

ARTICLES

DANGEROUS CITATIONS

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This Article considers when optional case citations may do more harm than good. There are valid reasons for citing to non-binding precedent—to promote consistency in the law, for example, or to avoid wasteful redundancy. But unconsidered invocations of non-binding authority may also introduce error into individual opinions and distort the path of the law over time. This Article catalogues such dangerous citations as used in particular by federal district courts citing to other federal district courts with three goals in mind: to help judges use non-binding authority constructively, to help law clerks think critically about their citation practices, and to help readers of judicial opinions question the rhetoric of constraint.

In mapping these problematic uses of non-binding authority, the Article distinguishes between poorly conceived citations and poorly implemented citations. Poorly conceived citations are those for which non-binding precedent is simply not a useful authority. Examples of poorly conceived citations include reliance on prior opinions to establish facts or the content of another sovereign's laws. Poorly implemented citations are those for which non-binding precedent may be relevant but should be selected and applied with care. Examples of poorly implemented citations include over-extended analogies and reliance on judge-made tests that are misaligned with the question being evaluated. This catalogue of poorly conceived and poorly implemented citations surfaces some common themes, including the need for better-designed tests and the challenges posed by modern research methods. But dangerous citations are not simply a matter of inadvertence, carelessness, or mistake; they may also be deployed for rhetorical purposes, in particular to signal legitimacy and restraint. The Article thus ends with a warning against “performative judging,” or the use of excessive citations to suggest greater constraint than the law in fact provides. Such citations are dangerous not just for the error they may introduce, but also because they obscure judicial choice and the inherently discretionary nature of judging.

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INTRODUCTION

Criticisms of “citationitis” are not new.¹ Excessive citations can clutter judicial opinions, inflating their length while detracting from the thrust of judicial reasoning.² They may serve more to signal the judge’s (or the law clerk’s) diligent work and intellectual bona fides than to explain the judge’s reasoning to litigants and future judges.³ Excessive citations may also, however, impose a legal cost—a cost to

¹ RUGGERO J. ALDISERT, *OPINION WRITING* 143 (3d ed. 2012); see also, e.g., Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1361 (1988) (emphasizing the “kernel of great wisdom” in an 1899 law review article: that “‘for the ordinary run of cases’ a full survey of the legal landscape is unnecessary and even counterproductive”); Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1429 (1995) (critiquing a “pure” style of opinion writing for, inter alia, “quot[ing] heavily from previous judicial opinions”).

² E.g., Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 39–40 (2009).

³ E.g., Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1267 (2006); Mikva, *supra* note 1, at 1366 (suggesting that judges increasingly rely on excessive citations to create the appearance of “complete knowledge” due to heightened scrutiny from a diverse array of audiences).

the law as developed through common law reasoning. In particular, unnecessary invocations of non-binding authority may introduce error into individual opinions and foster false constraints across cases. Left unchecked, they can skew the path of the law over time.⁴

This Article maps problematic uses of non-binding authority, what might be called “dangerous citations.” In doing so, it will distinguish between *poorly conceived* citations (instances in which non-binding authority is not a useful authority) and *poorly implemented* citations (instances in which non-binding authority may be relevant but greater diligence is needed in its selection and application).⁵ As an example of *poorly conceived* citations, it is settled law that—outside of the context of preclusion—factual findings by one court do not bind later courts.⁶ Yet judges do cite other opinions to establish facts, typically facts about the world beyond the four corners of the case.⁷ Such reliance on non-binding authority—and all case law when cited for factual assertions is non-binding authority—can obscure the weak foundation of factual assertions in individual opinions; over time, through the accumulation of string citations as proof of common knowledge, it may also make it more difficult for litigants to overcome those factual assumptions with updated information.⁸ As an example of *poorly implemented* citations, judges engaged in analogical reasoning may reduce the reasoning of prior cases to oversimplified heuristics, a risk compounded by decontextualized legal research.⁹

⁴ The Article’s argument builds on the work of scholars exploring the inherent (and imperfect) path dependence of the common law. See, e.g., Clayton P. Gillette, *The Path Dependence of the Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE* 245 (Steven J. Burton ed., 2000); Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) [hereinafter Schauer, *Bad Law*]. Just as “the outcome of natural selection is not perfection,” Hathaway, *supra*, at 639, so too the evolution of the law may not lead to optimal results. See, e.g., Hadfield, *supra*, at 583–85 (critiquing efforts of law and economics scholars to attribute efficiency to the common law); Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425, 426 (2005) (“[S]cholars who posit that judges generally aspire to establish efficient rules cannot thereby conclude that the common law tends ineluctably in that direction. Those scholars must take into account the pressures of time and shortcomings of ability that degrade judicial decisionmaking.”). This Article aims to show how such path dependence can emerge not just from binding authority, but also from citations to non-binding authority.

⁵ I am indebted to Allan Erbsen for suggesting these labels.

⁶ E.g., BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 382 (2016).

⁷ See, e.g., Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013) (documenting examples of lower courts citing facts asserted in Supreme Court cases).

⁸ See *infra* Section II.A.1.

⁹ For a selection of authors describing specific instances of this phenomenon, see, for example, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same*

When combined with selection effects created by procedural rules, the accumulation of these analogical heuristics can bias the development of the law.¹⁰

These problematic citation practices appear at all levels of the federal judiciary: lower courts citing dicta from higher court opinions,¹¹ federal circuits citing case law from other circuits,¹² higher courts citing lower court opinions,¹³ and district courts citing to each other.¹⁴ Indeed, such citations are particularly dangerous when deployed by higher courts: An error introduced in district court opinions can become the binding law of the circuit if it is picked up and repeated in an appellate decision.

Despite the universality of the dangerous citations catalogued here, however, this Article will focus on examples of federal district court use of federal district court citations precisely because such opinions are never binding.¹⁵ In terms of establishing the stakes of dangerous citations, these district court citations are the proverbial canary in the coal mine.¹⁶ District court judges are typically careful to avoid undue reliance on district court citations. If we can nevertheless identify how occasional misuse of district court authority has led to

Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions, 51 EMORY L.J. 83 (2002); Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 116 (2012).

¹⁰ On the effects of structural asymmetry on the development of the law, see, for example, Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643 (2015); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1 (1990). For further discussion, see Section II.B.2 below.

¹¹ E.g., Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 221–22 (2010) (explaining that lower courts rely on Supreme Court dicta in formulating judicial opinions); Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 576 & n.106 (2017) (reviewing GARNER ET AL., *supra* note 6).

¹² Or dicta from their own opinions. See Leval, *supra* note 3, at 1251, 1273 (critiquing appellate courts' misattribution of their dicta as binding precedent).

¹³ See Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851 (2014) [hereinafter Bruhl, *Lower-Court Precedent*] (describing and partly critiquing this phenomenon).

¹⁴ See Brian Soucek & Remington B. Lamons, *Heightened Pleading Standards for Defendants: A Case Study of Court-Counting Precedent*, 70 ALA. L. REV. 875 (2019) (examining and critiquing district court invocation of the majority position around which prior district court decisions have coalesced).

¹⁵ See GARNER ET AL., *supra* note 6, at 255 (“[T]rial courts aren’t bound at all by other trial-court decisions, or even their own decisions, though trial judges may follow them at their discretion.”); *id.* at 515 (“The stare decisis effect of federal district-court decisions on other trial courts is nil.”); see also *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (noting in dicta that district courts are not bound by district court precedent). For further discussion, see Section I.A below.

¹⁶ I am grateful to Danya Reda for this metaphor.

error in subsequent cases, then we should expect to find even stronger effects from dangerous citations in other pairings in which judges are not as cautious in either the creation or treatment of binding precedent: when lower courts cite to dicta in higher court opinions, for example, or when higher courts cite to lower court decisions.

There is another benefit in focusing on district court use of district court citations: Much of the literature on systemic legal error on which this Article builds has focused on Supreme Court and circuit court precedent.¹⁷ Less attention has been paid to how similar systemic effects can result from reliance on district court decisions.¹⁸ Meanwhile, another literature emphasizes how district courts—which handle the vast majority of the federal judiciary’s workload—face different challenges, different constraints, and different audiences than do the appellate courts.¹⁹ District courts, in other words, are worthy of distinct study.

The following discussion aims to contribute to both of these important conversations. The primary goal of this Article, however, is more practical: to help judges use district court decisions constructively, to help law clerks think critically about their citation practices, and to help readers of judicial opinions question the rhetoric of citations.²⁰ This Article presupposes that the citation practices critiqued

¹⁷ See, e.g., Bainbridge & Gulati, *supra* note 9; Gertner, *supra* note 9; Masur & Ouellette, *supra* note 10; Schauer, *Bad Law*, *supra* note 4; Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153 (2012); Stinson, *supra* note 11.

¹⁸ Exceptions include Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941 (2017) [hereinafter Gardner, *Parochial Procedure*]; Soucek & Lamons, *supra* note 14; see also Masur & Ouellette, *supra* note 10, at 703 (noting that the deference mistakes they model can result from reliance on either binding or non-binding authority).

¹⁹ For just a small sampling of different approaches to studying district courts, see Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1 (2018) (excavating differences in interpretive methodologies across the different levels of the federal judiciary and urging greater attention to the work of district courts); Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1484, 1527 (2019) (encouraging a “bottom up” approach to procedure that focuses on the experience of poor litigants, and thus on district courts); Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL’Y 83, 83–85 (2009) (noting the institutional differences between district court and appellate decisionmaking and thus arguing for a distinct methodological approach to the study of district courts); see also Diego A. Zambrano, *Judicial Mistakes in Discovery*, 113 NW. U. L. REV. 197 (2018) (documenting errors in district court opinions regarding amendments to the discovery rules in order to explore the possible sources of error in judicial opinions).

²⁰ In this regard, the Article builds on the writings of federal judges on the work—and effects—of judging. See, e.g., ALDISERT, *supra* note 1; Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493 (1950); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982); Gertner, *supra* note 9; Leval, *supra* note 3; Mikva, *supra* note 1; Richard A. Posner, *What Do Judges*

here are not endemic to the use of district court citations and that some of these missteps can be avoided through small corrections. The argument is not about “lazy” or “activist” judges—but neither is it about super-human judges who are never affected by a preference for leisure or for certain normative outcomes (or by what they ate for breakfast). Judging is a human endeavor that involves a range of motives and biases, whether conscious or unconscious. A realistic assessment of judging as multifaceted and contextual is compatible with an assumption that most judges at least try to operate within an objective framework of the law.²¹ Put another way, the effort here is to help judges and their law clerks who are trying to get it right to get it right more often.

This Article proceeds as follows. Part I defines key terms and explores why district courts may need to cite to other district court opinions. There are good reasons for such citations, including judicial economy, epistemic development, consistency, legitimacy, and the development of peer relationships. But there are also good reasons for why district court decisions are not binding on future courts: Many of the values that justify stare decisis are weaker in the institutional context of the district courts. When it comes to courts of first instance, the pursuit of consistency can conflict with the pursuit of correctness, for example, while the desire for efficiency and legitimacy may foster problematic short cuts.

Part II develops a catalogue of dangerous citations divided into poorly conceived citations and poorly implemented citations. The first group includes the use of district court citations to establish facts and non-federal law. Judges and law clerks should be particularly wary of invoking non-binding authority for these purposes. The second group includes overvaluing the proverbial “weight of authority,” over-

and Justices Maximize? (The Same Thing Everybody Else Does), 3 SUP. CT. ECON. REV. 1 (1993).

²¹ *Accord* Bainbridge & Gulati, *supra* note 9, at 96 (“On the lower courts, we are aware of no more than a handful of judges who have reputations for pushing their policy agendas. Most judges are relatively staid and, as we see it, are focused on getting through their caseloads.”); Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 615–17 (2017) (finding that an estimate of ideological difference between district court judges and their appellate court does not explain why district court judges are increasingly unwilling to distinguish precedent); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1303 (2018) (concluding from interviews with federal appellate judges that ideology mattered less than the judge’s generation and experiences in other branches of the government); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2007) (identifying “judicial accuracy, not judicial activism, as the most challenging issue facing the courts”).

extending analogical reasoning, and adopting tests that are not well-suited for the task at hand. To be clear, my critique is not of learning from the reasoning of prior cases, analogical reasoning, or developing tests to guide decisionmaking. These are all fundamental aspects of the judge's craft. Rather, the discussion of this second group is intended as a warning of common mistakes that can lead such efforts astray.

Turning to prescription, Part III gathers process-based suggestions for reducing the risk of dangerous citations. An overarching lesson from the catalogue of Part II is the need for thoughtfully designed tests to assist district court adjudication. Part III also takes up access to information and the roles of litigants and law clerks. In reflecting on the role of legal research methods in perpetuating dangerous citations, Part III raises a note of skepticism regarding the growing consensus that the quality of judicial decisionmaking would be improved by increased access to unreported decisions.²²

The prescriptions of Part III, however, will not entirely remove the draw to use non-binding authority to establish facts or interjurisdictional law, to simplify analogical reasoning, or to use tests even when they do not fit the question being asked or the materials available for answering it. Some judges may (mis)use non-binding authority purposefully to achieve certain ends. But even non-“activist” judges may be drawn to dangerous citations because they feel uncomfortable acknowledging the inherent uncertainty and subjectivity of some decisions. This is a critique of dangerous citations as a form of rhetoric, used to signal greater objectivity and constraint in the law than the law in fact provides. My hope is that this Article convinces judges that such performative use of citations carries costs for both litigants and the law. Part IV calls on judges, and those assisting judges, to instead be more forthcoming about the work of judging—and for readers of judicial opinions to be more critical of claims of constraint when they are based on non-binding authority.

²² See, e.g., Peter W. Martin, *District Court Opinions That Remain Hidden Despite a Long-Standing Congressional Mandate of Transparency—The Result of Judicial Autonomy and Systemic Indifference*, 110 LAW LIBR. J. 305 (2018) (documenting the negative consequences of failing to provide access to unpublished opinions on judicial data collection and legal argumentation); Merritt E. McAlister, “Downright Indifference”: *Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020) (arguing for minimum standards of publicly available reasoning in unpublished decisions, primarily for the benefit of indigent litigants); Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515 (2016) [hereinafter McCuskey, *Submerged Precedent*] (investigating the impact of unpublished opinions, particularly those inaccessible to the public, on the legitimacy, efficiency, and fairness of precedent).

I

DISTRICT COURTS CITING DISTRICT COURTS

Although dangerous citations can arise from any court's use of non-binding authority, this Article will focus on district court citations to district court decisions to make the inquiry more manageable. Doing so raises some preliminary questions, like why *do* district courts cite to district court decisions, even though they are not bound by them? This Part starts by defining key terms and describing the institutional conditions that not infrequently make district court decisions the only on-point case law available to district court judges. It then canvasses the reasons why district courts might rely on these prior decisions, as well as some limits to those reasons.

A. Defining District Court Precedent

Although terminology is not critical to the argument that follows, this Article uses the term "precedent" capaciously to encompass all prior judicial opinions, whether or not they are binding on the citing court and whether or not they are published in a formal reporter.²³ The only limitation, for present purposes, is that an opinion must be written and it must be available through a widely used legal database such as Westlaw or Lexis. This limitation reflects my focus on how judges use precedent, which means I am interested in the precedent judges can readily locate.²⁴

To distinguish between precedent that binds a court and precedent that does not, this Article will refer to *binding* versus *non-binding* authority. I avoid the term "persuasive" authority, which encourages conflation of a category of precedent with one of its possible functions (that of persuasion, or epistemic clarification more generally).²⁵ The category of *binding* authority can be further divided into *vertical* and *horizontal* precedent. *Vertical precedent* refers to binding authority emanating from courts in direct hierarchical relationship to the citing court. For a federal district court, these would be its geographic circuit and the Supreme Court.²⁶ *Horizontal precedent*

²³ See, e.g., GARNER ET AL., *supra* note 6, at 22–23, 35–36, 40 (similarly treating "precedent" as encompassing non-binding case law).

²⁴ This definition thus excludes what Elizabeth McCuskey has termed the "submerged precedent" of unreported decisions that are available only from docket searches. See generally McCuskey, *Submerged Precedent*, *supra* note 22. As docket searches become more automated through services like Bloomberg Law, however, these "submerged precedents" may become much more accessible, with implications for the analysis that follows.

²⁵ See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935–36 (2008) [hereinafter Schauer, *Authority and Authorities*]; see also *infra* Section I.B.2.

²⁶ GARNER ET AL., *supra* note 6, at 27–28.

refers to prior decisions of the same court that are treated as binding. The binding effect of horizontal precedent is weaker than that of vertical precedent as a court may overturn its horizontal precedent under certain circumstances.²⁷ A federal circuit, for example, is generally bound by its prior panel decisions unless overturned by a later en banc decision.

Federal district courts are different in this regard. “District-court judges aren’t bound by the decisions of other district-court judges, or even their own decisions.”²⁸ In other words, district court precedent does not have stare decisis effect. Though stare decisis can be a slippery concept, it is used here to refer to rules of formal constraint that entail a presumption of validity, in contrast to the more general efforts of judges to promote stability and uniformity in the law. Thus while district court judges may “strive for harmony with the rulings of colleagues and predecessors,”²⁹ this background norm of common law decisionmaking does not *require* district court judges to follow the decisions of prior district court judges, even those within the same district.³⁰ Because the terms *horizontal precedent* and *vertical precedent* both imply the constraints of stare decisis,³¹ the decisions of peer courts that do not have stare decisis effect (like those of the district courts) might best be termed *parallel precedent*.

²⁷ See, e.g., *id.* at 40–41, 386–87; see also *id.* at 37–38 (noting some variation in law-of-the-circuit rules and noting that en banc panels can revisit prior en banc decisions).

²⁸ *Id.* at 40; see also *id.* at 441–43 (describing the minor exception of the law of the case doctrine). Notably, this treatise’s definitive assertion is solely supported—as are similar assertions in other treatises and recent cases—by a citation to *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). The footnote in *Camreta*, however, was an aside about an issue that the Supreme Court made clear it was not deciding. In other words, the definitiveness today of the non-binding nature of district court decisions may itself reflect some over-reliance on non-binding authority (i.e., dicta). Cf. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 829 (2012) (suggesting that the non-binding nature of district court precedent may have itself evolved through misapplication of district court precedent).

²⁹ GARNER ET AL., *supra* note 6, at 385.

³⁰ See *id.* at 385 n.4 (“[F]or a variety of quite valid reasons, including consistency of result, it is an entirely proper practice for district court judges to give deference to persuasive opinions by their colleagues on the same court. . . . [W]hile this is a laudable and worthwhile practice, it does not convert [their] decisions into binding precedent.” (quoting *TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990))). For examples of intra-district splits, see Arthur Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman & Georgene Vairo, *Neutralizing the Stratagem of Snap Removal: A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 105–06 (2015) (identifying five districts with conflicting decisions regarding “snap” removal); Soucek & Lamons, *supra* note 14, at 891–95 (documenting intra-district disuniformity regarding pleading standards for affirmative defenses).

³¹ See GARNER ET AL., *supra* note 6, at 27 (preferring the terms vertical and horizontal precedent to the ambiguous phrase “stare decisis” but suggesting they refer generally to the same concept).

I also prefer the term “reported opinion” to “published opinion.” Both terms refer to decisions that are chosen for inclusion in a hard-copy reporter, whether the official reporter of the court (e.g., the *U.S. Reports*) or those published privately (e.g., the West reporters, such as the *Federal Supplement*). The distinction between *published* opinions and *unpublished* opinions has blurred, however, as the latter category are also available in online databases like Westlaw and Lexis.³² Indeed, the Bluebook now directs legal writers to list published and unpublished cases together in string citations,³³ and parties may cite unpublished cases before the appellate courts³⁴ as well as the district courts.³⁵ Given these increasingly similar treatments, and because inclusion in an online database is itself a form of publication, speaking in terms of “published” and “unpublished” opinions invites confusion.³⁶

Focusing on “reported” opinions, in contrast, reminds the reader of both the physical difference between reported and unreported decisions (i.e., the former usually appear in hard copy books while the latter do not) and the human element that accompanies reporting. The first human decision is typically that of the opinion author in submitting the opinion for publication. With the federal circuit courts, this decision renders the opinion binding authority.³⁷ For district courts, judges’ decisions are never binding authority in future cases, and West may not report every opinion that is submitted (and may publish some that are not). But the judge’s decision to submit the opinion is at least indicative of a belief that the decision represents careful work product

³² See Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 427 n.223 (2012) (gathering scholars defining “published” opinions differently, including those who consider any case available in a major database to be published).

³³ See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.4(d), at 61 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015) (“Cases are arranged within a signal according to the courts issuing the cited opinions. Subsequent and prior histories are irrelevant to the order of citation, *as is whether the opinion is published or unpublished.*” (emphasis added)).

³⁴ On the adoption in 2006 of Federal Rule of Appellate Procedure 32.1, which permits litigants to cite to “unpublished” and “non-precedential” decisions issued on or after January 1, 2007, see GARNER ET AL., *supra* note 6, at 144. On the evolving treatment of such citations before appellate courts, see *id.* at 148; Soucek, *supra* note 17, at 156 n.12 (collecting sources regarding the debate over unpublished appellate opinions).

³⁵ No federal district prohibits litigants from citing to unreported decisions via local rule, though some require additional procedures (like the attachment of unreported decisions not otherwise available on Lexis or Westlaw).

³⁶ *Accord* Mead, *supra* note 28, at 798 n.85 (“In this era of Westlaw and Lexis electronic databases, referring to opinions as ‘published’ and ‘unpublished’ is inaccurate and downright confusing.”).

³⁷ See GARNER ET AL., *supra* note 6, at 142.

and might be useful for other judges and litigants to review. Subsequently, human editors may annotate the reported decisions, including by categorizing the legal rules discussed in the decision. Although the role of *human* editors (as opposed to algorithms) may be decreasing,³⁸ the potential relevance of such editorializing merits maintaining a distinction between opinions that are reported and those that are not.³⁹

District court precedent, then, is a form of parallel precedent that has no formal *stare decisis* effect, whether or not the decision is reported. Even if district court judges are not bound to follow district court precedent, however, the values underlying *stare decisis* may still support invocation of such parallel precedent, at least under certain conditions.

B. *Stare Decisis Values in District Courts*

The goal of this Article is not to discourage all reliance on parallel precedent. District courts face unique pressure to cite to non-binding authority, particularly the decisions of other district courts. This pressure stems from the frequent absence of binding authority on issues that district courts must decide—what Elizabeth Y. McCuskey terms the “vertical vacuum.”⁴⁰ There are several reasons why a vertical vacuum might exist for any given question before a district court judge. First, some procedural questions are structurally shielded from appellate review, meaning that only district court decisions will address them.⁴¹ These include, for example, most decisions remanding cases to state court.⁴² Second, because appeals are litigant-initiated, litigation strategy will lead to selection effects in what issues are presented to appellate courts: If a matter seems straightforward, or if

³⁸ See Susan Nevelow Mart, *The Case for Curation: The Relevance of Digest and Citor Results in Westlaw and Lexis*, 32 LEGAL REFERENCE SERVICES Q. 13, 18–21 (2013) [hereinafter Mart, *Curation*] (describing the role of algorithms versus human editors in the annotation and indexing of cases within Westlaw and Lexis); see also Ronald E. Wheeler, *Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research*, 103 LAW LIBR. J. 359, 360–61 (2011) (describing the machine learning built into WestlawNext’s proprietary search engine).

³⁹ The relevance of this distinction is considered further in Section II.B below.

⁴⁰ Elizabeth Y. McCuskey, *Horizontal Procedure 28* (2017) (unpublished manuscript) (on file with author) [hereinafter McCuskey, *Horizontal Procedure*].

⁴¹ Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 701 (2014) (“Many trial court procedural decisions [like joinder rules] are structurally insulated from appellate review.”); McCuskey, *Horizontal Procedure*, *supra* note 40, at 25–26 (noting that some Federal Rules of Civil Procedure are almost solely cited by district courts).

⁴² See, e.g., Andrew D. Bradt, *Grable on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153, 1156 (2011) (studying the effects of remand orders being shielded from appellate review).

it is sufficiently minor, parties have less incentive to raise it on appeal, which increases the likelihood that no appellate court has spoken on the issue.⁴³ Third, some issues are novel (due, for example, to changes in statutes or rules),⁴⁴ or they simply seldom arise; if there is any relevant case law regarding such issues, chances are that the case law will be from the district courts, based solely on those courts' significantly greater workload and opinion output.

Particularly in light of the vertical vacuum, the values underlying *stare decisis* may justify reliance on district court precedent: values like judicial economy, the need for epistemic development, the goal of consistency (which furthers both predictability and equal treatment), the projection of judicial legitimacy, and the development of peer relationships.⁴⁵ Because district courts differ from higher courts in terms of structure and process, however, these values play out slightly differently at the district court level. This Section highlights the justifications for why district court judges may cite district court precedent, but it also explores some limits to those justifications.

In doing so, it sets aside descriptive uses of district court citations. For example, judges may find themselves citing district court decisions either to explain the procedural posture or factual background of a case or to summarize parties' arguments. Because these are descriptive uses of precedent tied to a specific case, they do not carry the same risk of introducing error or distortion across cases that other uses may entail.

1. *Judicial Economy*

Compared to the appellate courts and the Supreme Court, district courts have an even greater need for judicial economy. Their workload is greater, their pace is faster, and their staffing is thinner: District court judges work largely on their own (in contrast to appellate

⁴³ See, e.g., Schauer, *Bad Law*, *supra* note 4, at 909–10, 909 n.110 (discussing selection effect on the perpetuation of errors in precedent and gathering literature regarding selection effects on litigation).

⁴⁴ See McCuskey, *Horizontal Procedure*, *supra* note 40, at 32–35 (giving examples of district court decisions relying on district court citations when addressing recent rule changes).

⁴⁵ For examples of standard formulations of the values underlying *stare decisis*, see, for example, RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 36 (2017) (“promoting decisional efficiency, protecting settled expectations, and finding common ground among judges”); Gillette, *supra* note 4, at 254 (“fairness to actors bound by legal rules, efficient decision making, ties to tradition, ensuring certainty and predictability in legal doctrine, or conserving decisional resources”); Mead, *supra* note 28, at 792 (“predictability, fairness, appearance of justice, and efficiency”); Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 595–602 (1987) (noting fairness, predictability, efficiency, and stability).

panels) yet have fewer law clerks to whom they can delegate research and drafting tasks. Though some questions arise regularly—motions to dismiss and summary judgment motions, for example, or § 1983 claims—much of the docket will be varied.⁴⁶ Federal judges, after all, are expected to be generalists capable of resolving complex questions of statutory, state, foreign, and international law. And even on familiar terrain, like with evidence rulings or jury instructions, the infinite variability of life can generate unfamiliar questions. The novelty of these questions in turn suggests that if any precedent exists, it will likely be from the district courts. In working through these questions, then, judges understandably turn to the work already done by their peers.

Efforts to avoid reinventing the wheel can nonetheless cross into problematic short cuts. Brian Soucek has documented, for example, how legal errors can be introduced and perpetuated when law clerks or staff attorneys copy and paste rule paragraphs from one opinion to another.⁴⁷ Beyond such practical short cuts, there are also conscious and unconscious decisionmaking short cuts, often termed “heuristics.”⁴⁸ Heuristics are an inherent aspect of human decisionmaking, and they can be helpful—even necessary—to the extent they enable “fast and frugal” decisionmaking within a resource-constrained institution.⁴⁹ Heuristics may be cause for concern, however, when they become inflexible, are based on faulty generalizations, or do not align well with the task at hand.

At their root, all of the categories of dangerous citations in Part II reflect problematic short cuts in research or reasoning that may feel efficient in the short term but may instead introduce error and distortion in the long run. The goal is not to eschew all heuristics in judicial decisionmaking—a task that may not be humanly possible or institutionally desirable—but to flag the circumstances in which opinion writers should slow down their analytical processes to ensure that their heuristics are not misleading them.⁵⁰

⁴⁶ For statistics on the workload of the U.S. district courts, see the reports published by the Administrative Office of the U.S. Courts. *Statistics & Reports*, U.S. CTS., <https://www.uscourts.gov/statistics-reports> (last visited Aug. 11, 2020).

⁴⁷ See Soucek, *supra* note 17 (describing the effects of copy-pasted rule paragraphs in unpublished appellate opinions).

⁴⁸ See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (reporting research showing that decisionmaking by federal trial judges exhibits five common heuristics).

⁴⁹ Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1586 & n.25 (2006) (summarizing and endorsing the literature on the usefulness of “fast and frugal heuristics”).

⁵⁰ See Guthrie et al., *supra* note 21, at 3–6 (noting that eliminating all intuition from judging “is both impossible and undesirable because it is an essential part of how the

2. *Epistemic Development*

Non-binding authority is often termed “persuasive” authority because it is thought to help judges think through legal issues and reach the “correct” outcome, even if judges are not bound to follow it.⁵¹ The need for such epistemic development is perhaps greatest at the district court level. In light of the vertical vacuum, the only way some areas of law may develop is if district court judges learn from and build on what other district court judges have considered. There is also a perceived benefit to lower courts “percolating” on difficult questions, in that their varied or vetted approaches to such questions can help inform and improve decisionmaking by future courts, particularly higher courts.⁵² District court judges may thus seek out district court precedent to learn how other judges have analyzed the same sort of problem—whether with the goal of building on those approaches or of seeking reassurance that one’s own approach is within the realm of reasonability.⁵³

There is a potential tension here, however. To the extent that the goal of “percolation” is to divine the most “correct” answer to a question, it reflects an intuition—supported by the Condorcet Jury Theorem—that the collective decisions of many decisionmakers will be more likely to identify the correct answer to a problem than will a

human brain functions” but arguing that judges do and should override intuitive judging with deliberation in certain circumstances).

⁵¹ See, e.g., Bruhl, *Lower-Court Precedent*, *supra* note 13, at 863–64; Hathaway, *supra* note 4, at 627 (“[J]udges often follow a precedent for the simple but obvious reason that they find its reasoning compelling.”); see also GARNER ET AL., *supra* note 6, at 165–66 (listing reasons for using non-binding authority that relate to the persuasiveness of its legal reasoning).

⁵² Stare decisis “improves decision making by requiring judges to draw on a body of law that represents the collective experience and knowledge of judges over time.” Hathaway, *supra* note 4, at 652. There has nonetheless been a consistent literature questioning the value of “percolation” from the perspective of the Supreme Court. See, e.g., Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. (forthcoming 2021) (gathering literature). The tensions identified below between percolation and consistency—along with the concomitant risk of premature herding, see *infra* Section II.B.1—further cast doubt on the benefit of percolation from the perspective of higher courts. But I am primarily concerned in this Article with whether district court judges can themselves rely on the wisdom of the district court crowd if early decisions are falsely constrained by early movers.

⁵³ See GARNER ET AL., *supra* note 6, at 25 (“The precedent may not dispose of the new case—it may not be a sufficient basis for the later decision—but it represents a source of experience, insight, and learning that courts may find helpful.”); KOZEL, *supra* note 45, at 39 (noting that judges might pause before “blazing a new trail . . . for fear of unforeseeable problems”); Bruhl, *Lower-Court Precedent*, *supra* note 13, at 875–76 (referring to the “modest pragmatism” of seeing how past decisions have worked out).

single, more expert decisionmaker.⁵⁴ The strength of that theorem, however, turns on the number and independence of the individual decisions. If district court judges turn too soon or rely too heavily on prior district court decisions, they may undercut the epistemic argument for relying on the (eventual) collective wisdom of the district courts.⁵⁵

3. *Consistency and Equal Treatment*

Consistency in the application of the law is a central justification for stare decisis, and its pursuit can lead judges to follow even non-binding precedent.⁵⁶ Consistency is linked with stability and predictability, in that it allows actors to manage their future affairs with greater certainty; after litigation begins, it also encourages the like treatment of similarly situated parties.⁵⁷ These concerns are greatest within a single judicial district: There is a reasonable intuition that the outcome of an issue or a case should not turn on the happenstance of which judge within a courthouse is assigned to it. Thus consistency concerns may provide an especially compelling justification for citing other judges within the same district.

Nonetheless, the concern for consistency raises another tension for district courts. If district courts are to percolate on open questions,

⁵⁴ See Bruhl, *Lower-Court Precedent*, *supra* note 13, at 863 (describing the Condorcet Jury Theorem as establishing that, “[w]hen the members of a group are all better than random at selecting the correct answer to a question, the likelihood that a majority vote of the group will select the correct answer approaches certainty as the size of the group increases . . . [and t]hus, the aggregate decisionmaking ability of a modestly competent large group can outperform the judgment of the most expert individuals”) (footnotes omitted); see also *id.* at 863 nn.36–37 (collecting references regarding the Condorcet Jury Theorem).

⁵⁵ See, e.g., *id.* at 864–65. For further discussion of this tension, see *infra* Section II.B.1.

⁵⁶ See, e.g., McCuskey, *Horizontal Procedure*, *supra* note 40, at 43 (noting that district court reliance on district court precedent for procedural questions “is, to some extent, a reflection of district courts voluntarily binding themselves to the constraints of precedent in pursuit of efficient and predictable procedure”); cf. Bruhl, *Lower-Court Precedent*, *supra* note 13, at 923 (noting that circuit courts similarly strive for horizontal coordination, even though they are not obligated to do so, in order to increase geographical uniformity across the United States).

⁵⁷ See, e.g., Bruhl, *Lower-Court Precedent*, *supra* note 13, at 879 (“[Stability] promotes the equal treatment of similar litigants over time and, perhaps most importantly, protects the interests of those who have ordered their affairs in reliance on a certain state of the law.”); Effron, *supra* note 41, at 691 (“Consistency of outcomes (and the attendant predictability) achieves a certain degree of equality among and between litigants.”); Hathaway, *supra* note 4, at 653 (“The use of precedent fosters justice because it encourages judges to treat like cases alike.”). Though these concerns for predictability and equality overlap, they can also be considered separately. See, e.g., *id.* at 651–54 (discussing predictability separately from fairness and legitimacy); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–70 (1988) (discussing certainty separately from equality).

this epistemic pursuit conflicts with the pursuit of consistency. There may be a trade-off, in other words, between equal treatment across cases and correctness in individual cases.⁵⁸ With procedural questions for which the costs of incorrectness are low, the balance may tip in favor of consistency. Consistency may be more valuable than identifying the absolute “best” solution when courts confront coordination problems (for which the existence of a settled answer matters more than its content), or when the cost of figuring out the answer independently in each case outweighs the benefits of greater accuracy.⁵⁹ Here district court citations—particularly from within the same district—may helpfully promote predictability and equal treatment.⁶⁰

The balance may come out the other way, however, for substantive questions and more novel or outcome-determinative procedural questions, or when the goal is to promote stability nationally. In such cases, the need to identify the best possible answers in the long run is greater. At the same time, there may be less risk that variations in outcome in the interim will be perceived as arbitrary when the questions are new or high-stakes, or when prior answers have been provided only by judges in distant districts.

4. *Legitimacy*

District court judges may also be drawn to cite district court precedent in order to signal the legitimacy of their conclusions. To quote Frederick Schauer quoting Dave Barry, this is the “I am not making this up” use of precedent.⁶¹ For example, a judge might reason independently to a conclusion but then include what is essentially an “accord” citation to assure the parties that the conclusion is sound.⁶²

⁵⁸ One way to avoid this trade-off might be greater use of district court en bancs. See Maggie Gardner, District Court En Bancs (Aug. 28, 2020) (unpublished manuscript) (on file with author) [hereinafter Gardner, En Bancs].

⁵⁹ Cf. Gillette, *supra* note 4, at 248 (“Where legal precedents simply solve coordination problems or where legal change would create improvements only by generating transition costs not worth incurring, constraints on judicial inventiveness serve a valuable function for the very reason that they lock in an existing legal rule.”).

⁶⁰ Even here, however, consistency can be achieved through collective action of a district, whether through local rule making, standing orders, or (albeit admittedly rare) en banc proceedings. See Gardner, En Bancs, *supra* note 58 (collecting examples of district court en bancs).

⁶¹ Schauer, *Authority and Authorities*, *supra* note 25, at 1950; see also McCuskey, Horizontal Procedure, *supra* note 40, at 38 (noting that use of district court precedent can help litigants understand that a decision “is consistent or unremarkable, even if painful”).

⁶² This use of citations is distinct from the work of analogizing to a prior decision, which requires grappling with the similarities and differences between the cases. The idea here is that a judge might work through a legal question that has a fairly determinate answer (for example, how a rule of evidence might apply to an unusual problem, perhaps in light of binding precedent), with a citation affirming that other judges have reasoned similarly.

Or a judge might include citations to cases that she considered in order to be transparent about her process of decision formation, even if the case citation is not required for decision justification; such transparency would in turn be justified by its legitimacy-enhancing effects. A judge might also cite intra-district precedent to educate litigants, particularly pro se litigants, about standard customs of the district.⁶³ Lengthy string citations can be used to underscore the settled nature of a question, particularly with procedural matters.⁶⁴ They can also be used to scold repeat players who are engaging in repeat bad behavior.⁶⁵

There is a limit to this use of non-binding authority, however. Beyond conveying the settled nature of a particular legal question or transparency regarding the judge's reasoning process, non-essential citations may be deployed to suggest greater objectivity and constraint in the law than in fact exists. That is, citations may be used to establish not the legitimacy of a particular answer, but the legitimacy of the judge's process—that the judge is serving as an umpire within a narrow set of parameters. But non-binding authority does not actually set such parameters; the judge is still making judgment calls about when consistency outweighs correctness, for example, or how the law should apply to a particular set of facts. This more rhetorical use of citations is a theme to which the Article returns in Part IV.

5. *Peer Relationships*

Finally, district court judges may cite to district court opinions in an effort to maintain or develop relationships within the federal judiciary.⁶⁶ Judging is a collegial enterprise, even for district court judges. They may not typically handle cases in panels, like the appellate courts do, but their work still reflects interpersonal relationships.

⁶³ See McCuskey, *Horizontal Procedure*, *supra* note 40, at 38.

⁶⁴ For an older example, see *Matteson v. Bresette*, 250 F. Supp. 646, 647 (W.D. Mo. 1966) (citing five district court cases for the proposition that “diversity must be alleged at the time of the commencement of the action as well as at the time of removal”).

⁶⁵ See Joe Patrice, *Wal-Mart Benchslapped in Epic String Cite*, ABOVE THE LAW (Oct. 11, 2018, 4:02 PM), <https://abovethelaw.com/2018/10/wal-mart-benchslapped-in-epic-string-cite> (describing “nuclear string cite” in *Rivera v. Sam’s Club Humacao*, 386 F. Supp. 3d 188, 208–09 (D.P.R. 2018), in which the judge gathered eighteen prior cases, including fifteen district court opinions, in which the same defendant had been sanctioned for spoliation); see also *Keatley v. Food Lion Inc.*, 715 F. Supp. 1335, 1336 n.1 (E.D. Va. 1989) (collecting cases in which the same attorney had made the same procedural mistake). This sort of “benchslap,” however, borders on a descriptive use of precedent, which I have set aside in this discussion.

⁶⁶ See, e.g., Bainbridge & Gulati, *supra* note 9, at 108 (noting that judges care about the audience of other judges, particularly local judges, and that “it is the informal norms of the judiciary” that keep judges from shirking their work).

Many district court judges share courthouse space with other judges, and most interact regularly with peers in their district—interactions greatly eased across courthouses by the advent of email, smartphones, and teleconferences. These interactions are both social and professional, though the exact nature and mix of them may vary by district. Local rules and administrative practices need to be adopted; time-consuming cases may need to be moved around; new colleagues need to be acclimated.⁶⁷ Some judges eat lunch together; others may use their colleagues as sounding boards. In such an environment, there is implicit pressure not to disagree publicly with one's colleagues unless compelled to do so.⁶⁸

These social factors are not limited to intra-district deference, either. Many federal judges maintain regional and national connections as well—through committee work on jury instructions or federal rules, for example, or through circuit conferences, judicial trainings, or extracurricular activities (like the American Law Institute). These collegial connections may encourage district court judges to consider how their peers have addressed similar questions and may put a thumb on the scale in favor of following those precedents.

In addition to bolstering collegiality, thorough citations to other district court opinions may help establish a judge as a thought leader on whose work other judges can dependably rely.⁶⁹ Such citations also signal to appellate courts the legitimacy (or at least the consensus behind) a particular approach or outcome, thus increasing the likelihood of affirmance.⁷⁰ Relying on parallel precedent can also help judges navigate areas of law that are complex or obscure, or otherwise

⁶⁷ Cf. Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 112–13 (2019) (reporting that appellate courts may invite district court judges to sit by designation in part to acculturate new judges to the circuit's law and norms); *id.* at 108 (identifying that “familiarity and even friendship might play a role in a visiting judge’s selection”).

⁶⁸ Cf. *id.* at 113 (quoting a Fourth Circuit judge as noting that visiting judges can improve intra-circuit civility because “a circuit judge who has actually met a district judge is less likely later on to use language that’s too harsh or strident in an opinion”); *id.* at 115–16 (quoting numerous judges as worrying that district court judges may be reluctant to reverse a colleague when sitting by designation on an appeals court). The collegial effect may vary by district, reflecting differences in culture or simply differences in size. See *id.* at 116–17 (quoting judges from the Second Circuit noting that the Southern District of New York bench is so large that those judges would not be uncomfortable reversing a colleague).

⁶⁹ Cf. Leval, *supra* note 3, at 1267 (critiquing judges’ desire “to appear erudite” as encouraging excessive or unnecessary discussion of doctrine).

⁷⁰ See, e.g., Bainbridge & Gulati, *supra* note 9, at 116 (describing “lengthy string cites” as a technique used by courts to lower the risk of reversal); Gillette, *supra* note 4, at 264 (noting the “incentive to avoid reversal, in part to avoid criticism from peers and in part to avoid investment of time in an enterprise (creating the judge’s own precedent) that is easily undone”).

to avoid mistakes in areas in which they do not feel comfortable, in turn protecting themselves from the reputational harm of error.⁷¹ In other words, there is safety in numbers.

While these collegial pressures are understandable, and perhaps smooth the internal workings of the courts overall, these citations do not inevitably add to the epistemic development of the law. Collegiality can direct judges to helpful (even if non-binding) precedent, but citations just for the sake of goodwill or interjudicial reputation can carry a legal cost that may outweigh any personal benefits.

In short, there are good reasons why a district court judge might cite district court opinions. But there are limits to these reasons, and when those reasons run out, unnecessary citations to non-binding authority may work affirmative harm, both in individual cases and more systemically.

II

DANGEROUS CITATIONS

This Part catalogues uses of non-binding authority for which the risk of systemic error outweighs reliance rationales. It gathers examples from my own work on transnational litigation, as well as from the work of other scholars regarding attorney fee awards,⁷² employment discrimination,⁷³ choice of law determinations,⁷⁴ securities litigation,⁷⁵ and procedure,⁷⁶ among others. To be clear, these are not the only areas in which such dangerous citations might be observed. While these examples were chosen for convenience, there is no reason to think the phenomenon is limited to particular issue areas. The rhetoric and research techniques critiqued here are generalizable to all opinion writing.

I group these “dangerous citations” into two categories: *Poorly conceived* citations are those uses of non-binding authority that judges should generally avoid. This category should be fairly non-controversial: District court opinions are not authoritative sources for

⁷¹ See, e.g., Bainbridge & Gulati, *supra* note 9, at 117 (comparing judges to managers in noting that, “[i]f a bad outcome occurs, but the action was consistent with approved conventional wisdom, the hit to the manager’s reputation from an adverse outcome is reduced”).

⁷² See Maureen Carroll, The Central Tensions of Statutory Fee Shifting (n.d.) (unpublished manuscript) (on file with author).

⁷³ See Gertner, *supra* note 9.

⁷⁴ See John T. Parry, *The Dead Hand of the Past in Oregon Choice of Law*, LEWIS & CLARK L. REV. ONLINE, Summer 2019, at 1.

⁷⁵ See Bainbridge & Gulati, *supra* note 9; Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2002).

⁷⁶ See Soucek & Lamons, *supra* note 14.

discerning non-federal law, and no case is an authoritative source for establishing facts (outside the narrow confines of issue preclusion). *Poorly implemented* citations, on the other hand, are uses of non-binding authority that are valid—perhaps even central to the work of district court judging—but should be approached with caution. Judicially constructed frameworks can help organize decisionmaking, for example, but should be formulated and applied with care; analogical reasoning lies at the heart of common law judging, but it can easily be overextended into “rules” and “requirements” that may falsely constrain future judges.

A. *Poorly Conceived Citations*

Judges already know that they are not bound by factfinding in prior opinions, or that federal district court opinions are not authoritative sources on the content of state law. The following categories of poorly conceived citations should thus not be surprising—but the fact that judges still use non-binding authority for these purposes might be. These sources of legal error may prove the easiest to correct, then, once greater attention is drawn to them.

1. *Facts*

Judges cite case law to establish facts. Allison Orr Larsen has documented, for example, how lower court judges cite Supreme Court opinions as “factual precedent” to support such statements as “forensic evidence is frequently manipulated, postabortion depression is exaggerated, Americans attend church more often than citizens of other nations, predatory pricing rarely occurs in the market, campaign donations lead to biased judges, and psychopaths retain some ability to control their behavior.”⁷⁷ One danger of citing case law to establish facts is that facts can change.⁷⁸ But more fundamentally, the facts might have been wrong from the outset, or at least under-considered.⁷⁹ In *McKune v. Lile*,⁸⁰ for example, Justice Kennedy noted in the Court’s plurality opinion that the recidivism rate “of untreated [sexual] offenders has been estimated to be as high as

⁷⁷ Larsen, *supra* note 7, at 64–65 (footnotes omitted).

⁷⁸ *Id.* at 63.

⁷⁹ *Id.* As an example of under-considered factfinding, consider Shirin Sinnar’s argument that dicta in *Iqbal v. Ashcroft* about the legitimacy of detaining thousands of men because they shared the same race and religion of the September 11 hijackers, included partly for rhetorical effect and left unchallenged by the dissenters, have been used by lower court judges to justify racial profiling in subsequent cases. Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 428–35 (2017).

⁸⁰ 536 U.S. 24 (2002).

80%,” a rate he described as “frightening and high.”⁸¹ There was no basis for that statistic.⁸² Yet Ira Mark Ellman and Tara Ellman have found over ninety opinions from state and federal courts quoting that description, with direct consequences for criminal defendants and their families.⁸³ Or to take another example, in *Nken v. Holder*⁸⁴ the Supreme Court stated that an immigrant who is deported pending resolution of her claim can return if her claim is ultimately successful.⁸⁵ The government, on whom the Supreme Court had relied in making this assertion, subsequently admitted that the United States does not in fact have a policy to help deported immigrants return after successful resolution of their claims.⁸⁶ Nonetheless, lower federal courts have quoted the Supreme Court’s (erroneous) factual assertion about U.S. policy.⁸⁷

The phenomenon is not limited to lower courts’ use of higher court dicta: District court judges also cite district court decisions to establish facts. As with factual precedent derived from higher court opinions, there is a direct, first-order danger with factual precedent taken from district court opinions: Such “facts” might be based on judicial intuition or on the biased submissions of more resourced repeat players (like the government attorneys in *Nken*), or they might simply be wrong.

There is also a more systemic cost. District court judges may be especially likely to turn to district court precedent in order to fill in factors for multi-factor tests that are otherwise difficult to determine, a use of factual precedent that can lock in those factors over time. Such “lock in” occurs through two interrelated effects: First, facts tend to *ossify* through the accumulation of string cites; the more judges have repeated a fact, the more difficult it is for a future judge to disagree. Second, when there is no factual precedent directly on point, judges may be tempted to extrapolate from what precedent there is.⁸⁸

⁸¹ *Id.* at 33–34; *see also* *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting the “frightening and high” description).

⁸² Justice Kennedy cited a Department of Justice guide, which in turn relied solely on a pop psychology article published in 1986 that had simply asserted the number as an estimate without any supporting data or studies. Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 497–98 (2015).

⁸³ *Id.* at 497.

⁸⁴ 556 U.S. 418 (2009).

⁸⁵ Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1601–02 (2013).

⁸⁶ Larsen, *supra* note 7, at 63–64; Morawetz, *supra* note 85, at 1602, 1605.

⁸⁷ *See* Larsen, *supra* note 7, at 64 & n.21.

⁸⁸ *Cf. id.* at 81 (discussing “imported factual precedent”).

This leads to the *generalization* of facts, further increasing the factual precedent's ossification while decreasing the likelihood of its accuracy.

Before providing some illustrative examples, it may help to define what counts as a "fact" for purposes of this argument. The line between law and fact is infamously hard to explicate, but a practical definition of "fact" for present purposes might be *a statement about the world that could be falsified by additional evidence*.⁸⁹ A traditional further distinction, following the work of Kenneth Culp Davis,⁹⁰ is between "legislative" facts (or "generalized fact[s] about the world"⁹¹) and "adjudicative" facts (meaning simply "the facts of the particular case"⁹²). District court judges are set up to determine adjudicative facts. Legislative facts, including fairly objective facts about the world at large, are much more difficult for them to ascertain. Yet district court judges are often asked to find legislative facts, especially as part of judicially constructed tests. Consider, for example, the *Daubert* analysis for vetting expert witnesses (e.g., has the expert's methodology been generally accepted, and what is the known or potential rate of error of the expert's scientific technique?⁹³); the enforcement of foreign-country money judgments (is the judicial system of the foreign state fundamentally unfair?⁹⁴); the calculation of attorney fees awards (what is the "prevailing market rate[]" in the relevant community?⁹⁵); or the evaluation of ineffective assistance of counsel claims (what are the "prevailing professional norms" of attorney conduct?⁹⁶). These are the trickiest facts for trial court judges to assess, as they are beyond the four corners of the case yet call for some authoritative support.

As resource-constrained institutions, district courts have no great solution for filling in such facts. The parties will not have direct knowledge of these legislative facts, as they might for adjudicative facts. Judges can nonetheless rely on the parties to identify external sources that answer these questions; they may worry, however, that the par-

⁸⁹ I have based this working definition on the approach taken by Larsen. *See id.* at 67–73 (discussing the difficulty of delineating law from fact and developing a definition of the latter).

⁹⁰ *See, e.g.*, FED. R. EVID. 201(a) advisory committee's note (drawing on the work of Davis to explain that judicial notice is limited to adjudicative facts).

⁹¹ Larsen, *supra* note 7, at 71.

⁹² FED. R. EVID. 201 advisory committee's notes.

⁹³ *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993).

⁹⁴ *Cf.* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(3) (UNIF. LAW COMM'N 2005).

⁹⁵ *Blum v. Stenson*, 465 U.S. 886, 895–96 (1984); *see, e.g., Missouri v. Jenkins*, 491 U.S. 274, 283 (1989).

⁹⁶ *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (defining the inquiry for whether a criminal attorney provided "reasonably effective assistance" of counsel).

ties' adversarial bias and unequal resources will render such submissions unreliable.⁹⁷ Judges could instead undertake the secondary research themselves, aided by the Internet. When the extrinsic facts are fairly objective and can be established through credible external sources, online research may well be the best option. But such judicial self-help has been criticized for short-circuiting the adversarial process's checks on reliability and fairness,⁹⁸ particularly as legislative facts are not appropriate for judicial notice.⁹⁹ A third route is to rely on prior judicial opinions. Judicial opinions have the appearance of impartiality as well as credibility, particularly if judges perceive prior courts as having had greater expertise or access to superior information.¹⁰⁰ Aligning with the factfinding of prior opinions also allows judges to promote consistency in the treatment of parties. But even assuming that the prior opinion got the facts right, the pursuit of fairness is undermined if "consistency" becomes an excuse for ossification and generalization, despite changes on the ground.

Maureen Carroll, for example, has highlighted how reliance on district court precedent can lead to the ossification of attorney fee awards.¹⁰¹ In determining the reasonable rate for an attorney's time, courts are to consider the prevailing market rate for the locale—a factual question for which a range of sources may be available, including attorney fee surveys, affidavits from other practitioners, and evidence of what the attorney's other clients have in fact paid. Judges sometimes, however, favor rates adopted as reasonable in prior cases even if those rates are lower than average rates reported by recent surveys

⁹⁷ Cf. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1784 (2014) (critiquing Supreme Court reliance on amicus briefs for factfinding because "the factual data amici present to the Court . . . are all funneled through an advocacy sieve," which results in "periodic unreliability").

⁹⁸ See, e.g., Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137, 1139 (2014) (voicing concern about online judicial research "expand[ing] the use of judicial notice in ways that raise significant concerns about admissibility, reliability, and fair process"); Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51, 60 (2013) (noting "the fear that judges who engage in post-argument independent research may be denying . . . parties . . . the opportunity to present opposing facts or opposing interpretations, or just to argue that the research . . . is in some way unsound").

⁹⁹ See FED. R. EVID. 201 advisory committee's notes.

¹⁰⁰ See, e.g., Schauer, *Authority and Authorities*, *supra* note 25, at 1948–49 (noting that judges may defer to other judges presumed to have greater expertise, even if the citing judge is unable to evaluate the soundness of the expert judge's conclusions); cf. Bainbridge & Gulati, *supra* note 9, at 117 ("Under conditions of complexity and uncertainty, actors who perceive themselves as having limited information and can observe the actions of presumptively better-informed persons may attempt to free ride by following the latter's decisions.").

¹⁰¹ See Carroll, *supra* note 72, at 33–34.

for attorneys in the same market with the same years of experience for the same type of work.¹⁰² Relying exclusively or primarily on rates accepted in prior decisions carries two risks: First, such reliance can lock in judicial intuitions in prior cases that may not have been grounded in reality; as Carroll has pointed out, most federal judges are far removed from private practice and may thus overestimate their expertise in determining current market rates.¹⁰³ Second, it can risk ossifying attorney rates across years—even decades—regardless of interim changes in the market.¹⁰⁴ As the Ninth Circuit noted in critiquing a district court judge’s reliance on past awards, “One problem

¹⁰² See *Strohbehn v. Weltman Weinberg & Reis Co. LPA*, No. 16-CV-985-JPS, 2018 WL 1997989, at *3 (E.D. Wis. Apr. 27, 2018) (acknowledging survey data indicating mean and median attorney fee rates of \$437 and \$400, but setting the rate in the case at hand at \$300 in light of prior decisions); see also *Kaylor-Trent v. John C. Bonewicz, P.C.*, 916 F. Supp. 2d 878, 885 (C.D. Ill. 2013) (rejecting several surveys as purportedly not reflective of small town markets and relying instead “on this Court’s experience and knowledge of local billing practices, as well as on the Criminal Justice Act hourly rate in non-capital criminal and pro bono cases” to cap fees at \$125–\$155). In contrast, the District of Oregon has formally recognized via its Local Rules that it bases its rate determinations on the Oregon State Bar Economic Survey. *E.g.*, *Sturgis v. Asset Acceptance, LLC*, No. 3:15-CV-00122-AC, 2016 WL 3769750, at *3 (D. Or. July 14, 2016) (citing Local Rule 54-3(a)). Such an approach achieves real consistency within the district and prevents the ossification of rates over time by relying on a credible and neutral external source. *Cf.* *Soucek & Lamons*, *supra* note 14, at 919 (encouraging district courts to make greater use of local rules to address concerns about consistency).

¹⁰³ Carroll, *supra* note 72, at 31–32.

¹⁰⁴ A 2018 decision in the Southern District of Alabama, for example, reduced the requested rates based on decisions dating back almost ten years. See *Wells Fargo Bank, N.A. v. Peterson Produce, Inc.*, No. 18-00405-KD-MU, 2018 WL 7286505, at *3 & n.4 (S.D. Ala. Dec. 11, 2018) (citing various cases from 2009 to 2016). In reducing the paralegal’s rate to \$75, for example, the court relied on a 2011 decision that in turn relied on a 2009 decision. See *id.* at *3 n.4 (citing *Wells Fargo Bank, N.A. v. Williamson*, No. CIV.A. 09-00557-KD-C, 2011 WL 382799, at *5 (S.D. Ala. Feb. 3, 2011) (citing *Adams v. Austal, U.S.A., L.L.C.*, No. CIV.A. 08-0155-KD-N, 2009 WL 3261955, at *2 (S.D. Ala. Oct. 7, 2009))). Meanwhile, in reducing the senior attorney’s rate to \$300, the court cited a 2012 case as “recognizing that \$250-\$350/hour was reasonable for ‘top Mobile lawyers in complex cases.’” *Id.* at *3 n.4 (quoting *Decorative Components Inc. v. ICON Computing Sols., Inc.*, No. MC 1:12-00007-KD-C, 2012 WL 5398800, at *5 (S.D. Ala. Nov. 2, 2012)). But that case was in turn quoting another case that was summarizing a 2011 case in which the senior attorney, with a similar amount of experience, had also been assigned a rate of \$300 an hour—seven years earlier. See *Decorative Components*, 2012 WL 5398800, at *5 (quoting *Young v. Int’l Paper Co.*, No. CIV.A. 10-179-CG-M, 2012 WL 37647, at *5 (S.D. Ala. Jan. 6, 2012) (summarizing *Gulf Coast Asphalt Co. v. Chevron U.S.A., Inc.*, No. CIV.A. 09-0187-CG-M, 2011 WL 612737, at *3 (S.D. Ala. Feb. 11, 2011))). Similarly, in two Eastern District of Wisconsin decisions decided in 2019 and 2018, magistrate judges reduced the rates for (the same) two attorneys to \$300 and \$220. See *Spuhler v. State Collection Servs., Inc.*, No. 16-CV-1149, 2019 WL 2183803, at *3 (E.D. Wis. May 21, 2019); *Strohbehn*, 2018 WL 1997989, at *3. Both decisions relied on a 2016 decision that had accepted the same attorneys’ then-current (and uncontested) rates of \$300 and \$250. See *Gagliano v. State Collection Serv.*, No. 14-CV-1512, 2016 WL 2853538, at *2 (E.D. Wis. May 13, 2016).

with any such policy is that it becomes difficult to revise over time, as economic conditions change; here the rate apparently hadn't changed for 10 years Unless carefully administered and updated, any such policy becomes a strait-jacket."¹⁰⁵

To take another example from transnational litigation, consider the tests employed by district courts to determine whether litigants will have to use the procedures of the Hague Evidence Convention (rather than the federal discovery rules) to obtain material located in other countries.¹⁰⁶ These tests require judges to assess, as one factor in the analysis, whether using the Convention procedures “will prove effective.”¹⁰⁷ Judges routinely answer this question in the negative, based on string citations to district court precedent that have found the Convention procedures to be “cumbersome” and “slow.”¹⁰⁸ When traced back, however, these citation chains are based on little more than unsourced assertions, outdated anecdotes, or cases that actually reached the opposite conclusion. For example, a commonly cited source for this proposition is *Valois of America, Inc. v. Risdon Corp.*,¹⁰⁹ which gathered a string of other district court precedent offering the same conclusion.¹¹⁰ Two of those cases in turn relied on a

¹⁰⁵ *Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008). As the court also noted, “[m]ore fundamentally, such a policy—no matter how well intentioned or administered—is inconsistent with the methodology for awarding fees that the Supreme Court . . . has adopted.” *Id.* The job of the district court is “to award fees that reflect economic conditions in the district; it is not to ‘hold the line’ at a particular rate, or to resist a rate because it would be a ‘big step.’” *Id.*

¹⁰⁶ For more information about how the Hague Evidence Convention works, see Gardner, *Parochial Procedure*, *supra* note 18, at 968–69.

¹⁰⁷ See, e.g., *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 345–46 (D. Conn. 1997) (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 (1987)). An alternative test asks whether there are “alternative means [other than the Federal Rules of Civil Procedure] for securing the information,” e.g., *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 245–46 (S.D.N.Y. 2010), which courts have similarly reduced to whether the Convention procedures will prove efficient and effective. See Geoffrey Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 BROOK. L. REV. 181, 206–08 (2015).

¹⁰⁸ See, e.g., *MeadWestvaco Corp. v. Rexam PLC*, No. 1:10CV511 (GBL/TRJ), 2010 WL 5574325, at *2 (E.D. Va. Dec. 14, 2010); *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 530 (D.N.J. 2009); *Madden v. Wyeth*, No. 3-03-CV-0167-MD, 2006 WL 7284528, at *2 (N.D. Tex. Jan. 12, 2006).

¹⁰⁹ 183 F.R.D. 344 (D. Conn. 1997); see, e.g., *MeadWestvaco Corp.*, 2010 WL 5574325, at *2 (“Finally, with respect to the third prong, courts have ‘generally recognized that procedures under the Hague Convention are far more cumbersome than under the Federal Rules of Civil Procedure[.]’” (alteration in original) (quoting *Valois of Am.*, 183 F.R.D. at 349)).

¹¹⁰ See *Valois of Am.*, 183 F.R.D. at 349.

1984 district court case¹¹¹ that in turn relied on a single anecdote regarding German discovery recounted in a practitioner's guide published in 1982.¹¹² Another was based on a judge's intuition in 1987 that the Convention would add additional delay for an already slow case.¹¹³ The remaining two cases do not seem to support the claim that Convention procedures "will prove ineffective": One of them noted a lack of information in either direction,¹¹⁴ while the other appears to stand for the opposite proposition.¹¹⁵

Other cases evaluating this factor have relied on the Supreme Court's qualified dictum that "[i]n many situations, [Convention procedures] would be *unduly* time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules,"¹¹⁶ or on similar assertions in lower court decisions.¹¹⁷ The sup-

¹¹¹ See *Doster v. Schenk*, 141 F.R.D. 50, 54 (M.D.N.C. 1991) (citing *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984)); *Haynes v. Kleinwefers*, 119 F.R.D. 335, 338 (E.D.N.Y. 1988) (same).

¹¹² See *Murphy*, 101 F.R.D. at 361 ("At least one previous letter of request executed in Germany required many months of effort involving translation of materials, transmittal through local counsel, review by the German Ministry of Justice and then by German courts, and other procedural maneuvering. See Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 *International Law Journal* 575 (1982).").

¹¹³ See *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987) ("This case has already endured numerous delays Another delay while the Swedish authorities determine what discovery will be permitted and the further litigation undoubtedly spawned by their decision may bring actual discovery to a standstill. Therefore, in light of the lengthy history of discovery in this case and the potential for additional delays, I do not find that Convention procedures will prove effective." (no citations omitted)).

¹¹⁴ See *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988) ("The final factor . . . is whether use of the Convention procedures would be effective. Here, neither side has indicated that those procedures would not be effective. *Contrast* *Haynes v. Kleinwefers*, 119 F.R.D. 335 (E.D.N.Y. 1988). However, defendants also do not show they will be more effective than use of the Federal Rules.").

¹¹⁵ See *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 355 (D. Conn. 1991) ("[T]he major obstacle to the effective use of the Convention procedures, if one there be, is litigants' lack of familiarity [T]here is no reason, on the record before the Court, to believe that Convention procedures will be ineffective in producing the discovery to which plaintiffs are entitled.") (citations omitted).

¹¹⁶ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 542 (1987) (emphasis added). In a particularly prescient dissent, four Justices noted that "[a]ll too often, . . . courts have simply *assumed* that resort to the Convention would be unproductive and have embarked on speculation about foreign procedures and interpretations," and warned that "until the Convention is used extensively enough for courts to develop experience with it," such analysis would remain speculative. *Id.* at 2565, 2567 (Blackmun, J., concurring in part and dissenting in part).

¹¹⁷ See, e.g., *Trueposition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012) ("[I]t must be noted that the procedures required pursuant to the Hague Evidence Convention are much more likely to be time-consuming than the procedures under the Federal Rules."). *Trueposition* cited two cases for this assertion: a

posed cumbersomeness of Convention procedures is now so deeply engrained that courts are dismissive of new evidence, for example, of a particular country's track record of resolving Convention requests in less than two months.¹¹⁸

Given that case law is never an authoritative source for facts, judges should proceed cautiously when using case law to fill in facts about the world. If a judge perceives a prior judge as having access to better information, it might be helpful to say so explicitly; uncritical citations to legislative facts in prior cases, in contrast, can lock in facts that were never based on more than prior judges' intuitions. Nor is it necessary to include lengthy string citations for legislative facts, as string citations can help ossify such facts against change and encourage extrapolation of past findings to new circumstances. These effects make it harder for the law to adapt to changing conditions and may restrict later judges' perceptions of the range of their discretion.¹¹⁹ To the extent these legislative facts inform broader tests, string citations can also effectively narrow the possible range of outcomes for these tests, but in a nontransparent manner.¹²⁰

2. *Interjurisdictional Law*

As with the problem of legislative facts, district court judges face an informational hurdle in identifying and applying non-federal law. This challenge arises frequently in the context of the *Erie* doctrine, which requires federal courts to identify and apply state law. For purposes of efficiency and consistency, federal judges may be tempted to follow the lead of other federal judges when doing so. But state law can change, and relying on federal precedent to summarize state law risks creating a lag between the advancing state law and static federal citations.¹²¹ This can lead to real and repeated error, as Judge Wake of

Third Circuit opinion that in turn relied solely on the Supreme Court's dicta in *Aérospatiale*, *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 300 (3d Cir. 2004), and a district court opinion that simply asserted that the Convention procedures would result in unacceptable delays, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 53 (E.D.N.Y. 2010).

¹¹⁸ See *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 530 (D.N.J. 2009) (dismissing such evidence from Switzerland based on the "experience of this and many other courts"—as demonstrated by district court precedent).

¹¹⁹ Cf. Friendly, *supra* note 20, at 772 (noting how district court citations build over time to narrow discretion).

¹²⁰ This effect on multi-factor tests is explored further below in Section II.B.3. For further discussion regarding the design of judicial frameworks, see Section III.A below.

¹²¹ For an additional example, see Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 *YALE L.J.* 1898, 1933–34, 1934 n.116 (2011) (critiquing federal appellate courts for missing changes in state law regarding appropriate methods for interpreting state statutes).

the District of Arizona noted in *Crowell v. Knowles*.¹²² The question in *Crowell* was whether the habeas petitioner, who had been sentenced to life in prison, had to seek review from the Arizona Supreme Court in order to exhaust his state remedies.¹²³ The answer under current Arizona law was “no,” yet federal courts in habeas cases had repeatedly suggested that the answer was “yes” based on prior federal decisions that had in turn quoted outdated Arizona case law and statutes—what Judge Wake aptly termed “zombie precedent.”¹²⁴ Unfortunately, another District of Arizona decision had already followed that zombie precedent in holding (erroneously) that the petitioner had not exhausted his state remedies because he had not appealed his life sentence to the Arizona Supreme Court and had thus procedurally defaulted his habeas claim.¹²⁵

To take another state law example, John Parry has noted that after Oregon adopted statutes codifying a new set of choice-of-law rules, some federal district court opinions continued to apply the state’s old common law approach to choice-of-law questions.¹²⁶ Part of the problem was a dearth of state court decisions that correctly applied the new statutes, especially in the early years following the statutes’ passage.¹²⁷ But closer inspection of the district court cases that missed the change in state law reveals that those decisions often relied on earlier district court decisions, either ones that predated the new statutes¹²⁸ or ones that postdated the statutes but had themselves missed the change in the law.¹²⁹ Notably, these decisions typically

¹²² 483 F. Supp. 2d 925, 927 (D. Ariz. 2007). Judith Stinson discusses this line of cases in the context of overreliance on dicta. See Stinson, *supra* note 11, at 237–40, 238 n.98.

¹²³ *Crowell*, 483 F. Supp. 2d at 927.

¹²⁴ *Id.* at 930–31, 930 n.4 (collecting cases).

¹²⁵ *Id.* at 930–31 (critiquing *Stern v. Schriro*, No. CV 06-16-TUC-DCB, 2007 WL 201235 (D. Ariz. Jan. 24, 2007)); see also *Stern*, 2007 WL 201235, at *5–6 (citing to Ninth Circuit case law for the outdated proposition that Arizona state law requires those sentenced to life to appeal to the state supreme court in order to exhaust state remedies).

¹²⁶ Parry, *supra* note 74, at 10.

¹²⁷ *Id.* at 4–9.

¹²⁸ See *Home Poker Unlimited, Inc. v. Cooper*, No. 09-CV-460-BR, 2009 WL 5066653, at *3 (D. Or. Dec. 15, 2009) (citing *Pulido v. United Parcel Serv. Gen. Servs. Co.*, 31 F. Supp. 2d 809, 813 (D. Or. 1998), *clarification denied*, No. CIV 97-6080-FR, 1999 WL 225967 (D. Or. Mar. 30, 1999)).

¹²⁹ See *Doral Money, Inc. v. HNC Props., LLC*, No. 3:14-CV-00545-BR, 2014 WL 3512501, at *3 (D. Or. July 9, 2014) (citing *United States ex rel. TBH & Assocs., LLC v. Wilson Constr. Co.*, 965 F. Supp. 2d 1215, 1219 (D. Or. 2013) (quoting *Home Poker*, 2009 WL 5066653, at *3)); *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, No. CV-09-320-HU, 2011 WL 13253445, at *20 (D. Or. Jan. 21, 2011) (citing *Hallas v. Ameriquest Mortg. Co.*, No. CV-04-433-HU, 2005 WL 2044523, at *4 (D. Or. Aug. 24, 2005) (citing Oregon cases that predated statutes), *reconsideration denied*, 406 F. Supp. 2d 1176 (D. Or. 2005), *aff’d*, 280 F. App’x 667 (9th Cir. 2008)).

relied on prior decisions authored by the same district court judge,¹³⁰ suggesting that judges were reusing their own research (or entire rule paragraphs).¹³¹

Luckily, the same pressures that can lead to such intertemporal error can also help to overcome it: Once a few opinions cite the correct non-federal law—thanks to better briefing, updated state case law, industrious law clerks, or word of mouth—they can provide models for later decisions.¹³² The challenge is to minimize that time lag, as even one erroneous application of non-federal law can work real harm on litigants.¹³³

Similar challenges arise when it comes to determining the law of foreign countries or international law. Researching foreign law is daunting given language differences and limited access to foreign legal materials, not to mention fundamental conceptual differences across legal systems. This challenge is eased a bit, however, by Federal Rule of Civil Procedure 44.1. In recognition of “the peculiar nature of the issue of foreign law,”¹³⁴ Rule 44.1 is broadly permissive of the sources of information a court may take into account when determining foreign law: Judges are not limited to material submitted by the parties or admissible under the Federal Rules of Evidence, but may “consider any relevant material or source.”¹³⁵ The rule thus allows judges to triangulate between the input of experts in foreign law and their own analysis of foreign law.

¹³⁰ The same judge authored both *Doral Money* and *Home Poker*. The same magistrate judge authored both *Chehalem* and *Hallas*. Two opinions authored by another magistrate judge used the same rule paragraph summarizing pre-2001 Oregon case law, though without citation to one another. See *Kincaid v. W. Coast Life Ins. Co.*, No. CV-09-547-ST, 2010 WL 5621378, at *8 (D. Or. Oct. 14, 2010); *Malbeco Holdings, LLC v. AMCO Ins. Co.*, No. CV-08-585-ST, 2008 WL 5205202, at *4 (D. Or. Dec. 11, 2008).

¹³¹ See generally Soucek, *supra* note 17 (discussing the copying and pasting of rule paragraphs across opinions). While Soucek’s essay focuses on the use of copy-paste precedent in unpublished appellate decisions, he also notes that district courts engage in similar practices, particularly when summarizing common procedural standards. See *id.* at 169.

¹³² Indeed, as Parry notes, more and more district court decisions are relying on the Oregon choice-of-law statutes, suggesting that this particular cycle of intertemporal error may be drawing to a close. See Parry, *supra* note 74, at 10–12 (gathering cases).

¹³³ Recall, for example, the habeas petitioner who “procedurally defaulted” in *Stern v. Schriro*, No. CV 06-16-TUC-DCB, 2007 WL 201235 (D. Ariz. Jan. 24, 2007). See *supra* note 125 and accompanying text.

¹³⁴ FED. R. CIV. P. 44.1 advisory committee’s notes.

¹³⁵ FED. R. CIV. P. 44.1. The Supreme Court recently and unanimously reaffirmed the flexibility and breadth that this rule provides for judges. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018). On the merits of that flexibility, see *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 638–40 (7th Cir. 2010) (Wood, J., concurring) (explaining why it is important for judges to consider a range of sources to determine the content of foreign law, including the advice of legal experts).

Rule 44.1 does not extend to questions of international law, however, even though international law—particularly customary international law—may be even harder to ascertain. Federal courts may be called upon to determine international law for a number of reasons, including to apply federal statutes that incorporate international law, like the federal crime of piracy,¹³⁶ the Alien Tort Statute,¹³⁷ and the Lacey Act.¹³⁸ Such statutory incorporation is typically dynamic, meaning that the federal statute's coverage can change without any intervening federal precedent. Thus the danger of relying on case law to fill in international law is that international law may have evolved since the last relevant federal decisions. This happened, for example, with the federal piracy statute, which incorporates the definition of piracy under international law. When Somali pirates appeared before U.S. courts in the early 2000s, the most recent Supreme Court precedent was from 1820.¹³⁹ In resolving a split among district courts, the Fourth Circuit affirmed that courts were not bound by the Supreme Court's assessment of customary international law as of 1820 but should apply the customary international law of today.¹⁴⁰

But the turn to precedent is understandable because independently determining the content of international law is difficult and time-consuming. Customary international law, for example, requires identifying both consistent state practice and *opinio juris* for some sufficient number of states.¹⁴¹ There is no database, as Ryan Scoville has pointed out, that collects evidence of *opinio juris*; even if there were, translation of foreign legal materials would prove another hurdle.¹⁴²

¹³⁶ 18 U.S.C. § 1651 (2018) (criminalizing “piracy as defined by the law of nations”).

¹³⁷ 28 U.S.C. § 1350 (2018) (granting original jurisdiction to the district courts “of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

¹³⁸ 16 U.S.C. § 3372 (2018) (prohibiting commercial activities involving “any fish or wildlife . . . taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States” or “any regulation of any State or in violation of any foreign law”).

¹³⁹ See *United States v. Dire*, 680 F.3d 446, 452 (4th Cir. 2012) (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)).

¹⁴⁰ See *Dire*, 680 F.3d at 467. For further description of the district courts' competing approaches to precedent and customary international law regarding the crime of piracy, see Maggie Gardner, *Piracy Prosecutions in National Courts*, 10 J. INT'L CRIM. JUST. 797, 814–19 (2012) [hereinafter Gardner, *Piracy*].

¹⁴¹ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 & cmts. b, c (AM. LAW INST. 1987).

¹⁴² See Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1897 (2016) (gathering difficulties and concluding that “[t]he result is substantial epistemic uncertainty” about the content of customary international law); see also Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 SAN DIEGO L. REV. 1243, 1247–55 (2004) (cataloguing the “empirical dilemma” posed by determination of

Not surprisingly, in studying how federal judges overcome this challenge, Scoville found that they rely heavily on non-binding authority like district court precedent.¹⁴³ The practical need is two-fold: First, judges and their clerks may not know *how* to research international law.¹⁴⁴ Luckily, there are already resources available to district court judges in this regard, like the American Society of International Law's *Benchbook on International Law*.¹⁴⁵ Second, judges and their clerks need access to information about the *content* of international law. Here expanding the scope of Rule 44.1 to explicitly include international law might be of help.

Some responsibility should be borne by litigants who fail to draw judges' attention to changes in non-federal law or who provide shoddy or misleading summaries of foreign or international law. But the ultimate responsibility is on the judge, and those assisting the judge in chambers, to ensure that summaries of non-federal law contained in prior federal decisions are still correct. Even more so than accuracy in finding legislative facts, correctly identifying the applicable law is core to the judge's task. Yet the temptation to rely on federal precedent to establish non-federal law is significant given the thinness of alternative legal sources. Not only are most federal law clerks not trained in law school to research foreign law—or, frankly, state law—but there also might not be much law for them to find. Consider in this regard common law questions that everyone recognizes, post-*Erie*, are properly the domain of state law. In an era in which state courts rarely resolve cases with written opinions and in which tort cases have largely disappeared from their dockets,¹⁴⁶ there may be significant

customary international law by U.S. courts and explaining why “the usual proxies” are insufficient to establish customary international law correctly).

¹⁴³ See Scoville, *supra* note 142, at 1914 (“Rather than view a federal case or statute as a single point in a global constellation of national practices, courts often relied on domestic authorities as reliable and independently sufficient evidence of an international norm.”); see also *id.* at 1901 (noting his study does not include decisions that defined customary international law based solely on binding precedent).

¹⁴⁴ For an example of how *not* to establish customary international law, see Gardner, *Piracy*, *supra* note 140, at 815 (critiquing *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012), for relying on sources such as a student note, a non-academic practitioner, a scholar who referenced a treatise from 1830 in passing, a scholar whose analysis was more than twenty years old at the time of the opinion, and three writers who in fact disagreed with the court's interpretation).

¹⁴⁵ AM. SOC'Y OF INT'L LAW, *BENCHBOOK ON INTERNATIONAL LAW* (Diane Marie Amann ed., 2014), <https://www.asil.org/benchbook>.

¹⁴⁶ See PAULA HANNAFORD-AGO, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT'L CTR. FOR STATE COURTS, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 17, 20 (2015) (finding, based on data from select state court systems, that tort cases comprised only seven percent of the state courts' caseload and that two-thirds of state court cases were dismissed, resolved through default judgment, or settled). One explanation for the

gaps in any given state's development of its common law, particularly when it comes to novel questions. The leading case law may instead be federal opinions that purport to apply state law but are instead more generalized analyses of how common law *should* develop.¹⁴⁷ Indeed, Samuel Issacharoff and Florencia Marotta-Wurgler have found, for a set of modern contract law questions, that federal opinions are being cited far more commonly than state court decisions, that “there is virtually no contract case law at the state level [on these questions], and that the driving doctrinal work is being done at the federal appellate level.”¹⁴⁸ In short, the stakes are higher than they might at first appear. Renewed attention to the *state law* sources of *state law*—such as they are—would not only prevent error, but also promote a more robust federalism.

B. *Poorly Implemented Citations*

The following uses of non-binding authority are not inherently problematic, but they can lead to error and distortion of the law if not implemented carefully. Across these categories, a common theme is the impact of modern legal research methods. As many others have noted, the move to text-based research has encouraged an emphasis on keyword searching and quotable phrases, with a concomitant loss of nuance and context.¹⁴⁹ Fully digesting and synthesizing an opinion is time-consuming; “[f]ar easier to have the magic carpet of computer research whisk you straight to the pertinent sentence of the prior opinion.”¹⁵⁰ The resulting loss of nuance and context can in turn lead to errors in analogical reasoning and in the development and application of decisionmaking frameworks, as described below.

Indeed, given this common theme across the remaining examples of dangerous citations, it is worth pausing here to make some preliminary observations regarding the switch from digest-based to text-based case research. Researching case law via full-text searches,

missing tort claims is that Congress has made more of those cases removable to federal court, in particular through the Class Action Fairness Act. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1418–20 (2006) (predicting that CAFA would make federal courts the de facto arbiters of state common law).

¹⁴⁷ Cf. Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2177–80 (2019) (expressing concern that “the emigration of large cases from state to federal court may stunt state common law” despite the dictates of *Erie*).

¹⁴⁸ Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600 (2020).

¹⁴⁹ See, e.g., Larsen, *supra* note 7, at 62; Leval, *supra* note 3, at 1256, 1269; Stinson, *supra* note 11, at 222; Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1189 (2007).

¹⁵⁰ Leval, *supra* note 3, at 1269.

whether via traditional Boolean searches or via algorithmically driven natural language searches, can lead to the channeling and conflation of search results. These effects will not always be problematic—the benefits of text-based searching will generally outweigh its costs. But in some circumstances, particularly where a legal issue is novel or emergent, researchers should be aware that text-based searches in the online databases will typically be underinclusive, missing potentially relevant case law, and may also be overinclusive, sweeping in cases that sound similar but are legally irrelevant to the question at hand.

To understand these channeling and conflation effects, consider first the differences between text-based case research and digest-based case research. Before computer-assisted research, when the full corpus of judicial opinions could not be immediately searched for particular words, legal researchers had to rely on digests (like West's Key Number System) to locate potentially relevant cases.¹⁵¹ The digest approach had its own limits: It has been criticized for privileging a nineteenth-century worldview of formalistic categorization¹⁵² and for impeding legal change by forcing new problems to fit into old boxes.¹⁵³ It also depended on human editors, who are fallible, to categorize each case within an existing rubric of legal concepts.¹⁵⁴ Still, editor-assigned categorization of legal principles using the “controlled vocabularies” of digests¹⁵⁵ can enable “recall” of a full array of cases discussing a particular principle, regardless of the specific language a

¹⁵¹ For a description of digest-based research, see Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285, 289–92, 296–98 (2001).

¹⁵² See *id.* at 287 (“The digest scheme is a product of the era of the legal formalists.”); Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387, 418–19, 418 n.147 (2017) [hereinafter Mart, *The Algorithm*] (“Whether the worldview is based on the West classification system itself or the Langdellian worldview that older classification systems reflect, newer legal research databases may be freer of whatever limitations that worldview imposes.”).

¹⁵³ See, e.g., Bast & Pyle, *supra* note 151, at 288 (“Digests kept memetic variation to a minimum, encouraging the continued use of traditional legal principles and concepts while discouraging innovation.”); cf. Mart, *Curation*, *supra* note 38, at 24 (noting that legal digests work better for well-developed legal concepts but “perform[] rather less well for newly emerging areas of the law”).

¹⁵⁴ Bast & Pyle, *supra* note 151, at 289–90 (explaining how West staff attorneys use a predefined key number system to edit cases and classify headnotes). There is still, it should be noted, a human element behind most of the online legal databases: Westlaw incorporates its human-edited key number system and headnotes into its search algorithm, for example, and LexisNexis's Shepard's citations involve human indexing. Mart, *The Algorithm*, *supra* note 152, at 392.

¹⁵⁵ Peter A. Hook & Kurt R. Mattson, *Surprising Differences: An Empirical Analysis of LexisNexis and West Headnotes in the Written Opinions of the 2009 Supreme Court Term*, 109 LAW LIBR. J. 557, 561 (2017).

particular judge uses;¹⁵⁶ at the same time, that categorization can help exclude semantically similar but legally irrelevant opinions, increasing the “precision” of the inquiry’s result.¹⁵⁷

In contrast, text-based searching forces a more significant trade-off between recall and precision. Boolean searches for particular keywords will exclude opinions that address the same concept using different (even slightly different) language, decreasing recall. If this synonym challenge is left unaddressed, the returned results will represent only a subset of potentially relevant cases; in relying solely on those cases, opinion writers will then further channel the results of later researchers to that subset of cases. The same channeling can result from algorithmic search engines, the commercial goal of which is to “produce a limited set of very focused, and mostly very accurate, results.”¹⁵⁸ That is, search engines like the one behind WestlawNext aim to return the *most* popular or “relevant” cases, which “has the potential to bury or hide documents” that take different approaches.¹⁵⁹ They sacrifice breadth of recall, in other words, in order to achieve greater precision.

To counter such channeling, a modern legal researcher might try to broaden the recall of the text-based search. With a Boolean search, for example, the researcher could expand the number of synonyms or variations within the search command. But increasing the recall of a search can sweep in cases using similar language to discuss conceptually distinct issues. The risk in this direction is that researchers may inadvertently conflate distinct legal concepts that sound similar but should nonetheless be analyzed differently.¹⁶⁰ Algorithmically-driven searches may be able to ameliorate this risk of conflation to the extent they incorporate categorization schema, like the West Key Number System or secondary sources.¹⁶¹ But the artificial intelligence behind search engines like WestlawNext also incorporates users’ collective search history, which will compound channeling effects.¹⁶² That is,

¹⁵⁶ See Bast & Pyle, *supra* note 151, at 289 (“West staff attorneys are trained to edit a case in terms of the key number system; this applies even to a case given an unusual treatment by the judge authoring the opinion.”).

¹⁵⁷ See Mart, *Curation*, *supra* note 38, at 26 (“[T]he inverse relationship between precision and recall is ‘[a] universal principle of information science.’” (quoting Paul D. Callister, *Working the Problem*, 91 ILL. B.J. 43, 44 (2003))).

¹⁵⁸ Wheeler, *supra* note 38, at 373.

¹⁵⁹ *Id.* at 376.

¹⁶⁰ See Bast & Pyle, *supra* note 151, at 293 (noting that computer-assisted legal research is hampered when “keywords have many synonyms, can be stated in many different ways, or can express several different ideas”).

¹⁶¹ See Wheeler, *supra* note 38, at 360–61 (describing WestlawNext).

¹⁶² See *id.* at 361.

WestlawNext is designed to sacrifice recall for precision, and it is not clear whether users can override that choice.¹⁶³

These concerns about channeling and conflation are not a reason to return solely to digest-based research. Typically, the precision afforded by next-generation search engines is a benefit to legal researchers, particularly those in practice. But for those responsible for explaining and developing the law—for judges and those who work for them—it is important to understand that the basic user interface of the major case law databases will not return a full universe of potentially relevant case law. And of the cases that are returned, textually similar language may not always equate with legally equivalent analyses.

These challenges are further exacerbated by the sheer volume of district court precedent on which judges today can draw. In 1969, West published 3632 district court opinions; in 2009, that number peaked at 9128.¹⁶⁴ The growth in reported opinions, however, is dwarfed by the meteoric increase in the availability of unreported district court decisions. For 1969, the Westlaw database includes 2098 unreported district court opinions; for 2009, the database includes 110,985 unreported cases.¹⁶⁵ Similarly, since 2012, Lexis has included in its database around 160,000 unreported decisions *per year*.¹⁶⁶ That number will only increase, too, as more “submerged precedent”¹⁶⁷ from the district courts is made freely available in text-searchable format—as a congressional mandate in fact requires that it be.¹⁶⁸ Yet these unreported opinions receive little or no editorial annotation by the legal databases; the only way to identify unreported cases discussing a particular issue is through text-based searching or following

¹⁶³ See *id.* at 371–72, 376 (explaining how WestlawNext returns a narrow set of focused results but does not allow a user to broaden those results); see also *id.* at 370 & n.54 (noting that it is unclear whether users can still use Boolean searches within WestlawNext to generate a complete set of results).

¹⁶⁴ See E-mail from Dawn D. Struble, Senior Dir. of Customer Serv., Thomson Reuters, to Jacob Sayward, Dir. for Collections & Operations and Adjunct Professor of Law, Cornell Law Sch. (July 24, 2018) (on file with author).

¹⁶⁵ *Id.*

¹⁶⁶ I am grateful to Jacob Sayward for compiling these data based on a search executed on July 10, 2018. The data were compiled by searching for the term “district” within the Lexis database and limiting results to “cases” from the jurisdiction “federal district courts” by each calendar year and by reported versus unreported cases. E-mail from Jacob Sayward, Dir. for Collections & Operations and Adjunct Professor of Law, Cornell Law Sch., to author (July 10, 2018) (on file with author). It should be noted that these numbers are not necessarily stable as the databases may add additional unreported cases from prior years over time.

¹⁶⁷ See generally McCuskey, *Submerged Precedent*, *supra* note 22.

¹⁶⁸ See generally Martin, *supra* note 22 (noting the congressional mandate, the failure of the district courts to comply fully with it, and the options for improving compliance).

citation chains from other cases. In other words, to the extent district court judges draw on unreported cases (and they do), the research that identifies those cases is particularly prone to channeling, conflation, and similar confounding pressures.¹⁶⁹

I. *The Weight of Authority*

When facing a significant question for the first time, it is not uncommon for district court judges to survey how other district court judges have analyzed it. Some judges will explain why they are persuaded by the reasoning in prior opinions, a use of district court precedent that furthers epistemic development.¹⁷⁰ Others seem to note the “weight of authority” to bolster their independent conclusions, a use of district court precedent meant to signal the legitimacy of the court’s decisionmaking.¹⁷¹ But at times judges appear to rely on their understanding of an emerging majority position as the primary or even sole reason to reach a particular conclusion.¹⁷² Indeed, in the context of uncertain state law (so-called “*Erie* guesses”), some circuits direct courts to consider the “majority rule [on the issue] among other states” as evidence of what that state’s law is.¹⁷³ This latter use of the “weight of authority” can be problematic. The majority position will not accurately reflect crowd-sourced knowledge if it has been influenced by herding pressures. And even identifying the majority position correctly can be difficult, given the channeling of research results.

Start with the perceived epistemic value of the “weight of authority.” The Condorcet Jury Theorem, on which this intuition is based, depends on each decision being made independently.¹⁷⁴ If the decisions are not independent, then the apparent consensus may reflect less an epistemically correct answer than the result of herding.¹⁷⁵ Herding “occurs among agents when their decisions are

¹⁶⁹ Cf. Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 123 (1999) (noting that unreported opinions can encourage herding to the extent they do not contain full explanations of a judge’s reasoning).

¹⁷⁰ See *supra* Section I.B.2 (discussing epistemic development).

¹⁷¹ See *supra* Section I.B.4 (discussing legitimacy).

¹⁷² See Soucek & Lamons, *supra* note 14, at 902, 909–10 (examining several examples where judges appeared to take the majority view as dispositive).

¹⁷³ *Auburn Sales, Inc. v. Cypros Trading & Shipping, Inc.*, 898 F.3d 710, 715 (6th Cir. 2018); *accord, e.g., Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429, 435 (5th Cir. 2003); *Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002).

¹⁷⁴ See *supra* Section I.B.2.

¹⁷⁵ See Talley, *supra* note 169, at 101–03 (discussing similar effects in terms of information “cascades” and concluding that—in ideal conditions unlikely to be met in the real world—the risk that an inefficient rule will emerge through a cascade of non-binding decisions may never be reducible below thirty-five percent).

decreasingly determined by their own information and increasingly determined by the actions of others.”¹⁷⁶ When judges follow non-binding authority for the sake of consensus alone, they are assuming that the prior decisions (whether individually or collectively) reflect superior information or knowledge and may override their contrary inclinations as a result. But simply tallying outcomes may overweight the impact of early cases. At least in the absence of institutional checks like appellate review and carefully reasoned opinions, “one can never be sure that a stable rule has emerged because ‘its factual premises have been . . . validated by repeated testing,’ or rather because of a chance dependence on initial cases that turn out to be statistical outliers.”¹⁷⁷ And yet, once a conclusion is framed as the collective wisdom of the courts, subsequent judges will have to work harder to justify their disagreement.¹⁷⁸

Even setting aside the risk of herding, there is also a risk that the tally itself might be inaccurate, or rather incomplete. Note that identifying the consensus of district courts poses a much greater challenge than identifying the consensus of appellate courts, which only requires surveying the case law of (at most) twelve other circuits and locating the most recent binding decision from those courts. In contrast, there are nearly 700 federal district court judges,¹⁷⁹ none of whom are bound by the decisions of their peers—and that does not count magistrate judges or judges with senior status. As Brian Soucek and Remington Lamons found in their case study of district court decisionmaking, counting district court opinions is thus not as easy as it might seem, particularly when the denominator of opinions is large. Regarding a particular procedural question—whether the *Twombly*¹⁸⁰ standard for pleading applies equally to affirmative defenses—Soucek and Lamons determined that district court judges misidentified the

¹⁷⁶ Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158, 159 (1999); see also, e.g., Bainbridge & Gulati, *supra* note 9, at 117 (“Herd behavior occurs when a decisionmaker imitates the actions of others, while ignoring his own information and judgment with regard to the merits of the underlying decision.”).

¹⁷⁷ Talley, *supra* note 169, at 103 (alteration in original) (citation omitted).

¹⁷⁸ Cf. Daughety & Reinganum, *supra* note 176, at 181 (concluding, in applying herding theory to courts, that “the observation that a collection of courts agrees on an outcome cannot be taken as indicating that this outcome is the correct one,” yet noting that such agreement will discourage future appeals); Soucek & Lamons, *supra* note 14, at 902 (“[I]f one district court opinion has no precedential weight, several hundred weightless opinions presumably don’t either. And yet that is not how judicial trends or majorities are treated in practice . . .”).

¹⁷⁹ U.S. COURTS, U.S. DISTRICT COURTS: ADDITIONAL AUTHORIZED JUDGESHIP 1, <https://www.uscourts.gov/sites/default/files/districtauth.pdf> (last visited Aug. 5, 2020).

¹⁸⁰ Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

majority position about a third of the time that they invoked the weight of district court authority.¹⁸¹

Part of the difficulty in counting cases correctly is the risk of channeling and feedback loops that is driven by text-based research. Particularly when a question is novel or complex, courts may not use consistent language or labels when discussing it. Reliance on a particular keyword to identify relevant precedent may thus exclude opinions that use different language. To take an example from the appellate courts, the courts of appeals inconsistently refer to abstention in transnational cases as “international comity abstention.” Searching just for “international comity abstention” will thus miss conceptually relevant cases that refer instead to “international abstention,” “abstention on the grounds of comity,” or (simply but erroneously) “the doctrine of comity.”¹⁸² Missing cases that use different language matters because those cases may approach the question differently, apply different tests, or reach different conclusions.

Further, these channeled search results can become self-reinforcing if the researcher only cites to cases using similar language (like “international comity abstention”). Subsequent researchers, if starting with one of these cases (for example, due to a citation in a brief), will have a harder time locating cases in separate streams. The search algorithms of the online databases can further compound this channeling effect.¹⁸³ When ordering search results, some of the databases determine relevancy in part by the number of times a case has been cited.¹⁸⁴ Westlaw and Lexis draw on user search history to identify more important cases.¹⁸⁵ Westlaw has even introduced a new feature that allows users to upload a legal document in order for Westlaw to suggest which cases should be added or omitted.¹⁸⁶

From a practice perspective, that may be appealing: If I am trying to determine the content of the law quickly, I want to find the most

¹⁸¹ See Soucek & Lamons, *supra* note 14, at 904. That level of inaccuracy perhaps reflects the scale of opinions that have addressed the question (Soucek and Lamons identified over a thousand such opinions, *see id.* at 905).

¹⁸² See Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 65, 94, 98 (2019) [hereinafter Gardner, *Abstention*].

¹⁸³ See, e.g., Wheeler, *supra* note 38, at 368 (“If legal researchers are unable to find unpopular or less used tidbits of legal information, this has the potential to change the law. . . . Existing but less popular legal precedents could effectively become invisible. . . . The unfindable could practically cease to exist.”).

¹⁸⁴ See Mart, *The Algorithm*, *supra* note 152, at 403 (discussing Ravel Law).

¹⁸⁵ See *id.* at 416 (discussing Westlaw and Lexis); *see also* Wheeler, *supra* note 38, at 361 (discussing Westlaw).

¹⁸⁶ Robert Ambrogi, *New Feature in Westlaw Edge Tool Uses Artificial Intelligence to Analyze Briefs*, A.B.A. J. (July 12, 2019, 7:01 AM), <https://www.abajournal.com/news/article/new-feature-in-westlaw-edge-uses-ai-to-analyze-your-briefs>.

widely known cases on my question. But it can be problematic for those researching the law in order to determine its further development. These search algorithms can encourage channeling that may lock in the decisions of early movers, marginalize alternative approaches, and obscure dissent.¹⁸⁷

Meanwhile, given that identifying a majority or consensus position can be a challenging empirical task (the difficulty of which increases as n grows larger), judges may instead be tempted to rely on the counts identified in prior opinions.¹⁸⁸ Assertions of the weight of authority, in other words, can become a type of factual precedent. Like the factual precedent discussed above,¹⁸⁹ that move may “not only replicate prior courts’ (or academic articles’) potential errors but also lengthen the time lag before counts catch up with present realities.”¹⁹⁰

Ultimately, this is a problem of rhetoric and exposition. What does an opinion writer gain by emphasizing his or her alignment with a majority of non-binding precedent on a legal question? Or put another way, can whatever legitimate benefit such identification brings be achieved by noting that prior decisions are split and highlighting the bases of disagreement? Consider an example from another procedural context: the emergence and use of so-called *Lone Pine* orders.¹⁹¹ Some district court decisions have suggested that *Lone Pine* orders are becoming “routine[],” with string citations of other courts that have approved them.¹⁹² But other cases, while acknowledging those decisions, also acknowledged a different set of decisions that had cabined *Lone Pine* orders to “exceptional” cases.¹⁹³ As a result, the standard rule paragraph for opinions discussing *Lone Pine*

¹⁸⁷ Cf. Gardner, *Parochial Procedure*, *supra* note 18, at 978 & n.191 (noting in the context of the Hague Evidence Convention how early opinions faded from string citations of decisions reaching the opposite conclusion). Ronald Wheeler raised this potential problem in a 2011 article and reported some uncertainty among Thomson Reuters employees at the time regarding whether seldom-used sources could disappear altogether from WestlawNext searches. Wheeler, *supra* note 38, at 366 & nn.40–41, 368.

¹⁸⁸ See Soucek & Lamons, *supra* note 14, at 905–06 (tracing specific examples of judges relying on prior opinions’ determination of the majority position even after that majority position had technically become the minority view).

¹⁸⁹ See *supra* Section II.A.1.

¹⁹⁰ Soucek & Lamons, *supra* note 14, at 906.

¹⁹¹ For a discussion of *Lone Pine* orders and their significance, see Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 *YALE L.J.* 2 (2019).

¹⁹² See, e.g., *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008); see also *In re Fosamax Prods. Liab. Litig.*, No. 06 MD 1789 (JFK), 2012 WL 5877418, at *2 (S.D.N.Y. Nov. 20, 2012); *Abbatiello v. Monsanto Co.*, 569 F. Supp. 2d 351, 353 n.3 (S.D.N.Y. 2008) (quoting *In re Vioxx*, 557 F. Supp. 2d at 743).

¹⁹³ E.g., *Trujillo v. Ametek, Inc.*, No. 3:15-cv-1394-GPC-BGS, 2016 WL 3552029, at *2 (S.D. Cal. June 28, 2016) (quoting *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 388 (S.D.

orders now acknowledges both lines of cases—those that have granted such orders and those that have denied them.¹⁹⁴ In other words, a handful of decisions have helped establish a *lack* of consensus and perhaps prevented a channeled cascade from forming. This sort of high-level summary of variation across non-binding precedent helps further the epistemic goal of invoking the “weight of authority” (as well as the secondary goal of indicating that the author’s own conclusion is legitimate), yet it avoids the herding and channeling pressures that a more quantified count of cases can encourage. At the very least, readers of judicial opinions should be skeptical when they see district court judges assert a count of prior district court decisions as justifying a particular outcome. The additional value of emphasizing such a count, beyond identifying the split in opinions, may be primarily rhetorical.

2. *Analogical Heuristics*

Reasoning by analogy to prior cases is a form of inductive reasoning: a process of generalizing from a number of instances to discern a potential rule.¹⁹⁵ Inductive reasoning does not lead to necessary conclusions but to best approximations that can be updated as new information is received. “Analogical heuristics” are decisionmaking short cuts that simplify analogical reasoning into more binary and definitive answers. Their use pervades complex and fact-intensive areas of law. Hillary Sale¹⁹⁶ as well as Stephen Bainbridge and Mitu Gulati¹⁹⁷ have identified their use in securities litigation, and former judge Nancy Gertner¹⁹⁸ has described their use and effect in employment discrimination cases. The use of analogical heuristics can help explain the difficulty of obtaining habeas relief or overcoming qualified immunity defenses,¹⁹⁹ the short shrift some courts continue to give mitigating evidence in capital cases,²⁰⁰ or why judges seem unable

Ind. 2009)); *see also In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 255–58 (S.D. W. Va. 2010).

¹⁹⁴ *See, e.g., Arnold v. BNSF Ry. Co.*, No. 3:18-CV-1931-L, 2019 WL 1493160, at *6 (N.D. Tex. Apr. 4, 2019); *Russell v. Chesapeake Appalachia, L.L.C.*, 305 F.R.D. 78, 83–84 (M.D. Pa. 2015); *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293, 298–99 (M.D. Pa. 2012).

¹⁹⁵ *See* ALDISERT, *supra* note 1, at 136.

¹⁹⁶ *See* Sale, *supra* note 75.

¹⁹⁷ *See* Bainbridge & Gulati, *supra* note 9.

¹⁹⁸ *See* Gertner, *supra* note 9, at 116–22.

¹⁹⁹ *Cf. Masur & Ouellette, supra* note 10, at 668–77 (discussing deference mistakes by courts in both contexts).

²⁰⁰ *See* Emad H. Atiq & Erin L. Miller, *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 AM. J. CRIM. L. 167, 192–94 (2018) (critiquing Alabama, Arizona, and Florida state courts for failing to consider mitigating evidence of severe environmental deprivation).

to avoid rulifying standards despite clear Supreme Court instructions not to do so.²⁰¹ Though analogical heuristics may feel efficient or legitimacy-enhancing in individual decisions, they are a serious cause for concern because they can bias the development of substantive law over time.

Analogical heuristics come in different flavors. A common form is the *rule of thumb*, which turns the treatment of facts in prior cases into rules for how such facts should be treated in future cases.²⁰² An example is the “rule” (in the securities context) that nondisclosures or misstatements are immaterial if they only relate to a small portion of a corporation’s overall business.²⁰³ Another example is the “rule” (in the employment discrimination context) that an employer can still secure summary judgment despite having made an explicitly discriminatory statement, as long as that statement was only a “stray remark.”²⁰⁴

Past critiques of such rules of thumb have focused on appellate decisions,²⁰⁵ but they are readily observable in district court precedent as well. Consider, for example, civil rights cases brought under 42 U.S.C. § 1983. The district court in *Pierce v. Burkart* concluded there was no evidence that the police had failed to announce their presence before storming a house because the four occupants of the house who averred they had not heard anything were all engaged in activities that might have prevented them from hearing the police “knock and announce.”²⁰⁶ That chain of reasoning was then reduced to a rule of thumb in a subsequent “knock and announce” case, *James v. City of Detroit*, in which the plaintiff was able to hear a commotion and in fact had reached the door when it was rammed open into her face.²⁰⁷ The court in *James* granted the officers’ summary judgment motion because, quoting *Pierce*, “a plaintiff’s testimony that she ‘did not hear the police knock and announce does not give rise to a reasonable inference that the police failed to do so and thus is insufficient to

²⁰¹ Cf. Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646–47 (2014) (noting the Supreme Court “anti-rulification” rules such as in *Florida v. Harris*, 568 U.S. 237 (2013)).

²⁰² See, e.g., Bainbridge & Gulati, *supra* note 9, at 83–84 (terming the heuristics they study “rules of thumb”).

²⁰³ *Id.* at 125.

²⁰⁴ Gertner, *supra* note 9, at 118–20.

²⁰⁵ See Bainbridge & Gulati, *supra* note 9, at 113–18 (critiquing circuit court judges’ use of rules of thumb as short cuts).

²⁰⁶ No. 03-74250, 2005 WL 1862416, at *5 (E.D. Mich. Aug. 4, 2005). One occupant was sleeping, one was using the bathroom, and the remaining two were in the “lower-level family room” playing computer games. *Id.*

²⁰⁷ 430 F. Supp. 3d 285, 289–90, 293 (E.D. Mich. 2019).

defeat summary judgment.’”²⁰⁸ Missing from this rule of thumb was the context of the prior case that the occupants were not in a position to hear the police. That factual difference rendered its reasoning inapplicable to *James* (where the plaintiff was in fact responding to the sounds of the police yet averred she had not heard them identify themselves).²⁰⁹

Or to take a more procedural example, judges have used rules of thumb to simplify the discretionary but tedious analysis of attorney fee awards.²¹⁰ For example, it is common for judges to critique the practice of “block billing,” or not identifying the discrete amount of time used for each attorney task. Some judges have relied on district court precedent to assert that block-billed time should be excluded from fee award calculations altogether, regardless of the relevance of the tasks involved.²¹¹ But when those citation chains are traced back, the prior decisions had instead acknowledged that block billing “is not a prohibited practice,” just a disfavored one because it makes the court’s effort to review the reasonableness of requested fees more difficult.²¹² It is thus within the judge’s discretion to decide how to evaluate block-billed time.²¹³ When that nuance is dropped in later cases,

²⁰⁸ *Id.* at 293 (quoting *Pierce*, 2005 WL 1862416, at *5).

²⁰⁹ Compare *Pierce*, 2005 WL 1862416, at *2–3, with *James*, 430 F. Supp. 3d at 289.

²¹⁰ Cf. Carroll, *supra* note 72, at 23–24 (noting tension between the difficulty of this analysis and the Supreme Court’s admonition not to turn the analysis into a second course of litigation).

²¹¹ See *Spuhler v. State Collection Servs., Inc.*, No. 16-CV-1149, 2019 WL 2183803, at *4 (E.D. Wis. May 21, 2019); *Lapinski v. St. Croix Condo. Ass’n*, No. 6:16-cv-1418-Orl-40GJK, 2017 WL 8315890, at *4 (M.D. Fla. Oct. 3, 2017); *Kearney v. Auto-Owners Ins. Co.*, 713 F. Supp. 2d 1369, 1377–78 (M.D. Fla. 2010).

²¹² *Moore v. Midland Credit Mgmt., Inc.*, No. 3:12-CV-166-TLS, 2012 WL 6217597, at *14 (N.D. Ind. Dec. 12, 2012) (quoting *Farfaras v. Citizens Bank & Tr. of Chi.*, 433 F.3d 558, 569 (7th Cir. 2006)). *Moore* was cited by *Beach v. LVNV Funding, LLC*, No. 12-CV-778, 2013 WL 6048989, at *4 (E.D. Wis. Nov. 15, 2013), to justify excluding all block billing from a fee award when the magistrate judge determined that all the tasks included in the block-billed entries were unreasonable. In *Spuhler*, the same magistrate judge excluded all block entries without determining whether any of the included tasks were otherwise unreasonable, citing *Beach* for support. *Spuhler*, 2019 WL 2183803, at *4. Similarly, *Lapinski* relied on two prior decisions to reject block-billed entries in their entirety even though they included some compensable tasks. *Lapinski*, 2017 WL 8315890, at *4. One of those cases was *Kearney*, which in turned relied on an opinion that did not excise all block billing but instead reduced each block-billed time entry to account for non-compensable clerical work included in the lists of tasks. See *Zachloul v. Fair Debt Collections & Outsourcing*, No. 8:09-CV-128-T-27MAP, 2010 WL 1730789, at *3 (M.D. Fla. Mar. 19, 2010), *report and recommendation adopted sub nom. Zaghoul v. Fair Debt Collections & Outsourcing*, No. 8:09-CV-128-T-27MAP, 2010 WL 1727459 (M.D. Fla. Apr. 27, 2010).

²¹³ See, e.g., *Truesdell v. Thomas*, No. 5:13-cv-552-Oc-10PRL, 2018 WL 6983508, at *7 (M.D. Fla. Nov. 8, 2018) (“The court has broad discretion in determining the extent to which a reduction in fees is warranted by block billing.”), *report and recommendation adopted*, No. 5:13-cv-552-Oc-10PRL, 2018 WL 6620486 (M.D. Fla. Dec. 3, 2018).

however, the result is a rule of thumb that borders on punishment for bad timekeeping.

Another common form of analogical heuristic is the *normalization heuristic*. Judges invoke normalization heuristics when they reason that because the worse facts from a prior case were not enough to satisfy the relevant standard, the not-quite-as-bad facts of the present case must not be either. Returning to § 1983 claims, such normalization heuristics are not uncommon in excessive use of force cases. In *Jackson v. District of Columbia*, for example, the court granted law enforcement officers summary judgment because they had not violated clearly established law when, asserting that they thought a driver at a traffic stop was about to drive away, they pulled the driver out of his car in a manner that broke his arm.²¹⁴ In reaching this conclusion, the court reasoned that prior cases “have found such force not to be excessive even when the individual being arrested has *not* resisted or attempted to flee.”²¹⁵ But the case cited for that comparison differed from *Jackson* along a different—and meaningful—axis, as the reported injuries in that case were not as severe.²¹⁶ One might also see *extremity requirements*, when a judge suggests that the facts of a prior case were so extraordinary that the current case could not possibly fall into the same category. This assumes that a datum within a set represents the median (or even the minimum) for the set when it might instead be an outlier even within that set.

At root, analogical heuristics are the result of overextended and decontextualized analogies. The overextension of analogies results from the use of deductive language to describe what should be an exercise in inductive logic. Deductive reasoning starts with an established rule and considers its application to a specific instance; in contrast, inductive reasoning generalizes from a number of instances to discern a potential rule.²¹⁷ Deductive reasoning leads to necessary conclusions. But inductive reasoning does not—at most, it can provide support for a conclusion. The same is true for analogies: As long as case *x* might differ from case *y* along some dimension, that dimension may be a meaningful distinction, such that other similarities between the two cases cannot lead to definitive conclusions. To the extent

²¹⁴ 83 F. Supp. 3d 158, 162, 169–71 (D.D.C. 2015).

²¹⁵ *Id.* at 171 (emphasis added) (citing *Robinson v. District of Columbia*, Nos. 03-1455, 03-1456 (RCL), 2006 WL 2714913, at *4 (D.D.C. Sept. 22, 2006)).

²¹⁶ See *Robinson*, 2006 WL 2714913, at *1 (describing plaintiff’s injuries as abrasions and swelling of wrists resulting from tight handcuffs); cf. *Jackson*, 83 F. Supp. 3d at 171 (acknowledging, after citing *Robinson*, that “[t]he only fact that gives the Court pause is the fact that Plaintiff’s arm was broken as a result of the force used by the officers”).

²¹⁷ See ALDISERT, *supra* note 1, at 136.

judges derive heuristics from how prior cases applied law to facts, those heuristics are limited by logic—they do not establish requirements or provide necessary conclusions. Despite the limits of inductive reasoning and analogy, however, opinions can slide into describing analogical heuristics as requiring the judge to reach certain conclusions.²¹⁸

The dangers of over-definitive language are compounded by the decontextualization of legal research. As keyword searching focuses attention on specific words, and researchers churn quickly through an endless supply of cases, what stands out are clear directives and quotable turns of phrase.²¹⁹ Paragraphs are skimmed separately from their surrounding opinions; clerks who are worried about misrepresenting partially-read opinions will favor quoting over paraphrasing; and the nuance of procedural posture, interrelated claims, and field-specific doctrines drops out.²²⁰ (Recall in this regard *James's* decontextualized quotation from *Pierce*.²²¹)

One result of decontextualized research, as documented and explained by Jonathan Masur and Lisa Ouellette, is the risk of “deference mistakes,” or reliance on precedent “without fully accounting for the legal and factual deference regime under which that precedent was decided, thereby stripping the holding from its legal context.”²²² As Masur and Ouellette show, deference mistakes do not just introduce errors into individual opinions; they can create systemic harm when later judges unwittingly rely on opinions that have made deference mistakes.²²³ As they note, deference mistakes can arise in qualified immunity cases when judges rule that public officials have not violated constitutional rights based on prior decisions that only con-

²¹⁸ Cf. Gertner, *supra* note 9, at 123 (“Courts recite these ‘rules’ in case after case, without regard to context, without examination, like the child’s game of telephone. . . . [The result is that] the judge here truly believes that he or she is ‘just following the rules’ in dismissing the claim.”).

²¹⁹ Cf. Devins & Klein, *supra* note 21, at 621 (noting that the shift to text-based research has encouraged “an increased emphasis on finding and interpreting directive language from higher courts rather than analyzing and seeking to uncover the logic behind their actions”). This problem of decontextualized research is a common theme in the legal error literature. See, e.g., Larsen, *supra* note 7, at 62; Masur & Ouellette, *supra* note 10, at 664–65; Stinson, *supra* note 11, at 222.

²²⁰ Judge Charles Clark identified many of these same tendencies in the context of procedural decisions, long before the advent of online databases: He blamed popular treatises for highlighting the more “restrictive” cases that “tell[] the trial court or the litigant what’s what in ringing terms,” leading “the bad, or harsh, procedural decisions [to] drive out the good, so that in time a rule becomes entirely obscured by its interpretive barnacles.” Clark, *supra* note 20, at 498.

²²¹ See *supra* notes 207–09 and accompanying text.

²²² Masur & Ouellette, *supra* note 10, at 645.

²²³ *Id.* at 698–717.

cluded that public officials had not violated *clearly established* constitutional rights.²²⁴ In *Goolsby v. District of Columbia*, for example, the district court only determined that the violent take-down of a Black teenager wrongly accused of a crime did not amount to a clearly established constitutional violation.²²⁵ A later court cited to *Goolsby*, however, in determining that similar law enforcement conduct was “constitutionally reasonable.”²²⁶

The risk that analogical heuristics may distort legal analysis is further compounded by selection effects, which can cause errors to accumulate in one substantive direction. For example, it matters which decisions are more likely to be written (and thus available for later judges to cite). With dispositive motions, like motions to dismiss and summary judgment motions, judges are incentivized (due to immediate appellate review) to issue written decisions when they grant the motion.²²⁷ Thus if one side more often brings a dispositive motion, and decisions are more likely to be written up when that side wins, analogical heuristics will tend to develop in that side’s favor, increasing the hurdles that the non-moving party must overcome.²²⁸ For example, because defendants typically bring motions to dismiss for failure to state a claim, and because judges are presumably more likely to issue written decisions when they grant those motions, those opinions will tend to collect reasons why plaintiffs have alleged insufficient facts to establish harms.²²⁹ That will in turn increase the likelihood that later cases deriving analogical heuristics from prior decisions will find that those heuristics tend to identify why the plaintiffs’ allegations are insufficient. Over time, those analogical heuristics will raise the bar as to what plaintiffs must allege to survive a motion to dismiss.

Summary judgment motions may be more evenly divided between plaintiffs and defendants, but in some subject areas, the skew

²²⁴ *Id.* at 674–77. They suggest, however, that such deference mistakes will be relatively rare given the tendency of many judges to decide the question of constitutional violation first, before reaching the question of whether the violation was clearly established. *Id.* at 675–76. One might be wary of deference mistakes, then, when citing to opinions in which the judge has skipped the constitutional inquiry and decided solely on the basis of whether the constitutional violation was clearly established.

²²⁵ 317 F. Supp. 3d 582, 593–95 (D.D.C. 2018).

²²⁶ *Cutchin v. District of Columbia*, 369 F. Supp. 3d 108, 127 (D.D.C. 2019) (citing *Goolsby*, 317 F. Supp. 3d at 594–95).

²²⁷ *Cf. Gertner, supra* note 9, at 113 (noting that caseload pressures encourage judges not to write opinions if they do not have to).

²²⁸ *See id.* at 114–15 (describing this pattern in the context of summary judgment decisions in employment discrimination cases).

²²⁹ *See id.* at 114 (noting the comparative frequency with which defendants’ motions to dismiss are granted).

in one direction may be more pronounced.²³⁰ In particular, on issues where one party bears a heavy factual burden (which will typically be the plaintiff), the other side will have an easier time moving for summary judgment. In the context of employment discrimination cases, employer-defendants enjoy a particularly high win rate for dispositive motions.²³¹ As Gertner has argued, that differential win rate for summary judgment motions selects for defendant-friendly heuristics in the written decisions, which in turn leads to “the evolution of a one-sided body of law.”²³² Furthermore, that skew in the development of the law can be self-reinforcing due to its signaling effects to future litigants and judges. Again, as Gertner explains, “[i]f case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial.”²³³

Returning to the § 1983 context, for example, judges will presumably write opinions when they dismiss cases based on qualified immunity. That in turn provides judges in future cases with lengthy string citations describing police conduct that does not rise to the level of a

²³⁰ In the employment discrimination context, for example, “defendants make many more motions for summary judgment, and succeed on them more often, than do plaintiffs.” Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL’Y REV. 103, 128 (2009) (citing Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886–89 (2007)).

²³¹ See *id.* (“Over the period of 1979–2006 in federal court, employment discrimination plaintiffs have won 3.59% of pretrial adjudications, while other plaintiffs have won 21.05% of pretrial adjudications.”); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 548–49 (2010) (summarizing Federal Judicial Center studies on the disproportionate rate of summary judgment grants in employment discrimination cases).

²³² See Gertner, *supra* note 9, at 112–15; see also Masur & Ouellette, *supra* note 10, at 688–89 (discussing the work of Gertner and Clermont and Schwab in identifying how deference mistakes in employment discrimination summary judgment decisions can skew the development of the underlying law).

²³³ Gertner, *supra* note 9, at 115; see also Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 918 (2015) (describing a “justification bias” resulting from explaining and defending a doctrine, with the result that “[e]ven if such an actor is initially skeptical about the normative foundations of the rules or norms that he enforces, he is likely, over time, to come to believe in their correctness”). This could help explain the anti-plaintiff effect, in particular in the appellate courts, that Kevin Clermont and Stewart Schwab identified in employment discrimination cases. See Clermont & Schwab, *supra* note 230, at 115.

constitutional violation.²³⁴ The effect is a litany of permissible police violence that suggests the plaintiff's experience was not only routine, but also not particularly objectionable.²³⁵

Prior decisions can also limit what arguments litigants consider viable,²³⁶ or more fundamentally what cases are worth instituting²³⁷ (or even what activity is worth undertaking²³⁸). Kevin Clermont and Stewart Schwab, for example, have hypothesized that the rise and then drop in employment discrimination cases in federal courts following the Civil Rights Act of 1991 reflected the markedly low win rates for plaintiffs.²³⁹ Potential plaintiffs and their attorneys, in other words, learned from the outcomes of prior cases that many cases would not be worth pursuing, despite pro-employee changes in the underlying statutory law. In a common law system, these broader selection effects on litigation will further limit the range of available opinions from which later judges might draw their analogies.²⁴⁰

3. *Misaligned Tests*

Consider a district court judge faced with an unfamiliar and difficult question that the higher courts have not yet addressed or for which they have provided only an open-ended standard. Even if the higher court believes the question is best addressed through a totality-of-the-circumstances analysis, district court judges may not feel comfortable doing so.²⁴¹ From the perspective of district courts, a more

²³⁴ See, e.g., *Hargraves v. District of Columbia*, 134 F. Supp. 3d 68, 88 (D.D.C. 2015) (collecting cases, including four district court opinions, finding police use of force not to be constitutionally excessive).

²³⁵ See, e.g., *Goolsby v. District of Columbia*, 317 F. Supp. 3d 582, 594 (collecting descriptions of circuit court cases that endorse the constitutionality of “a non-cooperative, potential flight risk [being] slammed to the ground and violently or painfully handcuffed where the suspected crime was only a minor one”).

²³⁶ See, e.g., *Hathaway*, *supra* note 4, at 628; *Sale*, *supra* note 75, at 956; *Scoville*, *supra* note 142, at 1900.

²³⁷ See, e.g., *Hadfield*, *supra* note 4, at 605 (“[A]t the most basic level, courts face a potentially severe information handicap: they only see what is brought to them.”); cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–6 (1984) (arguing that plaintiff win rates will tend towards fifty percent because most litigants will select to pursue only close cases).

²³⁸ See, e.g., *Hadfield*, *supra* note 4, at 595; cf. *Bainbridge & Gulati*, *supra* note 9, at 138 (worrying that case-based heuristics will create effective safe harbors for conduct that Congress meant to deter).

²³⁹ Clermont & Schwab, *supra* note 230, at 132. The drop might also be explained, however, by the rise of forced arbitration of employment disputes.

²⁴⁰ See, e.g., *Hadfield*, *supra* note 4, at 585; cf. *Schauer*, *Bad Law*, *supra* note 4, at 910 (explaining how the principle of stare decisis systematically discourages cases that might challenge the status quo).

²⁴¹ Cf. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 811–12 (2005) [hereinafter *Schauer*, *Tyranny of Choice*]

structured framework provides reassurance that they are on the right analytic track, may speed up their work, and signals the legitimacy of their conclusions to litigants and other audiences. For decisions that may be subject to appellate review, a framework also provides the appellate court with a map to the judge's reasoning, which can serve as a sort of checklist for abuse-of-discretion review.

District court judges may thus develop and perpetuate decision-making frameworks. These tests are often important and helpful. My concern is not with the adoption of tests generally, but with the adoption of misaligned tests because they may lead over time to skewed outcomes. A misaligned test is one in which the factors do not quite fit the question being analyzed or one in which the analytical emphasis is misplaced.²⁴² There are at least three significant sources of misaligned tests. First is the conscious "rulification" of standards announced by higher courts, like when the Supreme Court enumerates factors that "may" be relevant to a given inquiry but lower courts come to treat those factors as a required test.²⁴³ Second is the transplantation of a test from a similar-sounding, but not precisely equivalent, inquiry—a *faux ami*. Third is the cascade or herding tendency that might follow the early pronouncement by a district court of a tentative framework for analyzing a new or emergent problem. One might think here of the *Zippo* test for evaluating personal jurisdiction over website operators.²⁴⁴ Even if well-intentioned, such rapid rulification, *faux amis*, and early mover tests may not prove helpful in application if the factors they identify are vague, ill-fitting, ill-conceived, excessive, or incomplete.

The danger with misaligned tests is that judges or their clerks may feel compelled to apply a test even if they do not know what to make of difficult or poorly fitting factors. When confronting such factors, a sensible option is to see how other district courts have treated them. Opinions may thus address difficult factors in general terms that can be supported by district court citations, or perhaps reinterpret those factors to address different considerations that can in turn be filled in

("[H]aving too many options is frustrating and suboptimal, and . . . when faced with too much choice people will seek to narrow the range of choices by quick heuristics. We want decisional guidance, we want a smaller number of options, and we want to have our decisional processes structured.")

²⁴² For a discussion of the evolution and effects of such misaligned tests in transnational litigation, see Gardner, *Parochial Procedure*, *supra* note 18, at 958–67.

²⁴³ See *id.* at 962–63 (discussing this phenomenon). On the process of rulification, see generally Schauer, *Tyranny of Choice*, *supra* note 241.

²⁴⁴ See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (adopting a sliding scale approach to personal jurisdiction over website operators based on the degree of the website's interactivity).

through reliance on district court citations. In other words, misaligned tests invite the quick development of factual precedent and analogical heuristics. Over time, individual factors within the misaligned test can ossify into a single outcome backed by a string citation. In extreme cases, such ossification may apply to every factor in the test, such that the test effectively collapses into a predetermined answer.

This process has occurred, for example, with the tests that lower courts developed to determine whether parties must seek foreign discovery through application of the Hague Evidence Convention.²⁴⁵ One test used by judges in considering whether to order litigants to follow Hague Evidence Convention procedures is derived from the Supreme Court's dictum that judges should consider "the particular facts, sovereign interests, and likelihood that resort to [the Convention] procedures will prove effective."²⁴⁶ These considerations are both broad and difficult to assess. District courts invoking them as a "test" have thus relied on district court precedent to fill them in.²⁴⁷ Other tests developed by the lower courts to address this question are *faux amis*: One was originally designed to determine *whether* foreign discovery should be compelled (and how much), not the mechanism for its production.²⁴⁸ The other derives from a test for resolving conflicts of enforcement jurisdiction more generally.²⁴⁹

²⁴⁵ See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) (refusing to "articulate specific rules to guide this delicate task of adjudication").

²⁴⁶ See *id.* at 544.

²⁴⁷ See Gardner, *Parochial Procedure*, *supra* note 18, at 978–79 (describing how the three-part "test" from *Aérospatiale* was quickly reduced to an almost foregone conclusion against the use of the Convention).

²⁴⁸ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(c) (AM. LAW INST. 1987) ("In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account [numerous factors]."); see also *id.* reporters' note 2 ("The factors set out in Subsection (1)(c) are those that have generally been applied by courts in considering motions to set aside discovery or to impose sanctions for noncompliance."). Lower courts weighing whether to use the Hague Evidence Convention drew on § 442 based on the Supreme Court's passing reference to it. See *Aérospatiale*, 482 U.S. at 544 n.28 (quoting the tentative draft of § 442 and noting that this multi-factor analysis "suggested" the "nature of the concerns that guide a comity analysis"). For an example of a court applying these factors in the Hague Evidence Convention context, see *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 52–55 (E.D.N.Y. 2010).

²⁴⁹ See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (AM. LAW INST. 1965). Courts in the Second Circuit have adopted these factors based on their invocation in *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517 (S.D.N.Y. 1987), a case that did not involve application of the Hague Evidence Convention. *E.g.*, *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 439 (E.D.N.Y. 2008). Courts in the Ninth Circuit have adopted similar factors following their use in *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474–75 (9th Cir. 1992), another case that did not involve the question of whether to use Hague Evidence Convention

It is not surprising, then, that these tests include factors that do not fit the question judges are trying to answer. For example, one of these tests asks whether “the extent to which enforcement by action of either state [i.e., the United States or the foreign nation] can reasonably be expected to achieve compliance with the rule prescribed by that state.”²⁵⁰ That factor simply does not make sense when the question is whether to order parties to use the Federal Rules or the Hague Evidence Convention to pursue discovery. What compliance with statutory rules is being sought? What state-initiated enforcement action would be used? Another factor asks about the “availability of alternative means for securing the information,” which (in its original context) referred to whether an international agreement like the Hague Evidence Convention existed.²⁵¹ Because that factor is again misaligned with evaluating whether or not to use the Hague Evidence Convention procedures when they *are* available, it has been elided with existing factual precedent regarding how Convention procedures are cumbersome and slow: If the Convention procedures are cumbersome and slow, the reasoning goes, the Convention must not provide an alternative means of securing the information.²⁵² Ultimately, these tests collapsed into a single outcome: At least when it comes to foreign discovery sought from other parties, judges pretty much never required compliance with Hague Evidence Convention procedures.²⁵³

The risk of courts settling on misaligned tests has been amplified by text-based research. To illustrate why, consider again the concept of “international comity abstention.” If a researcher uses a digest like the West Key Number System, she may have difficulty finding the right “box” for international comity abstention, and even if she does, there may not be many cases within that box.²⁵⁴ One might interpret

procedures. *E.g.*, *St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 104 F. Supp. 3d 1150, 1161 (D. Or. 2015).

²⁵⁰ *See, e.g.*, *Richmark*, 959 F.2d at 1475.

²⁵¹ *See, e.g.*, *Sant*, *supra* note 107, at 206.

²⁵² *See, e.g.*, *Trueposition, Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. at 53. For a discussion of the factual precedent regarding how “cumbersome and slow” the Convention procedures are, see *supra* Section II.A.1.

²⁵³ *Gardner, Parochial Procedure*, *supra* note 18, at 974–78. This finding was limited to written decisions available in Westlaw as of 2015. *See id.* at 971 n.157 (explaining the search methodology used). It is also limited to interparty disputes; judges do sometimes compel compliance with the Convention procedures when foreign discovery is sought from third parties. *See id.* at 971 n.156 & 973.

²⁵⁴ The two best options are Key Number 170Bk2661/2662: International Abstention and Comity, WEST KEY NUMBER SYS., <https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?transitionType=default&contextData=%28sc.Default%29> (follow “170B Federal Courts” hyperlink; then follow the “Federal-Foreign Relations and Questions of Foreign Law; International Abstention and Comity, k2661-k2670” hyperlink;

that difficulty as a useful signal to the researcher that the concept is undertheorized and that she should proceed with caution.²⁵⁵ If the researcher instead relies on keyword searching, the phrase “international comity abstention” will also return few cases, given the variety of labels used by judges.²⁵⁶ The keyword researcher may respond by broadening the search term used, which then increases the risk of conflation. For example, a search for the more general term “comity” will return results that include not only discussions of comity in the context of abstention, but also discussions of comity in the context of conflicts of law, the enforcement of foreign judgments, forum non conveniens, and other comity-inflected doctrines.²⁵⁷ These are not exactly bread-and-butter topics for most U.S. lawyers, particularly relatively inexperienced law clerks. Yet the online researcher is left to parse the doctrinal distinctions herself.²⁵⁸ The result may be the inadvertent transplantation of legal tests from one context to another. With international comity abstention, for example, judges have mixed into the abstention analysis considerations that relate to the enforce-

then follow the “2661” or “2662” hyperlink) (last visited Sept. 4, 2020) and Key Number 106k512: Comity Between Courts of Different Countries, WEST KEY NUMBER SYS., <https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?transitionType=default&contextData=%28sc.Default%29> (follow “106 Courts” hyperlink; then use the “Courts of Different States or Countries” drop-down menu and follow the “512 Comity Between Courts of Different Countries” hyperlink) (last visited Sept. 4, 2020). The former is fairly narrow, limited primarily to cases involving foreign parallel proceedings. See Gardner, *Abstention*, *supra* note 182, at 73 (noting that such cases are the primary appropriate basis for abstention in transnational cases). The latter is a bit broader and includes more dicta, but is nonetheless limited to cases discussing adjudicative comity concerns. Cf. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015) (discussing differences between adjudicative, prescriptive, and sovereign party comity doctrines).

²⁵⁵ See Gardner, *Abstention*, *supra* note 182, at 72 (highlighting how different courts have understood “international comity abstention” to mean different things).

²⁵⁶ International Comity Abstention, WESTLAW EDGE, [https://1.next.westlaw.com/Search/Home.html?transitionType=default&contextData=\(sc.Default\)&bhcp=1&firstPage=true&CobaltRefresh=59267](https://1.next.westlaw.com/Search/Home.html?transitionType=default&contextData=(sc.Default)&bhcp=1&firstPage=true&CobaltRefresh=59267) (search the main entry field for “‘international comity abstention’” under “All Federal”) (last visited Sept. 4, 2020).

²⁵⁷ Comity, WESTLAW EDGE, [https://1.next.westlaw.com/Search/Home.html?transitionType=default&contextData=\(sc.Default\)&bhcp=1&firstPage=true&CobaltRefresh=59267](https://1.next.westlaw.com/Search/Home.html?transitionType=default&contextData=(sc.Default)&bhcp=1&firstPage=true&CobaltRefresh=59267) (search the main entry field for “‘comity’” under “All Federal”) (last visited Sept. 4, 2020). To be fair, Westlaw includes some of these cases as well under its key number for “comity between courts of different countries,” though at least the excess cases tend to be limited to those considering adjudicative comity. See Key Number 106k512: Comity Between Courts of Different Countries, *supra* note 254 (listing the cases falling under that key number).

²⁵⁸ Cf. Bast & Pyle, *supra* note 151, at 297–98 (“[A] search that discovers factually similar cases does not also offer a theory of law as its natural result. Additional work and creative energy on the part of the researcher are required to formulate a legal theory.”).

ment of judgments and choice of law.²⁵⁹ Future cases will then entrench that elision as they continue to apply those tests. Later researchers will then have to work harder to trace back the tests' genesis to identify where concepts became conflated.

Once a misaligned test has become firmly entrenched, or even adopted by a higher court,²⁶⁰ it can be very difficult for a single district court judge to forge a new path. It may still be helpful, however, for judges to acknowledge the poor fit of some factors or the difficulty of evaluating them given the limited resources available to district courts. This shift in language may not make these factors any more helpful for an individual judge's analysis, but it could at least prevent those factors from arbitrarily constraining analysis in future decisions. And it will help flag that the test itself is misaligned and merits reconsideration or refinement.

III

PROCESS-BASED REFORMS

The problematic citation practices recounted in Part II reflect in part shortcomings in tests, legal research, and training. The premise of this Part is that, to some extent, dangerous citations can be avoided or ameliorated by addressing how judges and their clerks frame, research, and write about legal questions. While focused on district courts and their use of parallel precedent, some of the following suggestions are directed to the work of appellate courts and the judiciary as an institution, and many apply to the use of non-binding authority more broadly. Again, the goal is not to avoid all use of non-binding authority, but to reduce the need or motivation to do so in circumstances where it adds little value—and to improve processes for finding the right non-binding authority when its use is beneficial.

A. *Designing Tests*

Many of the problematic uses of citations described in Part II can be traced back to analytical frameworks that set judges up for frustration. Citations to non-binding authority, in particular district court precedent, provide a face-saving short cut for navigating complex

²⁵⁹ See Gardner, *Abstention*, *supra* note 182, at 96–108 (discussing how the conflation of tests has led some circuits to include irrelevant considerations in the analysis of “international comity abstention”).

²⁶⁰ Though even then, as Judge Leval has argued, such frameworks are generally dicta and may improperly constrain lower court judges. See Leval, *supra* note 3, at 1254 n.17 (discussing “rules” set out in *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981)); *id.* at 1264–65 (critiquing as dicta the Supreme Court’s burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973)).

tests, evaluating ill-fitting factors, and filling in hard-to-ascertain facts. Improving the design of tests in the first place should thus help reduce the pressure to resort to dangerous citations.

When it comes to designing tests for district courts in particular, judges should bear in mind the time and information constraints under which trial courts operate.²⁶¹ First, simpler tests—whether framed as rules or standards—will help ensure that judicial attention focuses on the most important considerations.²⁶² Complex tests with many factors or steps may ask judges to evaluate more considerations than they have the time, ability, or information to do well, which in turn invites resort to heuristics.²⁶³ Research on stopping rules and “satisficing,” for example, suggests that decisionmakers reach decisions based on just a few factors, with the remaining factors cascading into place.²⁶⁴ Further, which factors are considered first may depend on which are the most salient, or the most concrete and familiar.²⁶⁵ Even if such factors were afterthoughts in the test-designer’s initial conception, then, they may receive the greatest attention and may thus have the greatest bearing on the outcome of the test.²⁶⁶ To the extent that district court precedent makes it easier to assess certain factors (even if not reliably), those factors may be analyzed first, with

²⁶¹ Cf. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2002 (2007) (noting aspects of the procedural context that exacerbate the decisionmaking challenges flowing from judicial discretion).

²⁶² Cf. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 590 (1992) (discussing the tradeoffs between complexity and simplicity as distinct from the tradeoffs between rules and standards). On the hidden discretion created by complex sets of rules, see Eyal Zamir & Doron Teichman, *Judicial Decision-Making: A Behavioral Perspective*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 664, 686–87 (Eyal Zamir & Doron Teichman eds., 2014) (“Paradoxically, the more elaborate the system of rules, the broader is the judge’s discretion when determining which rule to apply in any specific case.”); *id.* at 687–88 (summarizing social science research).

²⁶³ Cf. Bainbridge & Gulati, *supra* note 9, at 101 (“Bounded rationality becomes a significant constraint on decisionmaking under conditions of complexity and uncertainty.”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1076 (2000) (similarly stressing “complexity and ambiguity” as encouraging resort to heuristics); Tokson, *supra* note 233, at 924 (summarizing research indicating that “status quo bias tends to become stronger as the number of choices increases or as tradeoffs become more difficult”).

²⁶⁴ See, e.g., Beebe, *supra* note 49, at 1601–02 (collecting research); see also *id.* at 1645–46 (observing that “multifactor tests of ten or even eight factors appear to ask too much of the judge’s ability simultaneously to weigh competing concerns” and recommending that tests be limited to three or four factors).

²⁶⁵ Gardner, *Parochial Procedure*, *supra* note 18, at 964 (discussing the operation of salience on multi-factor tests).

²⁶⁶ See *id.* at 1007 (“Too many considerations in run-of-the-mill decisions can encourage the conscious or subconscious use of heuristics, with less relevant or redundant factors overwhelming the test if they are immediately pressing or easier to assess.”).

a concomitant significance in the rest of the judge's analysis. Test-designers should thus be selective in the number of factors they include, excising any factors that are not critical because they may deflect attention from those that are.

For the factors that remain, they should be framed whenever possible in terms of information that is more readily ascertainable. Weighing sovereign interests is abstract and fraught; identifying whether a country has joined the Hague Evidence Convention and has a central authority to handle discovery requests is relatively straightforward. When hard-to-ascertain facts do matter for an inquiry, they can be assigned to actors with greater access to information via procedural devices like default presumptions and burdens of proof. Default presumptions might be used, for example, to address systemic considerations that are difficult to evaluate in individual cases yet are generally consistent across cases.²⁶⁷ For systemic considerations that are difficult to evaluate in individual cases but are *not* generally consistent across cases, burdens of proof or deference to executive agencies can help shift the onus onto actors with greater access to the relevant information.

In sum, simpler tests with factors that align with a trial court's core competencies—and with presumptions, rules of deference, and burden-shifting to help address those factors that are more difficult to assess—can help reduce the need to rely on non-binding authority in problematic ways.

B. *Improving Information*

Even with better designed tests, judges may still need to assess legislative facts, identify and apply unfamiliar or complex law, and otherwise engage in inquiries that test the limits of their institutional capacity. The courts already have a number of tools at their disposal to help manage such inquiries: the use of special masters, for instance, or Rule 44.1's broad invitation to draw on an array of sources to determine foreign law, or the compilation of subject-specific manuals and trainings.²⁶⁸ District court judges also have some avenues for

²⁶⁷ See *id.* at 1006–07 (discussing the use of presumptions to address systemic interests that are difficult to ascertain on a case-by-case basis).

²⁶⁸ See *supra* notes 134–35 and accompanying text; see also, e.g., *Manuals, Monographs, & Guides*, FED. JUD. CTR., <https://www.fjc.gov/education/manuals-monographs-guides> (last visited Aug. 2, 2020); *Programs and Resources for Judges*, FED. JUD. CTR., <https://www.fjc.gov/education/programs-and-resources-judges> (last visited Aug. 2, 2020) (describing “special focus programs” for judges). The value of such manuals, of course, depends in part on how often they are updated. As Maureen Carroll has brought to my attention, the heavily referenced *Manual for Complex Litigation* was last updated in 2004. See MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

engaging in collective decisionmaking, including the use of district-level rulemaking²⁶⁹ or “en banc” decisions.²⁷⁰ Such collective decisionmaking not only enables judges to pool their expertise and experience, but also allows them to solicit information from a broader range of the public beyond the litigants in a particular case.²⁷¹ Additional tools could also be developed. When it comes to foreign law, for example, Matthew J. Wilson has suggested the “creation of a credible and nonpartisan comparative [law] center” to assist judges, based on similar centers used in France, Italy, and Germany.²⁷² Similarly, memoranda of understanding with key foreign judicial systems could allow for non-binding “certification” of legal questions.²⁷³

There is admittedly little room for institutional improvement in this area, however. The bigger gain might come from improving how judges—and their clerks—process the information they do have.

C. *Beyond Judges*

Addressing overreliance or mis-reliance on non-binding authority requires acknowledging the full range of actors involved in judicial decisions. The responsibility for careful research and citation practices begins, of course, with litigants and the briefs they present to the court. But those briefs and arguments are then assessed by a broad range of legal professionals, not just Article III judges. Indeed, today’s district court judges are managers not just of litigators,²⁷⁴ but also of staff attorneys, career clerks, term clerks, and externs, all of whom may have a hand in researching and drafting decisions.²⁷⁵

²⁶⁹ See Bone, *supra* note 261, at 1989; Soucek & Lamons, *supra* note 14, at 921.

²⁷⁰ See John R. Bartels, *United States District Courts En Banc—Resolving the Ambiguities*, 73 JUDICATURE 40, 41 (1989) (documenting use of “en banc” proceedings by district courts); Gardner, *En Bancs*, *supra* note 58.

²⁷¹ Local rulemaking, for instance, typically involves notice and comment, while district court en bancs frequently acknowledge amicus briefs and the collective input of parties across a range of similar cases. See Gardner, *En Bancs*, *supra* note 58.

²⁷² Matthew J. Wilson, *Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts*, 45 N.Y.U. J. INT’L L. & POL. 1111, 1142–43 (2013).

²⁷³ See John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109, 1123 (2014) (describing such an arrangement between the courts of New York state and New South Wales, Australia).

²⁷⁴ Cf. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing and critiquing district court judges acting as managers of litigation).

²⁷⁵ For a description of the roles of staff attorneys in the federal appellate courts, for instance, see Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 345–54 (2011). Staff attorneys in particular may focus their work on specific issue areas and thus may be *more* expert on a given area of law than a generalist district court judge. Still, the repetitive nature of their dockets may encourage overreliance on “copy-paste precedent,” see Soucek, *supra* note 17, which can introduce and compound some of the errors discussed here.

The role of the term law clerk in particular is another recurrent theme in the literature on legal error.²⁷⁶ The first district court law clerks were only approved in 1936, and only for thirty-five clerks nationally.²⁷⁷ District court judges were not provided two law clerks until 1965,²⁷⁸ and that number is now creeping up to three as some judges opt to hire a third law clerk in lieu of a judicial assistant.²⁷⁹ Meanwhile, magistrate judges were allowed law clerks only starting in 1979, and U.S. bankruptcy judges were first allowed law clerks in 1984.²⁸⁰ By 2007, there were more than 2000 full-time law clerks working for active and senior district court judges.²⁸¹

Term law clerks (who serve only for one or two years) are often recent law school graduates with limited or no practice experience. However, they have been thoroughly trained, thanks to first-year legal writing courses and law review cite checks, to provide a citation for every proposition.²⁸² Though the increase in law clerks has coincided with the general increase in caseload for the federal courts, clerks also enable judges to write more opinions per case and to provide more citations per opinion.²⁸³ Judges in turn may encourage law clerks'

²⁷⁶ The role of the law clerk is another recurrent theme in the literature on legal error. See, e.g., Devins & Klein, *supra* note 21, at 622; Masur & Ouellette, *supra* note 10, at 665–66.

²⁷⁷ Act of Feb. 17, 1936, Pub. L. No. 74-449, 49 Stat. 1140; see PETER CHARLES HOFFER, WILLIAM JAMES HULL HOFFER & N.E.H. HULL, *THE FEDERAL COURTS: AN ESSENTIAL HISTORY* 237 (2016). The number was increased in 1945 to allow each district court judge to hire one clerk, but judges still had to obtain a certificate of need first. *Id.*

²⁷⁸ John Bilyeu Oakley & Robert S. Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286, 1291 (1979).

²⁷⁹ See HOFFER ET AL., *supra* note 277, at 421. This accords with my own personal observations of clerkship hiring trends.

²⁸⁰ ALVIN B. RUBIN & LAURA B. BARTELL, *FED. JUDICIAL CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES* 4 (rev. ed. 1989).

²⁸¹ Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 628 (2008) (reporting 2075 district court law clerks in 2007).

²⁸² I make this observation not only as a former district court clerk, but also as a former law review editor and a former teacher of first-year writing courses (as may perhaps be indicated by the number of footnotes in this Article). Accord RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 148 (1996) (“Law clerks . . . feel naked unless they are quoting and citing cases and other authorities.”); Mikva, *supra* note 1, at 1366 (“The typical law clerk has been schooled in the law review style: Every issue must be given comprehensive coverage, supplemented with endless footnotes.”).

²⁸³ See, e.g., POSNER, *supra* note 282, at 156 (noting in regard to appellate law clerks that they “have time to write at length and a fondness for the apparatus of scholarship—footnotes and citations—that is natural in those who have just emerged from their academic chrysalis”); Devins & Klein, *supra* note 21, at 622 (noting that “[j]udges increasingly rely on law clerks to write legal opinions” and that “studies have found that the rise of law clerks has resulted in a dramatic upswing in the number of cited cases in judicial opinions”).

thorough use of citations both as an internal signal of the quality of the clerks' work and as an external signal of the quality of the resulting opinion.²⁸⁴

A lesson from the foregoing discussion, however, is that the quantity of citations is not necessarily indicative of correctness. Chambers might consider adopting internal rules to help ensure the quality of citations generated by law clerks.²⁸⁵ For example, to reduce unnecessary reliance on non-binding authority, judges might adopt a presumption against citing unreported district court opinions.²⁸⁶ Technically, unreported district court decisions carry the same precedential weight as reported district court decisions—which is to say, none. But given that an opinion's unreported status may reflect a lower investment in research and drafting resources, such opinions may come with a higher risk of conflation, reliance on outdated authority, and invocations of heuristics (whether implicit or explicit).

Another presumption might be that cases, particularly district court cases, should be paraphrased, not quoted. Quoting requires less sensitivity to analogical context and allows selective excision from opinions that might not otherwise bear directly on a case. It also places emphasis on rhetoric rather than synthesis. And it can make analytical points developed in prior opinions sound more definitive and rule-like than they were intended to be. A third rule might be, at least for internal drafting purposes, that citations to district court cases should include a descriptive parenthetical. This further requires the drafter to synthesize and articulate the relevance of the cited case beyond the appeal of its rhetoric or the similarity of an isolated fact.²⁸⁷

Finally, law clerks should bear in mind the limitations of text-based research, particularly via algorithmic search engines. Treatises and digests should still be part of any major research project. Consideration might also be given to the number of databases consulted, as

²⁸⁴ Cf. Bainbridge & Gulati, *supra* note 9, at 108 (“What judges want to see from their clerks are opinions that pass muster with the other judges. To the extent that the clerks write opinions following formulas that other judges have generally accepted—even if they make little sense when examined in isolation—that is good.”); Schauer, *Authority and Authorities*, *supra* note 25, at 1950 (“[A] legal argument is often understood to be a better legal argument just because someone has made it before, and a legal conclusion is typically taken to be a better one if another court either reached it or credited it on an earlier occasion.”).

²⁸⁵ Cf. Aldisert et al., *supra* note 2, at 40–41 (listing suggestions for improving uses of citations in judicial opinions).

²⁸⁶ I would exempt from this presumption, of course, unreported opinions that form part of a case's procedural history.

²⁸⁷ Relatedly, Masur and Ouellette recommend noting the decisionmaking standard of each case in a parenthetical (e.g., motion to dismiss vs. summary judgment, or *de novo* vs. abuse of discretion). Masur & Ouellette, *supra* note 10, at 729.

different databases might yield different results given that they employ different algorithms.²⁸⁸

In sum, there are some process-based reforms—from internal chambers practices to the design of tests—that may help reduce problematic resort to non-binding authority. These tools aim to reduce structural pressures like the lack of reliable information, the absence of appellate review, the need for efficient resolution of cases, and the delegation of judicial workload. But they will not end all dangerous citations. While some dangerous citations reflect imperfect craftsmanship, others serve a more rhetorical function. Fully addressing dangerous citations requires confronting, in the end, some fundamental questions about the nature of judging.

IV

RHETORICAL CITATIONS AND PERFORMATIVE JUDGING

At some point, the law runs out. There is not a settled answer for every question, and the work of judging requires the exercise of judgment. Dangerous citations may reflect a desire to operate under, or to signal the existence of, greater constraint than in fact exists. Acknowledging uncertainty and subjectivity can feel in tension with a concern for legitimacy: the need to reassure litigants, other judges, and the public at large that the judge is not acting arbitrarily or in pursuit of his or her personal preferences.²⁸⁹ Along with judicial economy, legitimacy concerns underlie many of the citations to non-binding authority gathered in Part II. In the absence of binding authority, citations to non-binding authority can provide a sense of caution and constraint, signaling that the judge has moved conservatively (with a little “c”) within a limited sphere of permissible action. Thus legislative facts that are perhaps not objectively knowable are presented, via citations, as reassuringly settled; the majority position among past decisions on an unsettled question is invoked as a meaningful constraint; and the

²⁸⁸ Susan Nevelow Mart has identified how the six major databases, when given the same keyword search query, can return very different sets of cases. Mart, *The Algorithm*, *supra* note 152, at 406–19 (reporting results from WestlawNext, Lexis Advance, Fastcase, Casetext, Ravel, and Google Scholar). “[E]very database has an individual worldview of cases, classification systems, and commentary that it mines for relevant cases,” Mart concludes, which means that “each database’s algorithms return unique, relevant cases that may contribute to solving a legal problem that is not fully resolved by searching in only one database.” *Id.* at 415.

²⁸⁹ This concern has deep roots, reflecting the counter-majoritarian difficulty. Nonetheless, the language of inevitability and restraint in judicial opinions also reflects a genre of opinion writing that is not itself inevitable. See Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J.L. & HUMAN.* 201 (1990).

always variable application of law to fact is described in definitive terms through over-simplified analogies.

The sense that the legitimate judge is the constrained judge—a judge who limits the exercise of his or her own discretion—is reflected in a full range of judicial philosophies currently in fashion. Not just textualism, but also judicial minimalism and the post-realist self-awareness of implicit bias may encourage judges to rely on external authority as a meaningful check on conscious or unconscious judicial activism. These intellectual shifts are interrelated with structural shifts over the last century in the nature of the law that federal judges are asked to apply. When it comes to the courts' diversity jurisdiction, federal judges are no longer expositors of the general common law, but are operating as agents of the states in attempting to discern or predict state law. The cultural shift precipitated by *Erie* may leave federal judges uneasy about making common law, even if that is in effect what they are often doing.²⁹⁰ Meanwhile, when judges consider federal questions, those questions typically involve not the small nubbin of federal common law that remains, but law codified by the other branches. Here, the rise of the regulatory state has increased the role of positive law and deductive reasoning in federal opinions.²⁹¹ It is not that surprising, then, that judges have come to treat precedent itself more like positive law and more deferentially. Other commentators have found that federal judges are treating higher court dicta as though they were binding²⁹² and interpreting binding precedents as though they were statutory or regulatory law.²⁹³ In this environment, even judges who remain catholic in their process of decision formation may find themselves justifying those decisions in terms of constraint.

²⁹⁰ See Issacharoff & Marotta-Wurgler, *supra* note 148 (identifying how evolving questions of state contract law are being shaped by federal court decisions); cf. Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 661–62 (2013) (arguing that avoidance of state law issues has led federal courts to construe federal statutes as encompassing a broader range of questions, including choice-of-law questions).

²⁹¹ See Tiersma, *supra* note 149, at 1188 (noting that the “statutorification” of U.S. law predicted by Guido Calabresi has led not to the treatment of statutes as common law, but to the treatment of common law as statutory precedent).

²⁹² See, e.g., David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2044 (2013) (concluding that, in abdicating the dicta/holding distinction, lower courts are “profoundly affect[ing] . . . the way in which law is produced and developed in the judicial system,” sacrificing “the shared, incremental decision making envisioned in traditional conceptions of common law judging”); Stinson, *supra* note 11, at 221 (“[T]oo often lawyers argue for, and judges treat, extraneous statements made in a prior case—that is, dicta—as holding.”).

²⁹³ See Tiersma, *supra* note 149, at 1278 (“American precedents are more textual, and relatively less conceptual, than they were in the past. . . . The words of an opinion are not evidence of the law, as they once were. They are the law.”).

In interviewing federal appellate judges about their approaches to statutory interpretation, for example, Abbe Gluck and Richard Posner found that judges commonly admitted to using canons of statutory interpretation to sound sufficiently judge-like in their opinions when their actual decisions turned on a much wider range of sources and approaches.²⁹⁴

Ultimately, however, citations for the sake of citations do not make judges more faithful agents to Congress or more careful expositors of the law on behalf of the public. Rather, such performative judging—the use of unnecessary citations and definitive language in order to avoid criticism—can backfire.²⁹⁵ Performative judging may not increase perceptions of the courts' legitimacy. Some research suggests that, when the lay public disagrees with the outcome of a case, it may find “overstated” judicial opinions less legitimate than those that acknowledge and grapple with ambiguity.²⁹⁶ And zealous claims of judicial constraint can also end up aggrandizing the courts at the expense of Congress and the states.²⁹⁷

There is also a more intrinsic harm. Particularly for judges who recognize the discretion and choice inherent in judging, writing about the act of judging as though it were purely objective may further legitimate and entrench the trope of the “constrained” judge as the normative ideal.²⁹⁸ This is especially true in a legal system that trains new lawyers through the study of judicial opinions. The disclaiming of judicial power—even if mostly rhetorical—becomes self-reinforcing as law students who comprise the future law clerks (and future judges)

²⁹⁴ Gluck & Posner, *supra* note 21, at 1314, 1334, 1353.

²⁹⁵ The following cautions, of course, depend on whom the judge is performing *for*. Consistent with my assumption that most judges are not primarily motivated by ideology, I assume here that judges tempted to perform constraint are in fact motivated by concerns for legitimacy, constitutional structure, and professional reputation. But to the extent performative judging is geared towards promotion within the judiciary or other signaling to specific groups, it may prove “successful” despite the following costs.

²⁹⁶ See Nicholas Scourich, *Styles of Argumentation in Judicial Opinions (Legitimizing Judicial Decisions)*, 14 ANN. REV. L. & SOC. SCI. 205, 207, 212 (2018).

²⁹⁷ On the antidemocratic effects of constitutionalizing doctrines of restraint, see, for example, Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017); Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015). On the difficulty of legislating around restrictive canons of statutory construction, see, for example, Maggie Gardner, *RJR Nabisco and the Runaway Canon*, 102 VA. L. REV. ONLINE 134 (2016). On the displacement of state law through the use of non-binding authority in federal opinions, see Issacharoff & Marotta-Wurgler, *supra* note 148. On the development of a judge-made doctrine that may operate to displace state law, see Gardner, *Abstention*, *supra* note 182 (critiquing “international comity abstention” as trespassing on state prerogatives).

²⁹⁸ Cf. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011) (critiquing the script of the emotionally detached judge as counterproductive).

for the federal system are trained on cases that hide normative choices and ambiguity behind the language of certainty and constraint. The performance *becomes* judging—and eventually the law itself—as it is picked up and mirrored in the arguments of litigants and the Socratic dialogue of the classroom.²⁹⁹

Rhetorical citations are dangerous citations not only for the legal error they may introduce, but also for the message they send that the work of judges is limited to discerning, rather than developing, the law. Insisting on certainty or constraint where there is in fact ambiguity, uncertainty, and subjective induction dangerously obscures judicial choice and the inherently discretionary nature of judging.

²⁹⁹ Cf. Gluck & Posner, *supra* note 21, at 1331–32, 1351 (emphasizing the effect of shifts in pedagogy on the increased use of canons and formalistic modes of reasoning among law clerks and younger judges).