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Merritt McAlister is an Assistant Professor of Law at the University of Florida Levin College of Law. She teaches and writes in the areas of federal courts, civil procedure, and constitutional law. Her scholarship focuses on judicial decisionmaking, candor, transparency, and access to justice, and her work has appeared in or is forthcoming in the *Michigan Law Review* and the *Georgetown Law Journal*. Before entering academia, Merritt was a partner in the national appellate practice group of King & Spalding. She served as a law clerk to Justice John Paul Stevens of the Supreme Court of the United States and Judge R. Lanier Anderson III of the U.S. Court of Appeals for the Eleventh Circuit. Merritt received her bachelor's degree *magna cum laude* from Rice University and her law degree *summa cum laude* from the University of Georgia School of Law.

*“Downright Indifference”: Examining Unpublished Decisions in the
Federal Courts of Appeals*

Nearly ninety percent of the work of the federal courts of appeals looks nothing like the opinions law students read in casebooks. Over the last fifty years, the so-called “unpublished decision” has overtaken the federal appellate courts in response to a caseload volume “crisis.” These are often short, perfunctory decisions that make no law; they are, one federal judge said, “not safe for human consumption.”

The creation of the inferior unpublished decision also has led to the creation of an inferior track of appellate justice for a class of appellants: indigent litigants. The federal appellate courts routinely shuttle indigent appeals to a second-tier appellate process where judicial staff attorneys resolve appeals without oral argument or meaningful judicial oversight. For the system’s most vulnerable participants, the promise of an appeal as of right often becomes a rubber stamp: “You lose.”

This work examines the product of that second-class appellate justice system by filling two critical gaps in the existing literature. First, it compiles comprehensive data on the use of unpublished decisions across the circuits over the last twenty years. The data reveal, for the first time, that the courts of appeals’ continued reliance on unpublished decisions has no correlation to overall caseload volume. Second, it examines the output of the second-tier appellate justice system from the perspective of the litigants themselves. Relying on procedural justice values, this work argues for minimal reason-giving standards in most unpublished decisions.