500 words |

*Consolidated With Direct Appeal

ii. *Table 22. California: Pre-AEDPA*

| | Direct Appeal | State Habeas | Federal Habeas |
|----------------------------|--------------------------|--------------|---------------------------|
| Robert Harris 4/21/92 | Published 8,400 words | Unpublished | Published 14,000 words |
| Aaron Mitchell 4/8/67 | Published 7,700 words | Unpublished | Unpublished |
| Elizabeth Duncan 8/8/62 | Published 5,600 words | Unpublished | Published 2,800 words |

California: Average length of Federal Habeas: 7,758

2. *Florida*i. *Table 23. Florida: Ten Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|---|--------------------------|--------------------------|--------------------------|
| Linroy Bottoson 12/9/02 | Published 2,100 words | Published 8,400 words | Published 6,300 words |
| Aileen Wuornos 10/9/02 | Published 5,600 words | Unpublished | Unpublished |
| Rigoberto Sanchez-Velasco 10/2/02 | Published 4,200 words | Unpublished | Published 8,400 words |
| Robert Glock 1/11/01 | Published 2,800 words | Published 2,800 words | Published 7,000 words |
| Edward Castro 12/7/00 | Published 3,500 words | Unpublished | Unpublished |
| Dan Hauser 8/25/00 | Published 2,100 words | Unpublished | Published 5,600 words |
| Thomas Provenzano 6/21/00 | Published 3,500 words | Published 2,100 words | Published 700 words |
| Bennie Demps 6/7/00 | Published 3,500 words | Published 700 words | Published 5,600 words |

i. *Table 23. Florida: Ten Recent Executions (cont.)*

| | Direct Appeal | State Habeas | Federal Habeas |
|--------------------------|--------------------------|--------------------------|---------------------------|
| Anthony Bryan 2/23/00 | Published 3,500 words | Published 2,800 words | Published 4,200 words |
| Terry Sims 2/24/00 | Published 2,100 words | Published 700 words | Published 11,200 words |

ii. *Table 24. Florida: Pre-AEDPA*

| | Direct Appeal | State Habeas | Federal Habeas |
|-----------------------------|--------------------------|--------------------------|---------------------------|
| Jerry White 12/5/95 | Published 2,800 words | Published 1,400 words | Published 5,600 words |
| Phillip Atkins 12/4/95 | Published 2,100 words | Published 1,400 words | Published 5,600 words |
| Bernard Bolender 7/18/95 | Published 2,800 words | Published 1,400 words | Published 16,100 words |
| Roy Stewart 4/22/94 | Published 2,100 words | Published 700 words | Published 3,500 words |
| Michael Durocher 8/25/93 | Published 4,200 words | Unpublished | Waived |

Florida: Average length of Federal Habeas: 7,700

3. *Georgia*i. *Table 25. Georgia: Seven Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|---------------------------|---------------------------|---------------------------|---------------------------|
| Wallace Fugate 8/16/02 | Published 3,500 words | Unpublished ⁵⁶ | Published 21,700 words |
| Tracey Housel 3/12/02 | Published 3,500 words | Unpublished ⁵⁷ | Published 5,600 words |
| Ronald Spivey 1/24/02 | Published 9,800 words | Unpublished ⁵⁸ | Published 10,500 words |
| Byron Parker 12/11/01 | Published 1,400 words | Unpublished ⁵⁹ | Published 4,900 words |
| Fred Gilreath 11/14/01 | Published 12,600 words | Unpublished ⁶⁰ | Published 4,200 words |
| Jose High 11/6/01 | Published 4,200 words | Published 4,200 words | Published 4,200 words |
| Terry Mincey 10/25/01 | Published 8,400 words | Unpublished ⁶¹ | Published 25,200 words |

⁵⁶ See *Fugate v. Head*, 261 F.3d 1206, 1213 (11th Cir. 2001).

ii. *Table 26. Georgia: Pre-AEDPA*

| | Direct Appeal | State Habeas | Federal Habeas |
|-------------------------------|--------------------------|--------------------------|---------------------------|
| Darrell Devier 5/17/95 | Published 1,400 words | Unpublished | Published 14,700 words |
| Nicholas Ingram 4/7/95 | Published 7,700 words | Unpublished | Published 4,900 words |
| William Hance 3/31/94 | Published 4,900 words | Published 4,900 words | Published 9,100 words |
| Christopher Burger 12/2/93 | Published 2,100 words | Unpublished | Published 3,500 words |
| Thomas Stevens 6/29/93 | Published 1,400 words | Published 1,400 words | Published 8,400 words |

Georgia: Average length of Federal Habeas: 9,741

4. *Oklahoma*i. *Table 27. Oklahoma: Ten Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|-------------------------------------|---------------------------|--------------------------|---|
| Bobby Joe Fields 2/13/03 | Published 8,400 words | Published 3,500 words | Published 9,100 words |
| Daniel Revilla 1/16/03 | Published 8,400 words | Published 2,100 words | Published 9,800 words |
| Ernest Carter 12/17/02 | Published 9,100 words | Published 2,800 words | Unpublished (but available) 9,016 words |
| Jay Neill 12/12/02 | Published 11,900 words | Published 3,500 words | Published 7,000 words |
| Jerry Lynn McCracken 12/10/02 | Published 5,600 words | Published 2,100 words | Published 7,700 words |
| Earl Frederick, Sr. 7/30/02 | Published 4,900 words | Waived | Waived |
| Randall Cannon 7/23/02 | Published 10,500 words | Published 2,800 words | Published 15,400 words |

⁵⁷ See *Housel v. Head*, 238 F.3d 1289, 1293 (11th Cir. 2001).

⁵⁸ See *Spivey v. Head*, 207 F.3d 1263, 1268 (11th Cir. 2000).

⁵⁹ See *Parker v. Head*, 244 F.3d 831, 833 (11th Cir. 2001).

⁶⁰ See *Gilreath v. Head*, 234 F.3d 547, 548 (11th Cir. 2000).

⁶¹ See *Mincey v. Head*, 206 F.3d 1106, 1122-23 (11th Cir. 2000).

i. *Table 27. Oklahoma: Ten Recent Executions (cont.)*

| | Direct Appeal | State Habeas | Federal Habeas |
|----------------------------|---------------------------|--------------------------|---|
| David Woodruff 1/31/02 | Published 14,000 words | Published 2,800 words | Published 15,400 words |
| John Romano 1/29/02 | Published 16,100 words | Published 2,100 words | Published 4,900 words |
| Sahib Al-Mosawi 12/6/01 | Published 9,800 words | Published 3,500 words | Unpublished (but available) 6,440 words |

ii. *Table 28. Oklahoma: Pre-AEDPA*

| | Direct Appeal | State Habeas | Federal Habeas |
|--|--------------------------|--------------------------|---------------------------|
| Robert Brecheen 8/11/95 | Published 5,600 words | Published 2,800 words | Published 14,000 words |
| Roger Stafford 7/01/95 | Published 5,600 words | Published 7,000 words | Unpublished |
| Thomas Grasso ⁶² 3/20/95 | Published 7,000 words | Waived | Waived |
| Olan Robison 3/13/92 | Published 4,200 words | Published 1,400 words | Published 2,800 words |
| Robyn Parks 3/10/92 | Published 4,900 words | Unpublished | Published 7,700 words |

Oklahoma: Average length of Federal Habeas: 9,104

5. *Texas*i. *Table 29. Texas: Twenty Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|------------------------------|----------------------------|--------------------------|----------------------------|
| Samuel Gallamore 1/14/03 | Unpublished 5,750 words | Unpublished 121 words | Unpublished 3,680 words |
| James Collier 12/11/02 | Published 2,800 words | Unpublished 99 words | Published 6,300 words |
| Leonard Rojas 12/4/02 | Published 6,300 words | Published 419 words | Unpublished 2,100 words |
| William Chappell 11/20/02 | Unpublished 3,910 words | Unpublished 132 words | Unpublished 8,510 words |
| Craig Ogan 11/19/02 | Unpublished 5,290 words | Unpublished 143 words | Published 7,000 words |
| James Powell 10/1/02 | Published 9,800 words | Unpublished 110 words | Unpublished 3,450 words |

⁶² An attempt was made to move this case to New York.

i. *Table 29. Texas: Twenty Recent Executions (cont.)*

| | Direct Appeal | State Habeas | Federal Habeas |
|-------------------------------|-----------------------------|--------------------------|----------------------------|
| Calvin King 9/25/02 | Published 5,600 words | Unpublished 110 words | Unpublished 2,300 words |
| Rex Mays 9/24/02 | Unpublished 6,900 words | Unpublished 99 words | Unpublished 2,300 words |
| Ron Shamburger 9/18/02 | Unpublished 12,880 words | Unpublished 154 words | Unpublished 2,530 words |
| Jessie Patrick 9/17/02 | Published 9,800 words | Published 18 words | Unpublished 4,200 words |
| Tony Walker 9/10/02 | Unpublished | Unpublished | Unpublished |
| Toronto Patterson 8/28/02 | Unpublished | Unpublished | Unpublished |
| Gary Etheridge 8/20/02 | Published 11,200 words | Unpublished | Unpublished |
| Javier Medina 8/14/02 | Unpublished | Unpublished | Unpublished |
| T.J. Jones 8/8/02 | Published 7,700 words | Unpublished | Unpublished |
| Richard Kutzner 8/7/02 | Published 5,600 words | Unpublished | Published 2,100 words |
| Jeffrey Williams 6/26/02 | Published 7,000 words | Unpublished | Unpublished |
| Robert Coulson 6/25/02 | Unpublished | Unpublished | Unpublished |
| Daniel Rineau 6/13/02 | Unpublished | Unpublished | Unpublished |
| Stanley Baker, Jr. 5/30/02 | Published 3,500 words | Unpublished | Unpublished |

ii. *Table 30. Texas: Pre-AEDPA*

| | Direct Appeal | State Habeas | Federal Habeas |
|----------------------------|---------------------------|--------------|--------------------------|
| James Smith 6/26/90 | Published 7,000 words | Waived | Waived |
| Mikel Derrick 7/18/90 | Published 2,800 words | Unpublished | Unpublished |
| Lawrence Buxton 2/26/91 | Published 2,800 words | Unpublished | Published 4,900 words |
| Ignacio Cuevas 5/23/91 | Published 14,000 words | Unpublished | Published 245 words |
| Jerry Bird 6/18/91 | Published 8,400 words | Unpublished | Published 420 words |

Texas: Average length of Federal Habeas: 4,501

6. *Virginia*i. *Table 31. Virginia: Ten Recent Executions*

| | Direct Appeal | State Habeas | Federal Habeas |
|------------------------------|--------------------------|---------------------------|---------------------------|
| James Patterson 3/14/02 | Published 2,100 words | No appeal | No appeal |
| Daniel Zirkle 4/2/02 | Published 2,800 words | No appeal | No appeal |
| Walter Mickens 6/12/02 | Published 7,800 words | Unpublished ⁶³ | Published 16,100 words |
| Mir Aimal Kasi 11/14/02 | Published 6,300 words | Unpublished | Published 13,300 words |
| Thomas Akers 3/1/01 | Published 2,800 words | No appeal | No appeal |
| Christopher Beck 10/18/01 | Published 5,600 words | Unpublished ⁶⁴ | Published 10,500 words |
| Douglas Thomas 1/10/00 | Published 8,400 words | Unpublished ⁶⁵ | Published 4,900 words |
| Steve Roach 1/13/00 | Published 9,100 words | Unpublished ⁶⁶ | Published 9,800 words |
| Lonnie Weeks 3/16/00 | Published 6,300 words | Dismissed as untimely | Published 1,400 words |
| Michael Clagett 7/6/00 | Published 6,300 words | Unpublished ⁶⁷ | Published 7,000 words |

ii. *Table 32. Virginia: Pre-AEDPA*

| | Direct Appeal | State Habeas | Federal Habeas |
|-----------------------------|--------------------------|--------------|---------------------------|
| Herman Barnes 11/13/95 | Published 3,500 words | Unpublished | Published 11,200 words |
| Mickey Davidson 10/19/95 | Published 2,800 words | N/A | N/A |
| Dennis Stockton 9/27/95 | Published 9,100 words | Unpublished | Published 5,600 words |
| Willie Turner 5/26/95 | Published 7,000 words | Unpublished | Published 20,300 words |
| Dana Edmonds 1/24/95 | Published 4,200 words | Unpublished | Unpublished |

Virginia: Average length of Federal Habeas: 9,560

⁶³ See *Mickens v. Greene*, 74 F. Supp. 2d 586, 592 (E.D. Va. 1999).

⁶⁴ See *Beck v. Angelone*, 173 F. Supp. 2d 461 (E.D. Va. 2000).

⁶⁵ See *Thomas v. Taylor*, 170 F.3d 466 (4th Cir. 1999).

⁶⁶ See *Roach v. Angelone*, 176 F.3d 210 (4th Cir. 1999).

⁶⁷ See *Clagett v. Angelone*, 209 F.3d 370 (4th Cir. 2000).

IV. OBSERVATIONS AND CONCLUSIONS

An appellate court's decision as to whether to publish an opinion reveals something about how important the court believes that opinion to be. Our study indicates that most appellate courts believe death penalty opinions to be sufficiently significant to warrant publication, regardless of the precise issues raised in the appeal.

More generally, several conclusions are apparent from the publication data we have gathered. First, either the direct appeal opinion or state habeas opinion is published in one hundred percent of the cases in every jurisdiction other than Texas. Second, with the exception of the Fifth Circuit, every other court of appeals publishes a significantly higher percentage of its death penalty opinions than of its opinions generally. Third, the average length of opinions that are available, either electronically or in the federal reporter series, is significantly longer than unpublished opinions that must be requested from the court administrators.

We began with two assumptions: that death penalty opinions would be as invisible in the courts of appeals as they are in the media, and that they would be equally invisible irrespective of jurisdiction. Those assumptions proved false. Texas, as it happens, is unique. In Texas, state courts publish fewer opinions than the state courts in other jurisdictions that impose or carry out a significant number of death sentences. In addition, the Fifth Circuit has the lowest publication rate of any federal court of appeals in death penalty cases. Moreover, the trend of publication in the Fifth Circuit is downward. Of the first 301 executions in Texas since the death penalty was reinstated, 194 (64%) of all death penalty opinions were published. As the recent data reflect, the current publication rate is dramatically lower. What makes this statistic particularly meaningful is that in the Fifth Circuit for all intents and purposes, unpublished means unavailable, as the Fifth Circuit does not release unpublished opinions to either Westlaw or Lexis for the purpose of electronic publication.

Few judicial opinions are important enough to warrant the killing of a tree. Publication, however, no longer requires deforestation. Electronic publication does not reduce the environmental cost of publication all the way to zero, but it comes extremely close. There is, therefore, no apparent justification for the practice of the Fifth and Eleventh Circuits, as well as the Texas Court of Criminal Appeals, of hiding their opinions.

The root of the word "publication" is public, and the etymology of the word indicates precisely the reason why judicial opinions should be published. Publication ensures that the American judicial system remains a public institution and justice does not occur in secrecy. Although the practice of the Fifth and Eleventh Circuits and the Texas

Court of Criminal Appeals may be indefensible following this logic, it is understandable. Judges hide what they are not proud of. Indeed, in defending the practice of prohibiting citation to unpublished opinions, Judge Kozinski argued that were the rule otherwise, “judges would have to pay much closer attention to the way they word their unpublished rulings.”⁶⁸ In other words, if judicial sloppiness could be brought to the attention of the sloppy judges, not to mention the public generally, the sloppy judges would be forced to clean up their acts.⁶⁹

We would hope that Judge Kozinski is correct in his assessment of what would happen if unpublished opinions were to have the light of day shone upon them, but it is not obvious how that is a negative. In all contexts, but particularly where the state is taking a life, the argument that judges would have to work harder were their opinions to be subject to public scrutiny is, in a word, laughable.

In Judge Kozinski’s defense, the Ninth Circuit is dutiful when it comes to publishing opinions in death penalty cases. Consequently, even though it seems apparent that judges write inferior opinions when they do not intend to publish them, that phenomenon is not present in death penalty cases from California. Nor, for that matter, is it present in death penalty cases from any of the largest death penalty jurisdictions—with the exception of the State of Texas.

We began this analysis with an epigram from Judge Jones’s opinion in *United States v. McFarland*.⁷⁰ *McFarland* involved a federal criminal prosecution under the Hobbs Act, which, *inter alia*, creates a federal crime for certain robberies, and prohibits carrying and use of a firearm in the commission of such robberies.⁷¹ A panel of the Fifth Circuit affirmed the convictions, and the panel decision was upheld by an equally divided en banc court.⁷² The group of en banc judges who voted to affirm the panel opinion did not publish a detailed opinion, opting to issue a per curiam statement that by virtue of an equally divided en banc court the panel’s judgment was affirmed.⁷³ Judge Garwood’s opinion for the dissenting judges addressed the merits of the issue, arguing in

⁶⁸ *Hart*, 266 F.3d at 1178.

⁶⁹ The policy of “publishing” opinions electronically while forbidding citation to them is a policy that is at odds with the very idea of law. As Johana Schiavoni has argued:

That judges render binding precedential decisions is the basic precept of our common-law judicial system.... In choosing a common-law system over that of a civil-code system, the Founders expressed their preference for giving judges the power to make decisions that were prospectively binding.... The Framers consciously continued the common-law judicial system, placing their faith in the rule of law and in judges to follow their interpretations of the law in later cases.

Johanna S. Schiavoni, Comment, *Who’s Afraid of Precedents?*, 49 *UCLA L. REV.* 1859, 1877 (2002) (citations omitted).

⁷⁰ 311 F.3d 376 (5th Cir. 2002).

⁷¹ *Id.* at 381-82.

⁷² *Id.* at 376-77 (Garwood, Jolly, Higginbotham, Jones, Smith, Barksdale, DeMoss, & Clement, JJ., dissenting).

⁷³ *Id.*

essence that the federalization of robbery exceeded Congress's Commerce Clause power.⁷⁴ Judge Jones's dissent attacked the Fifth Circuit majority for not publishing its reasoning.⁷⁵

What makes Judge Jones's complaint in *McFarland* deeply ironic is that one consequence of denying publication was dramatically illustrated in a Fifth Circuit fiasco in which Judge Jones herself was a central player. In 1999, two inmates were set to be executed on consecutive days: Danny Barber was set to die on a Tuesday, and Stan Faulder was scheduled for execution on the following Wednesday. Barber's lawyers, believing that they had exhausted their legal claims, were telling their client goodbye. Faulder's lawyers, in the meantime, were persuading a federal judge in Austin that the State's clemency proceedings are constitutionally defective, and the judge therefore granted Faulder a stay.⁷⁶ Faulder's lawyers contacted Barber's lawyers and Barber authorized the identical issue to be raised in his case. He too received a stay from the same federal judge.⁷⁷ The State appealed both cases. On Tuesday afternoon the Fifth Circuit refused to disturb the stay in Barber's case. Yet the next day, a different panel, one that included Judge Jones, dissolved the stay in Faulder's case. Both inmates had raised the identical legal claim; indeed, the exact same pleadings were used by both sets of lawyers. All that differed was the name of the party seeking relief. Judge Jones's panel added a footnote to its opinion in the *Faulder* case acknowledging that it was aware that a different group of judges had, on the previous day, halted an execution on the same grounds. The *Faulder* panel did not explain why it was pursuing a different course.⁷⁸

It is possible that what explains Judge Jones's unwillingness to publish her opinion in *Faulder*, despite having exhorted her colleagues in *McFarland* to the virtues of publication, is simply that she cares more about reining in perceived violations of the Commerce Clause than in correcting violations of the Eighth or Fourteenth Amendments. It is also possible that the explanation lies in an aspect of modern death penalty culture that is not peculiar to Judge Jones: the banality of executions, and the concomitant relaxation of legal norms that surround them.

⁷⁴ *Id.* at 409-10.

⁷⁵ *Id.* at 416-21.

⁷⁶ See *Faulder v. Tx. Bd. of Pardons & Parole*, 178 F.3d 344 (5th Cir. 1999), *cert. denied*, 527 U.S. 1017 (1999) (recounting procedural history).

⁷⁷ Neither of the opinions relating to the clemency issue in the *Barber* litigation has been published. The Supreme Court's denial of relief is located at 525 U.S. 1132 (1999). I have previously criticized the refusal of the courts – both state and federal – to publish their opinions in death penalty cases. See David Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691 (1996). The details in the text are based on my first-hand knowledge of the cases.

⁷⁸ The opinion is unpublished. The Supreme Court did eventually stay Faulder's execution, though the legal basis for that decision remains unclear. Faulder was subsequently executed, as was Barber.

The difference between the Fifth Circuit and every other federal court of appeals that decides a significant number of death penalty cases is not that the Fifth Circuit is significantly more hostile to claims coming from death row. The difference is that the Fifth Circuit's hostility is secretive and buried. Only one other court that we examined goes to comparable lengths to hide its death penalty opinions from public view: the Texas Court of Criminal Appeals. The combination of the refusal of these two courts to announce their decisions in published opinions, coupled with the pace of executions in Texas, means that the majority of cases in the state that carries out the most executions go unnoticed. Publishing their opinions may cause embarrassment to judges on the Court of Criminal Appeals and the Fifth Circuit, but perhaps they ought to be embarrassed. It seems not too draconian to suggest that when the state is going to execute one of its citizens, the judges who authorize or permit that act of violence must not be permitted to hide.