Montana Law Review Online

Volume 84 Article 4

10-6-2023

The Big Sky Shadow Docket: Noncite Opinions and the Montana Supreme Court

Blake Koemans
Alexander Blewett III School of Law at the University of Montana, blake.koemans@umconnect.umt.edu

The Big Sky Shadow Docket: Noncite Opinions and the Montana Supreme Court

THE BIG SKY SHADOW DOCKET: NONCITE OPINIONS AND THE MONTANA SUPREME COURT

Blake Koemans*

I. INTRODUCTION

More than half of the Montana Supreme Court's written opinions in 2022 carry no precedential value and cannot be cited as binding authority to a Montana court.[1] The same is true for opinions issued in 2021, 2020, and 2019.[2] Thousands of opinions—tens of thousands of pages, filled with the Court's legal reasoning, factual applications, policy judgments, and practical advice—are unusable. Montana is not alone in this phenomenon as unpublished opinions constitute the majority of opinions in many other jurisdictions around the country.[3] Consequentially, this outdated practice is impacting the law in Montana and throughout the country.

Nonpublication was an innovation meant to deal with a uniquely judicial problem—every year it takes more than 100,000 pages of paper to record the decisions flowing out of courts across the United States.[4] The nonprecedential nature of most unpublished cases masks the effect such decisions have on a body of law. As a result, the consequences of such opinions are challenging to ascertain. This research tracks the rise of unpublished opinions in Montana through statistical data. Then, using illustrative examples, this comment argues that despite their nonprecedential moniker, unpublished cases can have significant unintended consequences.

Part II of this comment discusses the history of unpublished opinions at the federal and state levels. Part III uses Montana Supreme Court data to illustrate the prevalence of unpublished opinions in Montana and highlight

* J.D., Alexander Blewett III School of Law at the University of Montana, Class of 2023. This research was made possible by Bowen Greenwood and the staff of the Office of the Clerk of the Montana Supreme Court. I would like to extend special thanks to that office for their diligent work cataloging, recording, and disseminating the work of the Montana Supreme Court. The people of Montana have recognized a fundamental truth about representative democracy—for it to work, the people must be allowed to know what their elected officials are doing. The work of Mr. Greenwood and his office is instrumental in ensuring that the people of Montana know what is happening at the Montana Supreme Court.

1. *See infra* Part III; *see also* MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(ii).

2. *See infra* Part III.

3. The terminology used to describe this category of opinion can be confusing. The most common name given to this category of opinion is unpublished. However, as is discussed below, important differences exist within the broad class of unpublished opinions. Two terms, unpublished and noncite, are used to refer to this class of opinion in this research. Unless otherwise noted, the two terms are interchangeable.

4. Edward H. Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472, 473 (1916).

trends in the Court's practices. Part IV examines the effect of unpublished opinions through two case studies and discusses potential unquantifiable issues. Part V concludes this comment and recommends further research on this topic in Montana.

II. The Development of Unpublished Opinions in the United States

The written judicial opinion is arguably the most important way courts interact with the body politic in American society. The role of the judiciary was perhaps best articulated by Chief Justice Marshall when he said, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[5] Left unsaid by the Chief, but necessarily implied: when the court speaks, the nation must be allowed to hear it. The written opinion is the vehicle through which the court's speech is heard.

The tradition of written accounts of judicial proceedings stretches back at least to the Year Books of England in the late 1200s.[6] The Year Books do not resemble modern judicial opinions but consisted of reports of the arguments and goings-on inside the courtroom.[7] However, over the next five centuries judicial reporting developed to more closely resemble the modern opinion in both form and volume.[8]

In early America, judicial reporting was largely handled by individual courts and their presiding judges. Beginning in the late 1790s, state courts began recording and publishing official volumes of precedential judicial opinions.[9] As several other states and the federal courts adopted the practice of judicial reporting, the volume of precedential cases quickly became enormous.[10] One response to the growing work product of American courts was to begin issuing "unpublished" opinions.[11] In contrast to ordinary, published judicial opinions, unpublished opinions would not be printed and bound into reporter volumes and would not add to the crushing amount of documents collected by law libraries.[12] Like judicial reporting, the practice

5. Marbury v. Madison, 5 U.S. 137, 177 (1803).

6. John H. Langbein, Renee L. Lerner & Bruce P. Smith, History of the Common Law: The Development of Anlgo-American Legal Institutions 179 (2009).

7. *Id.* at 180.

8. *Id.* at 817.

9. *Id.* at 825.

10. *Id.* at 832. By 1929, there were 1.5 million precedential decisions in the United States with a year-over-year increase of 170,000 pages.

11. Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Reform 119, 121 (1995).

12. *See* Lauren Robel, *The Practice of Precedent:* Anastasoff*, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 Ind. L. Rev. 399, 402–03 (2002).

of unpublished opinions, once started, quickly spread to a majority of the appellate courts in the American judicial system.[13]

A. Overload in the Federal Courts and the Origins of Nonpublication in the United States

In the 12-month period ending September 30, 2021, there were 44,546 cases commenced in the United States courts of appeals.[14] Additionally, there were 419,032 cases filed in the United States district courts.[15] Despite this crushing number of cases, 2021 saw a significant decrease in case filings from the previous year.[16] A packed docket and the deluge of written opinions that follow are not a new phenomenon for courts.[17] One response to this issue has been the use of unpublished opinions.[18]

While evidence of nonpublication can be found in the practices of English courts in the 18th century, it is a more recent development in American law.[19] Throughout the first half of the 20th century, the dockets of the United States courts of appeals steadily increased.[20] These expanding dockets meant more opinions, creating the practical problem of organizing and storing this immense amount of paper.[21] In 1964, the Judicial Conference of

13. Martineau, *supra* note 11, at 125. R

14. *U.S. Courts of Appeals—Cases Filed, Terminated, and Pending—During the 12-Month Periods Ending September 30, 2020 and 2021*, U.S. COURTS (Sept. 30, 2021), *available at* https://perma.cc/S2AP-4USU [hereinafter *Table B*]. This data does not include cases filed in the United States Court of Appeals for the Federal Circuit.

15. *U.S. District Courts—Civil Cases Filed, Terminated, and Pending—During the 12-Month Periods Ending September 30, 2020 and 2021*, U.S. COURTS (Sept. 30, 2021), *available at* https://perma.cc/V2VA-H8D6 [hereinafter *Table C*] (344,567 civil filings); *U.S. District Courts—Criminal Defendants Filed, Terminated, and Pending (Including Transfers)—During the 12-Month Periods Ending September 30, 2020 and 2021*, U.S. COURTS (Sept. 30, 2021), *available at* https://perma.cc/FB76-WE3J [hereinafter *Table D*] (74,465 criminal filings).

16. *Table B*, *supra* note 14; *Table C*, *supra* note 15; *Table D*, *supra* note 15. In the United States courts of appeals, case commencement dropped by 7.6% between 2020 and 2021. In the United States district courts, commencements in civil cases dropped by 26.8% while commencements in criminal cases increased by 0.8%. R

17. Warren, *supra* note 4, at 472–73.

18. Martineau, *supra* note 11, at 121–22. R

19. Martineau, *supra* note 11, at 121. R

20. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168–69 (1978); Jon A. Strongman, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV.195, 197 (2001); *see also* Suzanne O. Snowden, *"That's My Holding and I'm Not Sticking to It!" Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 WASH. U. L. REV 1253, 1260–61 nn.64, 65 (2001) (discussing caseloads from the late 1880s through the 1970s).

21. Warren, *supra* note 4, at 472–73. An oft-cited illustration of the problems associated with expanding caseloads, Prof. Warren noted that in 1915 the Harvard Law Library calculated that it took 175,000 pages to record the decisions of the federal and English courts that year, all of which were

the United States decided to take on the issue directly.[22] In response to a rapidly growing number of opinions, the Conference resolved that the district and circuit courts would issue only opinions of "general precedential value."[23] The resolution sought to alleviate the growing difficulty and cost associated with maintaining accessible law libraries as the number of opinions issued by the federal courts expanded.[24]

The federal circuit courts quickly adopted the Conference's resolution, and many states followed.[25] However, not every court followed suit and some evidence suggests the resolution lacked the immediate impact on the number of published cases the Conference intended.[26] In the years following the 1964 resolution, the decision to adopt nonpublication rules fell largely to the discretion of each federal circuit.[27] This led to disuniformity and middling results with respect to a reduction in the number of published opinions, ultimately leading the Judicial Conference in 1972 to recommend all circuits review their procedures with a focus on limiting publication.[28]

In the following decades, the Judicial Conference and the various federal courts struggled to reach a consensus on how to handle unpublished opinions.[29] While rules lacked uniformity and disagreement abounded, the federal courts adopted rules of nonpublication and by the early 2000s the majority of decisions were unpublished.[30]

Despite the moniker, unpublished opinions are neither a single type of opinion nor are they necessarily *not published*.[31] Generally, courts use the unpublished label to designate cases that have no precedential value in the

added to the library's stacks; *see also* Anika C. Stucky, Comment: *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 Okla. L. Rev. 403, 425 (2006).

22. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964) [hereinafter JUDICIAL CONFERENCE].

23. *Id.*

24. *Id.*

25. Martineau, *supra* note 11, at 125. **R**

26. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts* 56 STAN. L. REV. 1435, 1443 (2004).

27. Donald R. Songer, *Criteria for Publication of Opinions in the U. S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990).

28. *Id.*

29. *See generally* Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV 1429, 1429 (2005) (cataloging in detail the many arguments over unpublished opinions beginning with the 1964 Judicial Conference's recommendation through the early 2000s).

30. Lauren S. Wood, Comment: *Out of Cite, Out of Mind: Navigating the Labyrinth that Is State Appellate Courts' Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561, 566 n.36 (2016); Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice*, 26 MISS. C. L. REV. 185, 193 (2007).

31. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 185–87 (1999).

view of the court.[32] Because of this limited precedential value, courts often place restrictions on how practitioners may use unpublished opinions.[33] However, significant variation exists in how different courts treat these types of opinions.[34] One scholar noted that at least five distinct categories exist for how state courts treat unpublished opinions.[35] Adding to the confusion, many jurisdictions do in fact publish "unpublished" opinions.[36] For instance, the Montana Supreme Court Internal Operating Rules require unpublished opinions to be reported and publicly available.[37] This leaves a body of available law that is largely unusable by practitioners.

Since its adoption, the practice of issuing unpublished opinions has been controversial. Criticisms include that the practice is unfair, limits judicial accountability, expands the judiciary's power beyond what is acceptable, and that judges may be less disciplined when drafting unpublished opinions.[38] Notably, some argue unpublished opinions give a degree of certiorari power to the federal courts of appeals.[39] This point is particularly relevant for Montana because, much like the federal courts of appeals, the Montana Supreme Court does not have certiorari control over its own docket; it has an obligation to review appeals properly brought before it.[40] A long-noted result of the practice of issuing unpublished opinions is that an appellate court gains the ability to craft its own docket, give limited explanation for its decisions, and to restrict the precedential value of its decisions.[41]

---

32. *See* JUDICIAL CONFERENCE, *supra* note 22, at 11; *see also* MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(i). **R**

33. For instance, under MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(ii), unpublished opinions, with some exceptions, are not citable as binding precedent in Montana state courts. In the modern era, citation is often limited because a court finds the opinion holds no precedential value; however, it is important to note that a very different concern drove the development of non-citation rules. In the early 1970s, as the federal circuit courts were developing early rules for nonpublication, the Advisory Council on Appellate Justice raised the concern that nonpublication would create disparate access problems. Despite nonpublication, the Council argued, large and well-resourced firms would still be able to access unpublished opinions, giving them an advantage in litigation. As a result, the Council recommended to the Judicial Conference that rules restricting citation should accompany nonpublication rules. *See* Songer, *supra* note 27, at 308. **R**

34. *See* William J. Miller, Note, *Chipping Away at the Dam:* Anastasoff v. United States *and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 DRAKE L. REV. 181, 186 (2001) (exploring the variety of unpublished opinions at the federal level).

35. Wood, *supra* note 30, at 595 (analyzing how the 50 states address unpublished opinions).

36. Strongman, *supra* note 20, at 199 n.33.

37. MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(ii).

38. Martin, *supra* note 31, at 180. **R**

39. Richman & Reynolds, *supra* note 20, at 293–9.

40. MONT. CONST. art. VII, § 2(1); *see also* State v. Seaman, 124 P.3d 1137, 1139 (Mont. 2005).

41. Richman & Reynolds, *supra* note 20, at 293–94.

At the federal level, arguments over unpublished opinions came to a head in 2000 when the Eighth Circuit held that the practice of issuing unpublished opinions violated Article III of the United States Constitution.[42]

B. The Constitutionality of Unpublished Opinions: Anastasoff*,* Hart*, and Unpublished Opinions in the Federal Courts of Appeals*

Anastasoff v. United States centered around a dispute over whether the IRS could issue a refund for overpaid taxes when the requested refund was outside the statutorily allowable time.[43] When *Anastasoff* reached the court of appeals, the Eigth Circuit had only ever had one other decision, an unpublished opinion in *Christie v. United States*,[44] addressing the legal questions at issue.[45] Anastasoff argued that, because *Christie* was unpublished, it was nonprecedential and did not apply to her case.[46] The Eighth Circuit held not only that *Christie* was binding but that the practice of issuing unpublished, nonprecedential opinions violated Article III of the Constitution.[47] In an opinion rooted in the history of Article III, the Eighth Circuit found that "inherent in every judicial decision," a court interprets and declares general principles of the law.[48] The court held these principles act as a rigid *stare decisis*, requiring subsequent courts to apply the same law to similarly situated parties.[49] Citing Sir William Blackstone and Sir Edward Coke, the court found the duty of a judge to follow prior decisions to be a direct derivation of the judicial power.[50] If judges may disregard previous decisions, according to the Eighth Circuit, they become de facto legislators, "regulated only by their own opinions."[51]

In 2000, when the Eighth Circuit decided *Anastasoff,* the federal circuit courts issued 21,895 unpublished opinions constituting 79.8% of all

42. Anastasoff v. United States, 223 F.3d 898, 905 (8th Cir. 2000).

43. *Id.* at 899. In *Anastasoff*, the appellant sought a refund for overpaid federal income taxes. Under federal law, the Internal Revenue Service may only issue refunds for tax periods within three years prior to a request. Ms. Anastasoff's request was received three years and one day after the deadline for the requested return. While the request was one day late, federal law also includes a mailbox rule allowing for a request to be considered timely if postmarked by the deadline. The parties agreed that Ms. Anastasoff's request was timely, but disagreed on whether the mailbox provisions of the law could extend the three-year deadline of the statute.

44. No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

45. *Anastasoff*, 223 F.3d at 899.

46. *Id.*

47. *Id.* at 899, 905.

48. *Id.* at 899–900 (citing *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803)).

49. *Id.* at 900.

50. *Id.* at 900.

51. *Anastasoff*, 223 F.3d at 901.

opinions issued.[52] The Eighth Circuit effectively held that four-fifths of the work product of the United States courts of appeals was unconstitutional.[53]

Anastasoff's holding was as short-lived as it was monumental. Four months after the panel decision, the opinion was vacated for mootness at rehearing en banc.[54] There, the full court of the Eighth Circuit stated that the question of whether unpublished opinions violated the Constitution remained unsettled.[55] While the issue remained open in the Eighth Circuit, the Ninth Circuit resoundingly rejected the reasoning in *Anastasoff*.[56] In *Hart v. Massanari*, the Ninth Circuit responded directly to the *Anastasoff* court.[57] Following a lengthy historical analysis of many of the same authorities, the Ninth Circuit found that the reasoning in *Anastasoff* would "preclude appellate courts from developing a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the court's below them."[58]

The opinions in *Anastasoff* and *Hart* further fueled the debate over the propriety of unpublished opinions. Several years after the two decisions, unpublished opinions continued to be hotly contested issues within the judiciary.[59] Nevertheless, the federal courts of appeals continued to rely on unpublished opinions.[60] By 2005, unpublished opinions accounted for nearly 82% of all opinions issued at the circuit court level.[61] In 2020, that number grew to almost 90%.[62]

C. Adoption of Unpublished Opinions in State Courts

While arguments over unpublished opinions in the federal courts played out, state courts began adopting their own publication rules.[63] In the

52. Solomon, *supra* note 30, at 193. R

53. *See Anastasoff*, 223 F.3d at 905. The Eighth Circuit did not explicitly make this holding. The decision in *Anastasoff* required the court to interpret Eighth Circuit Rule 28(A)(i) (restricting the citation of unpublished opinions). The holding in *Anastasoff* was limited to the Eighth Circuit and its rules. However—as illustrated in Hart v. Massanari, 266 F.3d 1155, 1176–78 (8th Cir. 2001)—the reasoning in *Anastasoff*, if correct, would necessarily apply to all federal courts.

54. Anastasoff v. United States, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

55. *Id.* at 1056.

56. *Hart*, 266 F.3d at 1180.

57. *Id.* at 1159.

58. *Id.* at 1176.

59. *See* Schiltz, *supra* note 29, at 1429. R

60. *See* FED. R. APP. P. 32.1. In 2006, in response to the growing debate surrounding unpublished opinions, the U.S. Supreme Court adopted Rule 32.1, which prevents the federal courts from prohibiting or otherwise restricting the citation of judicial opinions issued after January 1, 2007.

61. Solomon, *supra* note 30, at 193. R

62. *U.S. Courts of Appeals—Type of Opinion or Order Filed in Cases Terminated on the Merits—During the 12-Month Periods Ending September 30, 2021 and 2022*, U.S. COURTS (Sept. 30, 2020), *available at* https://perma.cc/ST7Y-R7B8.

63. Wood, *supra* note 30, at 564. R

decades following the 1964 Judicial Conference resolution, a dizzying patchwork of rules and procedures emerged, largely individualized to each state. As discussed above, one scholar has noted the various procedural schemes employed by each state fall into one of five categories: (1) full publication or no citation restriction; (2) citation of unpublished opinions as binding precedent; (3) citation of unpublished opinions as persuasive authority; (4) a hybrid system of citation rules based on the court; and (5) restricting the use of unpublished opinions.[64] Montana is one of 14 states that fully restrict the use or citation of unpublished opinions.[65]

Unpublished opinions in Montana are governed by the Court's internal operating rules.[66] A short series of provisions in these rules set forth the circumstances under which opinions may be unpublished, how practitioners may cite unpublished opinions, the voting requirements, and avenues of redress for parties whose case is decided in an unpublished opinion.[67]

Like many other states, Montana has adopted—more or less—the 1964 rule for designating decisions as unpublished.[68] In Montana, the Court can issue an unpublished opinion when a case does not involve a constitutional issue, does not establish new law, does not modify existing precedent, and when the Court determines the issues are settled according to established law.[69] As is discussed below in Part IV, it is not clear whether the Montana Supreme Court rigidly adheres to this rule when selecting opinions for nonpublication. Regardless of the criteria used to designate an opinion for nonpublication, the Montana Supreme Court makes clear that unpublished cases cannot be cited as binding authority.[70] This citation restriction was not part of the original 1964 Judicial Conference resolution.[71] However, Montana is not alone in this practice, as several state courts, and many federal courts, employ similar rules.[72]

64. *Id.* at 569–73. Even in states that employ fully restrictive rules, unpublished opinions are still allowed to be used with respect to the law of the case, res judicata, collateral estoppel, and similar issues.

65. *Id.* at 595.

66. MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c). As noted, the Montana Supreme Court refers to unpublished opinions as "memorandum opinions." For uniformity, only the term "unpublished" is used in this paper. When referencing any decision from the Montana Supreme Court, the term "unpublished" should be understood to refer to a decision designated for "memorandum opinion" under MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(i).

67. *Id.*

68. *Id.* ¶ 3(c)(i); *see also* JUDICIAL CONFERENCE, *supra* note 22, at 11. R

69. MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(i).

70. *Id.* ¶ 3(c)(ii).

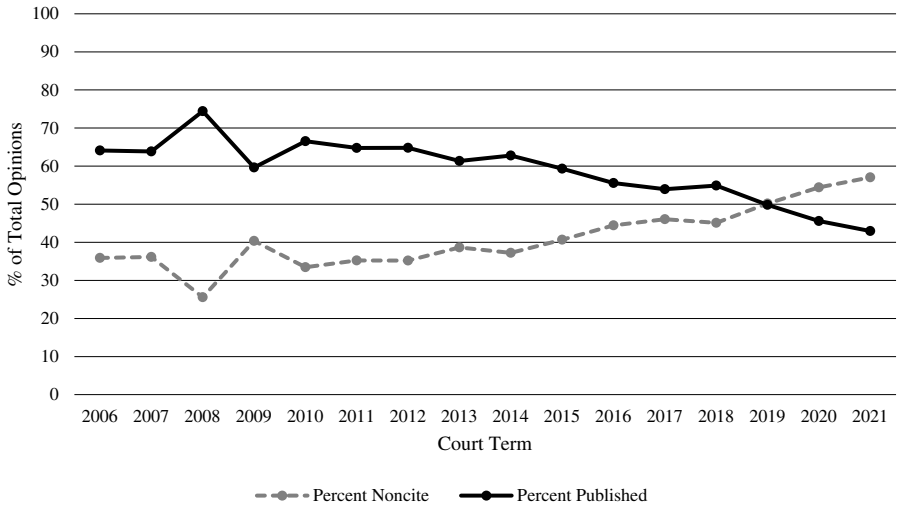
71. JUDICIAL CONFERENCE, *supra* note 22, at 11. R

72. Wood, *supra* note 30, at 565–67; Schilz, *supra* note 29, at 1430–31. R

III. Unpublished Opinions at the Montana Supreme Court: Trends in the Data

The use of unpublished opinions at the Montana Supreme Court is growing. In both raw numbers, and as a percentage of total opinions, the court is increasingly utilizing noncite opinions.[73] Unfortunately, the data does little to explain why the court is increasingly turning to noncite opinions. However, the Court's increasing use of nonpublication is noteworthy. The data collected and analyzed below suggests the rise in noncite authority may be attributable to a few specific and relatively small categories of cases decided by the Court. The first section of data shows the extent that the Court is increasingly issuing unpublished opinions.

Figure 1: Published and Noncite Opinions as Percentage of Total



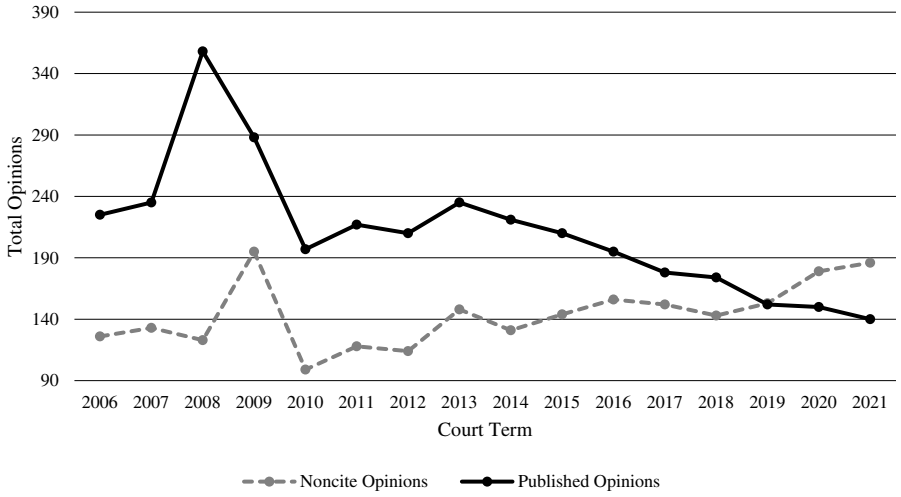
As illustrated in Figure 1, unpublished opinions now constitute the majority of written opinions issued by the Court. Since 2008, when 26% of opinions were marked unpublished, the Court has more than doubled its use of unpublished opinions, reaching a high of 57% in 2021.[74] 2019 marks the year where, for the first time, the Court issued more noncite than published opinions—153 to 152, respectively. However, this trend of increasing use

73. The data used in Part III includes only cases in which a written opinion was issued and reported by the Montana Supreme Court as either published or noncite. This section presents a series of graphs illustrating the Court's practice over time. Because of the large amount of data used for this research, it is not feasible to include the raw data here. However, an Excel file including all the data used in this analysis is in the possession of the author and available upon request.

74. The data provided by the Office of the Clerk of the Montana Supreme Court includes the published/unpublished designation.

of unpublished opinions stretches back much further. As Figure 1 shows, 2010—where the Court issued fewer than 100 noncite opinions—marked the beginning of a decade-long upswing in the use of noncite opinions that shows no signs of abating.

FIGURE 2: PUBLISHED AND NONCITE OPINIONS



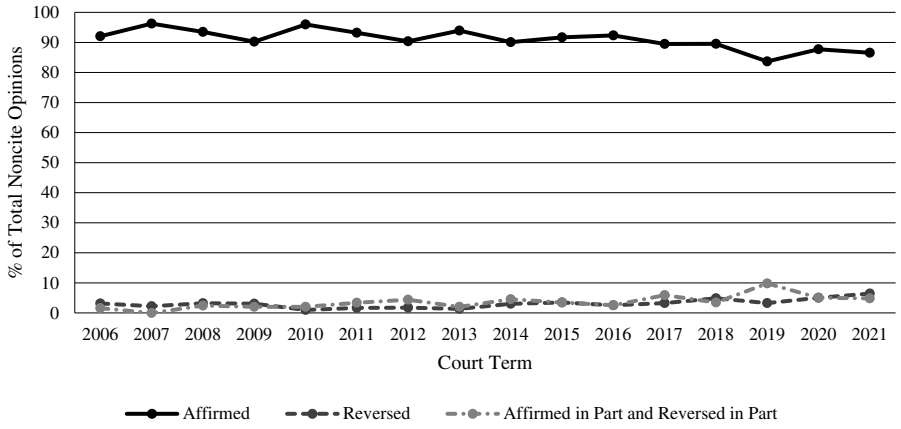
Since 2010, there has been a significant rise in the number of unpublished opinions issued by the Court. However, as Figure 2 shows, the gradual increase in unpublished opinions between 2010 and 2019 coincided with a more extreme *decrease* in the Court's issuance of *published* opinions. In 2013, the Court issued a total of 383 opinions; by 2018, that number fell to 317, a reduction of 66 opinions. During that same period, the Court went from issuing 235 published opinions to just 174, a difference of 61.

The drastic change illustrated in Figure I is likely due to a gradual increase, beginning in 2011, in the number of unpublished opinions combined with a more significant decrease in published opinions starting in 2013. However, that changed in 2018, when the Court issued 143 noncite opinions. In 2019, that number jumped to 153; in 2020, to 179; and finally, in 2021, the Court issued 186 noncite opinions—an increase of 43 noncite opinions from 2018. That increase mirrors the positive trend in noncite opinions from 2010 to 2018. In other words, what it took the Court nearly a decade to do from 2010 to 2018, they repeated in only four terms from 2018 to 2021.

Having established that the Court is increasingly turning to noncite authority, it is important to understand what is happening in noncite deci-

sions. The next section of data provides insight on this front in two ways. First, Figures 3 and 4 show the Court's treatment of district court decisions in published and unpublished opinions. Second, a series of charts explores how likely the Court is to issue noncite opinions based on the case type and subtype.

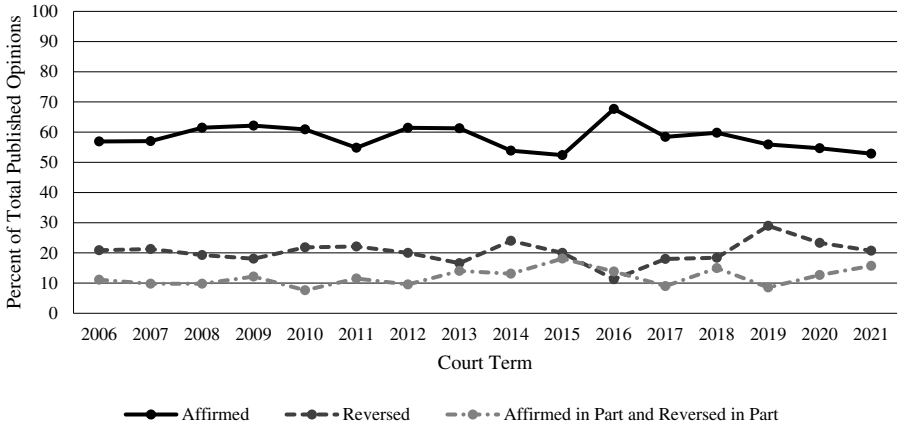
FIGURE 3: AFFIRMANCE/REVERSAL OF LOWER COURT DECISION IN NONCITE OPINIONS



When the Montana Supreme Court issues an unpublished opinion, it almost always affirms the lower court decision.[75] As Figure 3 illustrates, the affirmance rate of noncite opinions hovers close to 100%, with some variance from term to term. Figure 3 does show a slight decline in the Court's affirmance rate in noncite opinions beginning in 2013. However, that trend may be illusory as the data suggests that the cases making up the decline include those that were affirmed in part *and* reversed in part. Many reasons may account for the Court's slight decline in affirmation in unpublished opinions. As discussed below in Part IV, one interesting possibility is that the Court increasingly decides appeals of cases that originated in municipal court and justice court through noncite opinions.

75. Figures 3 and 4 include only cases in which the Montana Supreme Court reviewed a lower court decision. Accordingly, cases implicating the Court's original jurisdiction are not included in those two figures.

FIGURE 4: AFFIRMANCE/REVERSAL OF LOWER COURT DECISION IN PUBLISHED OPINIONS

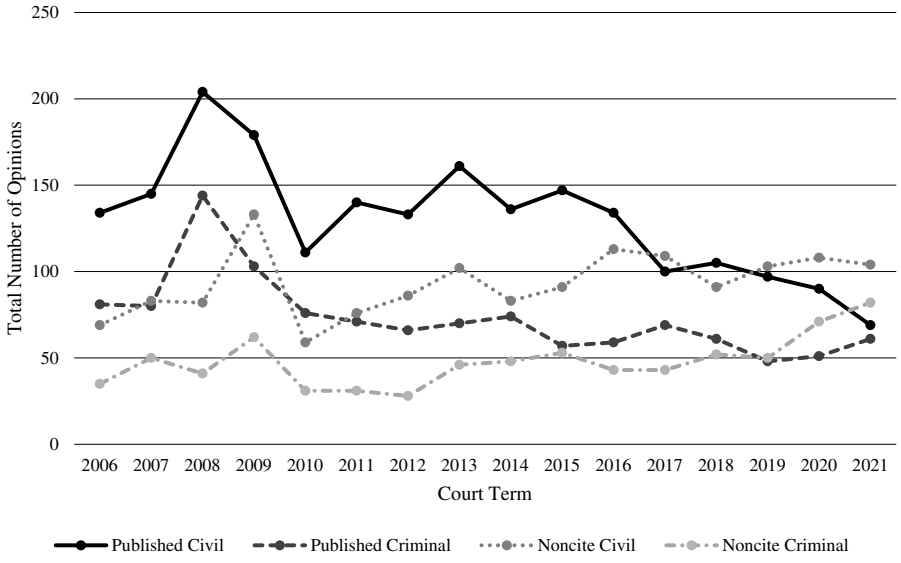


In contrast to noncite opinions, the Court's published opinions affirm the lower court decision only 60% of the time. As noted, the Court's internal operating rules call for the use of noncite opinion only where a case presents "no constitutional issues, no issues of first impression, does not establish new precedent or modify existing precedent, or, in the opinion of the Court, presents a question controlled by settled law."[76] Because the Court should only issue unpublished opinions where answers are clear, one would expect the district courts to be routinely coming to correct decisions and the Montana Supreme Court to affirm those decisions in most cases. Therefore, a high affirmance rate is neither surprising nor concerning. One interpretation of the data reflected in Figures III and IV is that the Montana Supreme Court sits in broad agreement with the decisions coming out of the state district courts. While a high affirmance rate is not necessarily cause for concern, other commentators have raised questions regarding the propriety of courts' high affirmance rates in unpublished opinions.[77]

76. MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(i).

77. David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1675–76 (2005).

FIGURE 5: OPINIONS BY CASE TYPE



Interesting trends emerge when dividing the data into civil and criminal case-types.[78] Over the last decade, the number of opinions issued by the Court in criminal cases has increased, while the total number of opinions in civil cases has decreased. In 2008, the Court issued 286 civil case opinions; by 2021, that number had fallen to 173. During that same time, the Court's issuance of opinions in criminal cases also fell, but by a much smaller amount. In 2008, the court issued 185 criminal opinions; by 2021, that number had fallen to 143.[79]

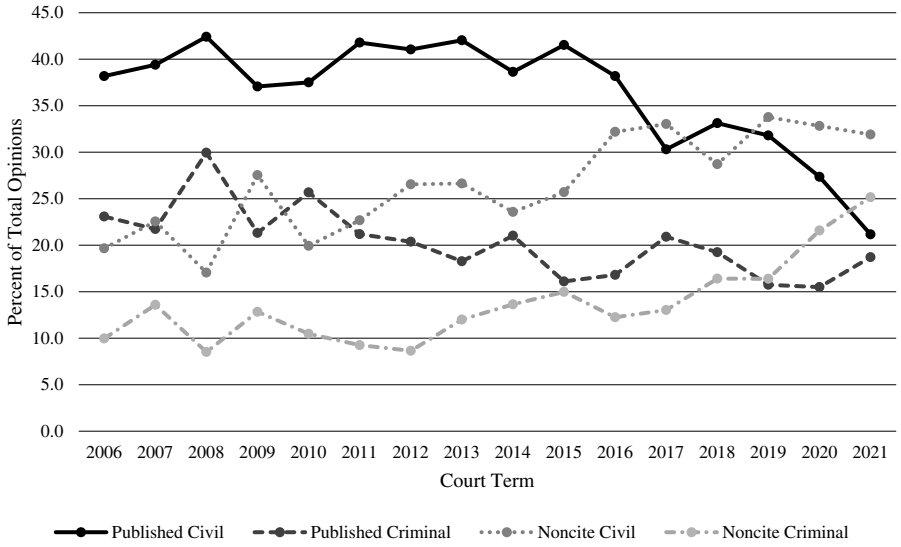
Figure 5 adds important details to two trends noted in Figures 1 and 2. First, in Figure 5, the data shows that the decline in published cases beginning in 2013 was mainly due to the reduction in published civil case decisions. In 2013, the Court issued 161 published opinions in civil cases. By 2021, that number had fallen by nearly triple digits to 69. During that same period, the number of noncite civil cases issued by the Court increased only slightly from 102 to 104. Second, Figure 5 shows that the rise in unpublished cases noted in Figures 1 and 2 is likely due to the Court issuing

78. Similar to Figures 3 and 4, this designation only includes cases that come to the Court under its normal appellate jurisdiction. Ordinary appeals make up the majority of the Court's docket.

79. 2008 is a natural starting point to measure trends in the data because it is a high point for many of the data sets. However, it is important to explicitly note a phenomenon that is clear from Figures 1, 2, and 5, which is that 2008 and 2009 are significant outliers in the number of total cases decided by the Court in one term year. Between 2006 and 2021, and excluding 2008 and 2009, the Court issued an average of 337 cases per year. In 2008, the Court issued a total of 481 opinions, and in 2009, that number grew to 483.

noncite opinions in *criminal* cases. Over the past decade, the Court's issuance of unpublished opinions in criminal cases nearly tripled from 28 opinions in 2012 to 82 in 2021. As Figure 6 illustrates below, noncite opinions in criminal cases have gone from being fewer than 9% of the Court's written opinions to greater than 25%. In 2021, nearly 60% of the Court's opinions in criminal cases were designated as noncite.

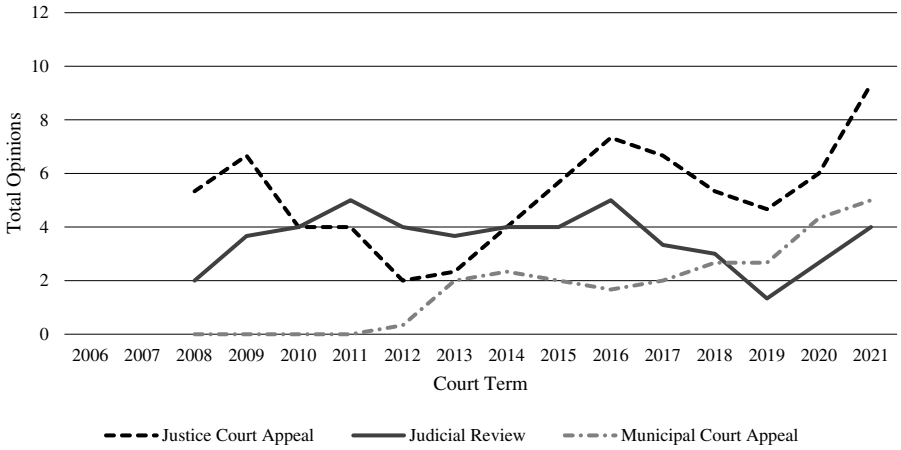
FIGURE 6: PERCENTAGE OF OPINION TYPE BY CASE TYPE



In addition to the broad categorization of cases as either civil or criminal, the Court also designates cases by subtype. Between 2006 and 2021, the Court utilized 119 distinct subcategories. Figures 7, 8, and 9 present several subtypes that seem to have had the greatest impact on the rising number of unpublished opinions.[80]

80. Unlike the other charts in this section, the data in Figures 7, 8, and 9 do not represent the actual numbers of opinions issued. Because of the large number of categories, each subtype category will only include a small number of cases every year. To better illustrate changes over time, the lines in Figures 7, 8, and 9 represent moving averages of the underlying data. For all three charts, the moving average has a period of three. It is important to note that any given opinion is only issued one case subtype, regardless of the number of issues in the underlying case. Case subtype cannot distinguish between the myriad of reasons an opinion may be designated as noncite.

FIGURE 7: NONCITE OPINIONS BY CASE SUBTYPE 1



In recent years, there has been a significant rise in the number of noncite opinions involving the review of decisions originating in justice court and municipal court. This data may help to explain the slight decrease in affirmance rates in unpublished opinions noted in Figure 3. However, any link between lower affirmance rates and increasing review of justice and municipal court decisions would likely require examination of the individual cases reflected in the data.

While the effect is partially masked by the moving average shown in Figure 6, the Court also appears to be turning to noncite procedures when issuing opinions involving the judicial review of agency decisions. In 2020 and 2021, the Court issued five and seven unpublished opinions in this subtype, respectively—a significant increase from recent years.

FIGURE 8: NONCITE OPINIONS BY CASE SUBTYPE 2

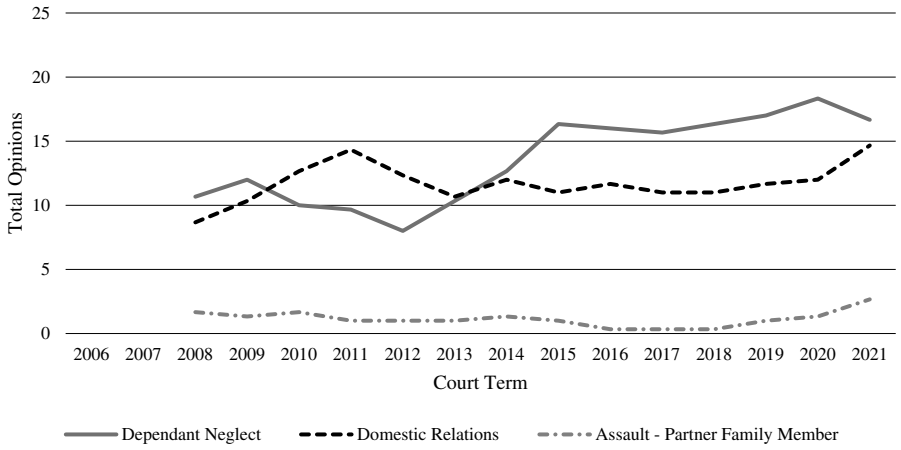
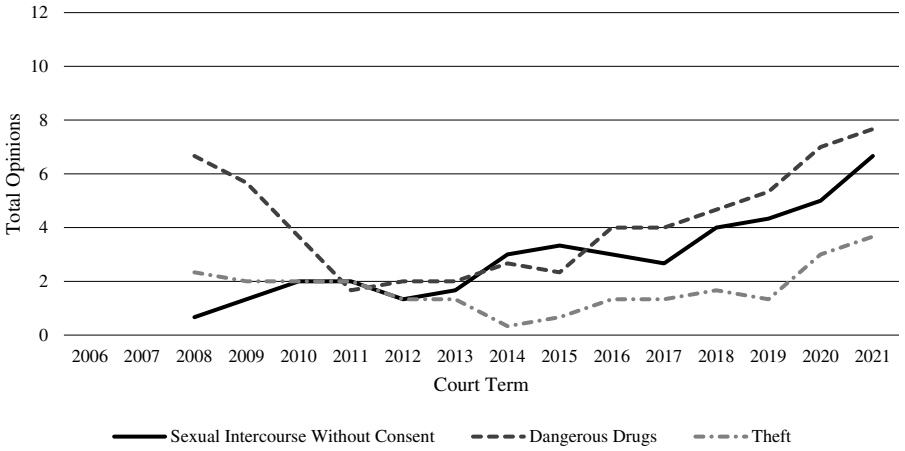


FIGURE 9: NONCITE OPINIONS BY CASE SUBTYPE 3



The Dependent Neglect (DN) and Domestic Relations (DR) case subtypes are important both because they are on the rise and because of the number of cases the Court reviews in those subtypes. Since 2006, there were more DN and DR cases than any other case subtype.[81] Together, they comprise nearly 17% of the cases decided by the Court since 2006. In these two areas of the law, the Court appears increasingly likely to decide cases through noncite opinion.

As noted above, a large portion of the recent increase in unpublished opinions is attributable to criminal cases. The data on case subtypes suggests the Court is increasingly likely to issue noncite opinions in cases in-

81. This does not include cases categorized in the catch-all case subtype of "Other."

volving certain types of crimes. Figure 8 shows that noncite opinions in cases of Partner Family Member Assault (PFMA) are on the rise. Similar to the data on judicial review in Figure 7, the average shown in Figure 8 is misleading. From 2019 through 2021, the Court issued eight noncite opinions of the PFMA subtype. Before 2019, it took the Court ten years to issue the same number of noncite opinions in PFMA cases.

Figure 9 illustrates a similar trend in Sexual Intercourse Without Consent (SIWOC), Dangerous Drugs, and Theft cases. The trend is particularly noteworthy in SIWOC cases, where the total number of opinions per year has stayed between 5 and 12 opinions since 2006 but the Court has shifted from issuing mostly published opinions to issuing mostly noncite opinions.

A few clear conclusions can be drawn from the data. First, the Court is issuing more unpublished opinions and fewer published ones. Second, a reduction in published civil opinions coupled with an increasing preference for noncite opinions in criminal cases appear to be fueling this change. The majority of these changes are occurring in targeted areas of the law illustrated in Figures 7, 8, and 9. However, this data cannot answer whether these trends are the result of intentional policies by the Court, nor can the data share what impact this shift is having on the law in Montana. Further study into these legal subcategories may reveal the impacts of noncite authority in these areas.

IV. Illustrations of Potential Confusion Created by Noncite Opinions in Montana

The Montana Supreme Court's increased use of noncite authority in certain areas of the law may lead to substantive effects on litigation in those areas. Unfortunately, the data alone does not prove such a conjecture because, by design, unpublished opinions mask their effects on the law. The relegation of unpublished opinions to nonprecedential status hides the tangible impacts these opinions have on the law in Montana. As discussed above in Part III, this comment's analysis of the thousands of opinions the Court has decided since 2006 suggests broad changes in its publishing practices in criminal cases.

While a large data set can suggest broad trends in the court's practices, individual opinions also impact the law. This Part illustrates the confusion noncite opinions create by examining the Court's jurisprudence in two areas of the law: retaliatory discharge and civil immunity. First, in a series of cases, capstoned by a 2017 unpublished opinion, the Court shut the door on claims for retaliatory discharge for an entire class of employees. Second, in a 2021 unpublished opinion, the Court suggested that statutory immunities for governmental employees are much broader than previously held.

A. The Montana Wrongful Discharge from Employment Act and the Blodgett *Opinion*

In Montana, the Wrongful Discharge from Employment Act (WDEA) is the sole remedy for employees seeking redress for wrongful termination.[82] The law holds employers accountable for the wrongful termination of employees and provides specific remedies for terminated employees.[83] The WDEA distinguishes between two categories of employees: probationary and non-probationary.[84] The core of the WDEA is Mont. Code Ann. § 39-2-904. Subsection (1) of § 39-2-904 provides three causes of action for terminated employees.[85] First, an employer may not terminate an employee for the employee's refusal to violate public policy or reporting of a public policy violation.[86] Second, an employer may not terminate a non-probationary employee without good cause.[87] Finally, an employer may not terminate an employee if the employer materially violated its own written personnel policies and the violation deprived the employee of a fair opportunity to remain in the position.[88]

The restrictions on employers described in § 39-2-904(1) are modified by § 39-2-904(2). Subsection 2 reads: "During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or no reason."[89] The plain text of § 39-2-904(2) appears to exempt probationary employees from the protections of the WDEA entirely. However, a reading of the plain text illustrates multiple problems in the statute.

First, if the WDEA does not protect employees during their probationary period, the protection must only apply to non-probationary employees. However, supposing the WDEA only applies to non-probationary employees, the qualification in § 39-2-904(1)(b)—that it only applies to employees who have completed their period of probation—appears to be surplusage.[90] Second, as the Montana Supreme Court has noted, allowing employers to retaliate against probationary employees for reporting public policy violations directly contradicts the Legislature's intent and the spirit of the law.[91]

82. MONT. CODE ANN. § 39-2-902 (2021).

83. *Id.* § 39-2-905.

84. *Id.* § 39-2-910.

85. *Id.* § 39-2-904(1).

86. *Id.* § 39-2-904(1)(a).

87. *Id.* § 39-2-904(1)(b).

88. MONT. CODE ANN. § 39-2-904(1)(c).

89. *Id.* § 39-2-904(2).

90. *Id.* § 39-2-904(1)(b). This subsection states a discharge is wrongful if "the discharge was not for good cause and the employee had completed the employer's probationary period."

91. *See* Krebs v. Ryan Oldsmobile, 843 P.2d 312, 316 (Mont. 1992); Ritchie v. Town of Ennis, 86 P.3d 11, 19 (Mont. 2004) (Leaphart, J., dissenting).

From these contradictions rose the question of whether the provisions of § 39-2-904(2) apply to retaliatory discharge under § 39-2-904(1)(a).

This tension in the law resulted in a series of decisions where the Court attempted to reconcile the two sections. First, before the passage of § 39-2-904(2), the Court found that the sections of the WDEA addressing retaliatory discharge for reporting a violation of public policy did not distinguish between probationary and non-probationary employees.[92] In *Motarie v. Northern Montana Joint Refuse Disposal District*, an employee of a multi-county refuse district claimed he was harassed and ultimately fired for reporting conditions at his worksite he believed to be unsafe or deficient.[93] The Court noted the distinction between probationary and non-probationary employees made by what was then § 39-2-904(2), and the absence of the distinction in the other sections of the law.[94] The Court then allowed the employee's claim to proceed past the summary judgment phase, despite there being no dispute that he was a probationary employee.[95] In 2001, the Legislature amended the WDEA to include the "at-will" provision of the WDEA, now codified as § 39-2-904(2).[96]

In the wake of the 2001 amendment, the Court began to reinterpret the WDEA. In *Blehm v. St. John's Lutheran Hospital, Inc.*,[97] the Court—now interpreting the WDEA under the new § 39-2-904(2)—reasoned that allowing a probationary employee to bring a claim for retaliatory discharge would constitute a "substanti[al] re-write [of] critical provisions of the Act" and would violate Montana law.[98] The Court appeared to hold that the WDEA barred probationary employees from bringing retaliatory discharge claims, without explicitly saying so.[99]

It appeared *Blehm* had settled the matter for a short time. However, in 2017, the Court introduced ambiguity back into the question of whether

92. Motarie v. N. Mont. Joint Refuse Disposal Dist., 907 P.2d 154, 156 (Mont. 1995). When the Court decided *Motarie*, the Montana WDEA was structured as follows:

> § 39-2-904. Elements of wrongful discharge. A discharge is wrongful only if:
>
> (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
>
> (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment or
>
> (3) the employer violated the express provisions of its own written personnel policy.

MONT. CODE ANN. § 39-2-904 (1995); *see also Motarie*, 907 P.2d at 156.

93. *Motarie*, 907 P.2d at 155–57.

94. *Id.* at 156.

95. *Id.* at 157.

96. *See* MONT. CODE ANN. § 39-2-904(2) (2001); *see also* MONT. CODE ANN. § 39-2-904(2) (2021).

97. 246 P.3d 1024 (Mont. 2010).

98. *Id.* at 1028.

99. *Id.*

probationary employees are protected under the WDEA.[100] In *Dundas v. Winter Sports, Inc.*, a probationary employee was terminated and brought a claim under all three subsections of § 39-2-904(1).[101] At the summary judgment stage, the district court concluded that, as a probationary employee, Dundas was not protected by the WDEA.[102] In a short opinion, the Montana Supreme Court affirmed the district court's grant of summary judgment, finding "Dundas failed to produce any evidence to support [a retaliatory discharge claim]."[103] Citing *Krebs v. Ryan Oldsmobile*,[104] the Court noted that the provisions of § 39-2-904(1) protect whistleblowers.[105] If Dundas's status as a probationary employee precluded his claims, as is suggested in *Blehm*, then the evidence, or lack thereof, should be irrelevant.

One year after *Dundas*, the Court again reopened the question of whether probationary employees can bring claims under § 39-2-904(1)(a), answering this question in an unpublished opinion in *Blodgett v. State*.[106] Blodgett, a probationary employee of the Judicial Branch, was terminated after reporting what he believed to be public policy violations committed by his supervisor.[107] Blodgett claimed retaliatory discharge under § 39-2-904(1)(a).[108] In affirming the district court's summary judgment ruling, the Court held that under *Blehm*, "Blodgett's WDEA whistleblower claims would fail because he was terminated as a probationary employee."[109]

In its decision in *Blodgett*, the Court stated the case presented a question that was "controlled by settled law or by the clear application of applicable standards of review."[110] However, as illustrated in *Dundas*, whether

100. *See generally* Dundas v. Winter Sports, Inc., 410 P.3d 177 (Mont. 2017).

101. *Id.* at 179.

102. *Id.*

103. *Id.* at 180 (internal quotation marks omitted).

104. 843 P.2d 312, 315–316 (Mont. 1992).

105. *Dundas*, 410 P.3d at 180. Importantly, *Krebs* was decided before the 2001 amendment to the WDEA when the provisions of § 39-2-904(2) did not exist. However, the reasoning in *Krebs*, cited in *Dundas*, does appear in other opinions following the 2001 amendment. In 2004, Justice Leaphart argued that exempting probationary employees from the protections of § 39-2-904(1)(a) was clearly antithetical to the legislative purpose of the law. Ritchie v. Town of Ennis, 86 P.3d 11, 19 (Mont. 2004) (Leaphart, J., dissenting).

106. *See generally* Blodgett v. State, No. DA 18-0149, 2018 WL 4705831 (Mont. Oct. 2, 2018).

107. *Blodgett*, 2018 WL 4705831 at *1.

108. *Id.*

109. *Id.* Interestingly, the Court also cited *Dundas* for this proposition. In a parenthetical explanation, the Court stated that, in *Dundas*, a "probationary ski resort employee who claimed whistleblower status [was] properly discharged." *Id.* While that statement may be factually correct, it does not actually support the Court's holding in *Blodgett* and is arguably a retcon of the *Dundas* decision. In explaining *Dundas*, the Court makes no mention of the fact that the *Dundas* court held the claim was properly dismissed because Dundas failed to make any showing of retaliation. The holding in *Dundas* left open the possibility, or directly supported the idea, that probationary employees are still protected by § 39-2-904(1)(a); the *Blodgett* court retroactively shut that door in a noncite opinion. *See Dundas*, 410 P.3d at 180.

110. *Blodgett*, 2018 WL 4705831 at *2.

probationary employees are covered under § 39-2-904(1)(a) remained unsettled when the court issued its decision in *Blodgett*.[111] After all, if *Blehm* decided the question, then the *Dundas* decision could just as easily have been an unpublished opinion.

Contrary to its own internal rules governing unpublished opinions, *Blodgett* is the first time since the 2001 amendment that the Court explicitly held probationary employees have no cause of action under the WDEA.[112] The *Blodgett* rule is a new development in Montana employment law and implicitly contradicts several cases.[113] Even if the Court believed it settled on the correct interpretation of § 39-2-904, it did so with minimal reasoning and explanation, contrary to its own rules of procedure, and in a way that leaves the matter unsettled because both *Blehm* and *Dundas* remain good law.

The Court's jurisprudence in this area of the law highlights both the benefits and the drawbacks of unpublished opinions. Because the *Blodgett* opinion is unpublished, there is no need for the Court to address the contradiction in its precedent. Practitioners cannot use the case as binding authority and must wait for the Court to resolve the question in a future case. Technically, the status quo remains the *Dundas* analysis—probationary employees may be protected under § 39-2-904(1)(a) but must make a sufficient showing to survive summary judgment.[114] However, the fact that *Blodgett* is an unpublished opinion does not mute its impact on the law—indeed, it has heightened the confusion. Practitioners, claimants, and lower court judges all have access to the case. *Blodgett*, as with all unpublished opinions in Montana, is easily accessible on commercial legal research platforms and free legal research websites, and the disposition of the case is printed in the pages of Montana Reports and the Pacific Reporter—in fact, the Montana Supreme Court's rule on the matter requires this.[115]

The decision to pursue litigation for wrongful termination requires significant commitments of time and resources for claimants. Any pre-litigation risk analysis must undoubtedly include considering the *Blodgett* decision. To answer this potentially open question, a claimant must be willing to commit their time and money to litigation, knowing from the beginning that the Court likely feels they have no claim. Because it is an unpublished, noncitable opinion, *Blodgett* will likely discourage a future case from revi-

111. *See Dundas*, 410 P.3d at 180.

112. *See* MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(i).

113. *See Dundas*, 410 P.3d at 180; Krebs v. Ryan Oldsmobile, 843 P.2d 312, 315–16 (1992). *See also* Ritchie v. Town of Ennis, 86 P.3d 11, 19 (2004).

114. *Dundas*, 410 P.3d at 180.

115. MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(ii).

siting the question, thereby stunting the evolution of the law and impacting the rights of probationary employees.

B. Darrow *and Statutory Immunity Under § 2-9-305*

The *Blodgett* opinion highlights how apparent changes in the law originating in unpublished opinions lead to confusion. *Blodgett* appears to settle an open legal question definitively, but practitioners cannot use the case. In *Darrow v. Executive Board of Missoula County Democratic Central Committee*,[116] the Court appeared to create entirely new law by expanding the scope of governmental immunity from suit under Montana statutory law.

Benjamin Darrow brought an action against the Executive Board of the Missoula County Democratic Party (MCDCC) and the committee chair, David Kendall, in his individual capacity and in his role as chair.[117] Darrow claimed Kendall and the Board violated Montana's open meetings statutes—and the Montana Democratic Party's internal rules—by not allowing for notice and comment before the adoption of rules and retaliating against Darrow for attempting to record several meetings.[118] The MCDCC moved to dismiss the claims against Kendall in his individual capacity, asserting Kendall was immunized from suit under Mont. Code Ann. § 2-9-305.[119] In granting the MCDCC's motion to dismiss, the district court assumed as a matter of law that the MCDCC is a public body.[120]

In its opinion in *Darrow*, the Montana Supreme Court affirmed the district court's dismissal of Darrow's claims.[121] In doing so, the Court reasoned Kendall was not amenable to suit for any claimed retaliation which took place in the course and scope of his duties as chair of the MCDCC.[122] Kendall, the Court found, was protected by the immunities of § 2-9-305.[123] Although unstated in the opinion, for this finding to be correct, the chairperson of the MCDCC, an arm of the Montana Democratic Party, must be public officer or employee under the law.[124]

The text of § 2-9-305 does not appear to extend statutory immunity to members of Montana's political parties. However, a scattered grouping of statutes may work together to functionally make political parties public en-

116. No. 20-0616, 2021 WL 5088408 (Mont. Nov. 2, 2021).

117. *Id.* at *1.

118. *Id.*

119. *Id.* at *4.

120. Opinion & Order at 7–10, *Darrow v. Exec. Bd. of Missoula Cty. Democratic Cent. Comm.* (Mont. Dist. Ct. Nov. 23, 2020) (No. DV-19-60).

121. *Darrow*, 2021 WL 5088408 at *1.

122. *Id.* at *4.

123. *Id.*

124. *See generally* Mont. Code Ann. § 2-9-305 (2021).

tities—thereby protecting their officers and employees from tort liability: first, under § 2-9-305(1), "public officers and employees" are immunized from personal civil liability for actions taken "within the course and scope of their employment."[125] Section 2-9-305 does not define what an employee or officer is with respect to the immunity; however, § 2-9-101 defines an "employee" as "an officer, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity."[126] Next, in Montana, the creation, operation, and administration of political parties are provided for in statute.[127] In other words, parties derive their legitimacy directly from the State of Montana. The argument then is that, because parties only exist pursuant to statute, they are public bodies. Finally, because political parties must necessarily be public bodies, their employees—compensated or volunteer—are immunized from individual liability under § 2-9-305.[128]

The merits of the case are irrelevant here. What matters is that *Darrow,* an unpublished opinion, appears to mark the first time the Montana Supreme Court has extended the immunity of § 2-9-305 to employees of a political party. The breadth of the reasoning in *Darrow* is hard to overstate. The first-order effects would immunize all employees of every Montana political party from civil suit for actions taken within the course and scope of their position. While that alone would be a substantial expansion of immunity law, the reasoning undergirding the decision in *Darrow* could arguably extend to all corporations in Montana, which are also created pursuant to statutory law.[129] The *Darrow* opinion provides fodder for a common criticism of unpublished opinions—that they typically receive less consideration or explication than published opinions.[130] Whether it made a mistake, meant to suggest that political party officials enjoy the immunities of public employees, or otherwise concluded the case did not warrant more extensive review, the Court spent only one paragraph justifying its decision on this question of immunity and cited no authority to explain its reasoning.

Darrow also reinforces the criticism raised by some scholars regarding the control courts give themselves by adopting noncite procedures.[131] It is an open secret within the Montana legal community that the Court utilizes unpublished opinions when it feels the parties in the case have not suffi-

125. *Id.* § 2-9-305(1).

126. *Id.* § 2-9-101(2).

127. MONT. CODE ANN. §§ 13-38-101 to 13-38-107 (2021).

128. This is essentially what happened in *Darrow*. Darrow argued that the Montana Democratic Party was a government entity because of § 13-38-101. The district court took that reasoning as correct and applied § 2-9-305 to it. *See* Opinion & Order, *supra* note 120, at 7.

129. *See, e.g.*, MONT. CODE ANN. § 35-2-214 (2021).

130. Miller, *supra* note 34, at 188–89. **R**

131. Richman & Reynolds, *supra* note 20, at 293.

ciently addressed the issues raised.[132] Whether Montana's political parties are governmental entities is a legal question with far-reaching implications beyond civil liability. The Court may have decided that, while it was obligated to hear the case, it could not responsibly use the arguments as briefed to decide the important issues raised. This may be altogether reasonable, but the Court's own rules do not permit it to use unpublished opinions as a workaround for insufficient briefing. The use of noncite authority to limit the impact of certain cases is precisely what a pair of legal scholars meant when they spoke of the "New Certiorari Courts."[133]

As an additional point, the plaintiff in *Darrow* made specific claims of constitutional violations which should have precluded the issuance of a noncite opinion in the case.[134] The Court's rules allow for the issuance of noncite opinions only where a case "presents no constitutional issues."[135] It remains unclear how strictly the Court adheres to this particular provision of the rules, but based on its current practices, other cases raising constitutional questions will likely continue to be decided in unpublished opinions.

Whatever the Court's reasons for deciding *Darrow* in a nonprecedential opinion, practitioners and claimants must now consider *Darrow* when litigating against political party officials. While prohibited from citing it in Montana courts, anyone can type "2021 MT 282N" into a Google search and find the full text of the opinion in the first search result. The Court's use of a noncite opinion in *Darrow* has created an enormous amount of ambiguity in this area of the law. To avoid confusion among practitioners, the Court should take care to not make new statements of law in an opinion that carries no precedential authority.

V. CONCLUSION

Unpublished opinions are on the rise in Montana. While the effects of these decisions are difficult to fully quantify, the Montana Supreme Court's increasing reliance on them means their impact will likely become more significant.

Unpublished opinions arose as a potential solution to a particular problem—the dramatic increase in the work product of courts during the mid-

132. I make this assertion based on my experiences discussing this issue with legal professionals practicing in Montana. Traditional sources of authority are unavailable due to limited research regarding the Montana Supreme Court's unpublished opinions. Readers, particularly those practicing in Montana, will need to decide for themselves the value or veracity of this claim.

133. Richman & Reynolds, *supra* note 20, at 293.

134. *See* MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(i); Appellant's Opening Brief at 15, *Darrow v. Exec. Bd. of Missoula Cty. Democratic Cent. Comm.*, 2021 WL 5088408 at *4 (Mont. Nov. 2, 2021) (No. 20-0616) (alleging violations of MONT. CONST. art II, § 8).

135. MONT. SUP. CT. INTERNAL OPER. R. § 1, ¶ 3(c)(i).

20th century and a consequentially unmanageable volume of documents.[136] The innovation of unpublished opinions, in many ways, was an attempt to print and store less paper. In the 21st century, this argument does not justify federal and state courts designating most of their work as nonprecedential and uncitable. The rise of accessible online legal research platforms makes the practice of nonpublication nearly irrelevant and the effects of unpublished opinions on legal practitioners an unnecessary inconvenience.

Additionally, the same online databases have compounded the problems of unpublished opinions by making unpublished opinions readily available. What began as a means of saving space has led to a situation in which American courts restrict a majority of their work product from serving one of its essential purposes—to be a stepping stone in the evolution of the law. In Montana, new precedents, novel legal reasoning, new interpretations of statutes, and answers to important questions are happening in the pages of unpublished opinions. Practitioners can access these opinions but are left to wonder how they reflect the law in the state.

Unpublished opinions are on the rise in Montana. While the effect of these decisions is difficult to fully quantify, the Montana Supreme Court's increasing reliance on them means their impact will likely become more significant. Further, the Montana Supreme Court appears to occasionally stray from its own rules when issuing unpublished opinions. The use of unpublished opinions as a remedy for less-than-adequate lawyering has merits, but the Court's own rules make no allowance for such a practice. Given the opaque nature of the procedure, the Court should be more transparent when explaining its reasoning for issuing noncite opinions.

Unpublished opinions arose out of circumstances that no longer exist. As such, the Montana Supreme Court should revisit its internal operating rules and reconsider how the law in Montana could benefit from changes in the Court's procedures, including greater transparency; the reduced use of unpublished opinions; or ending of the practice altogether.

136. *See* JUDICIAL CONFERENCE, *supra* note 22, at 11. **R**