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# “Unpublished” Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals

Robert A. Mead

## **“Unpublished” Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals\***

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*Mr. Mead examines the debate regarding unpublished opinions in the federal courts. Recent publication patterns in the Eighth and Tenth Circuits are compared to determine whether application of limited publication rules is fair. He concludes that significant differences exist between the way circuits apply limited publication rules.*

If a writer of prose knows enough about what he is writing about he may omit things that he knows and the reader, if the writer is writing truly enough, will have a feeling of those things as strongly as though the writer had stated them. The dignity of movement of the iceberg is due to only one-eighth of it being above water. The writer who omits things because he does not know them only makes hollow places in his writing.<sup>1</sup>

¶ Like Hemingway’s icebergs, the bulk of recent opinions rendered by the various United States Courts of Appeals lie below the surface, in the form of unpublished opinions. It is an open question, however, whether the choice not to publish all decisions enhances the “dignity of movement” of the federal judiciary or makes “hollow places” in the federal case law. In the 1970s, the federal courts of appeals enacted limited publication rules that allowed the circuits to determine which judicial opinions should be released for publication.<sup>2</sup> In the era where opinions were only accessible through published reporters and digests, unpublished opinions regarding a subject were essentially undiscoverable, unless the opinion was somehow newsworthy or the researcher gleaned information from an attorney familiar with the case. With the advent of electronic case databases, “unpublished” opinions are now published electronically, in more or less the same manner as other decisions of the federal courts of appeals. While they are not printed in the *Federal Reporter*, they are easily available to attorneys, scholars, and law students in a number of electronic, searchable formats. Just as sonar and radar revolutionized shipping safety by exposing the “bulk” of icebergs, electronic case law databases have revolutionized the discovery of applicable, potentially precedential, “unpublished” case law.

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1. Ernest Hemingway, *quoted in* MALCOLM COWLEY, *A SECOND FLOWERING* 73 (Viking Books 1973).

2. William L. Reynolds & William M. Richman, *Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 578 (1981).

¶12 This article examines the publication patterns of decisions by the Courts of Appeals for the Eighth and Tenth Circuits in light of the criticisms and defenses offered for and against federal limited publication rules. The first section details the development of limited publication rules in the courts of appeals. The second compares the arguments supporting and criticizing unpublished decisions. This is followed by a comparison of the publication patterns of decisions in the Eighth and Tenth Circuits in terms of their treatment of district court decisions and the subject matter of decisions that are published and unpublished. This analysis leads to the conclusion that limited publication rules are likely to leave “hollow places” in federal case law because they are applied in an inconsistent manner between the circuits. This inconsistency can cause significant differences between circuits in the frequency with which they designate certain broad categories of cases as unpublished.

### History of Limited Publication Rules

¶13 In 1964, the Judicial Conference of the United States<sup>3</sup> recognized the rapid growth of federal case law as both a threat to the efficient workings of the federal courts and the cause of the increasing cost of reported decisions.<sup>4</sup> The Judicial Conference noted that the growth of judicial opinions was causing the “ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities.”<sup>5</sup> Consequently, the Judicial Conference passed a resolution asking federal judges to limit publication of opinions to “only those opinions which are of general precedential value.”<sup>6</sup> The discussions sparked by this resolution resulted in the Judicial Conference requesting that the federal courts of appeals develop plans for limiting opinion publication.<sup>7</sup> Concurrently, in 1971 the Federal Judicial Center formed an Advisory Council on Appellate Justice to study limiting publication and other changes to appellate process.<sup>8</sup> In 1973, the Advisory Council published a report titled *Standards for Publication of Judicial Opinions* that called for both limited publication of federal opinions and procedural rules to prohibit the citation of unpublished opinions as precedent.<sup>9</sup> The Advisory Council reasoned that a citation prohibition is necessary

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3. The Judicial Conference of the United States was created by Congress, at the request of Chief Justice Taft, to, among other things, “submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business.” Act of Sept. 14, 1922, ch. 306, 42 Stat. 837, 839. See also ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 82 (1987).

4. DONNA STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 6 (1985).

5. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

6. U.S. ADMIN. OFFICE OF THE COURTS, JUDICIAL CONFERENCE REPORTS 1962–1964, at 11 (1964).

7. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (1972).

8. STIENSTRA, *supra* note 4, at 7.

9. ADVISORY COUNCIL ON APPELLATE JUSTICE, FED. JUDICIAL CTR., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE (1973).

as “[i]t is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.”<sup>10</sup>

¶14 By 1974, each circuit had submitted proposed rules to the Judicial Conference for limiting publication of opinions. Given the wide breadth of publication rules used in the circuits, the Judicial Conference was unable to agree on a standard national rule regarding limited publication and citation of unpublished decisions.<sup>11</sup> In 1979, a Judicial Conference subcommittee concluded that “[a]t this time we are unable to say that one opinion publication plan is preferable to another, nor is there a sufficient consensus on either legal or policy matters, to enable us to recommend a model rule. We believe that continued experimentation under a variety of plans is desirable.”<sup>12</sup>

¶15 It is important to emphasize the original underlying justification for limited publication and citation prohibition policies for federal circuit opinions. These policies were a direct response to the increase of federal litigation and the resulting cost of writing and publishing full opinions.<sup>13</sup> Limited citation rules also often included citation prohibition rules for unpublished decisions, because frequent litigants, such as U.S. Attorney offices, may have had an unfair advantage from their access to unpublished opinions before those opinions became widely available electronically.<sup>14</sup> Any office or firm that was a frequent participant in litigation at the circuit level had access to opinions regarding the cases in which they were participants that other attorneys did not have. Thus, some of the circuits implemented rules designed to even the research playing field by prohibiting citation of unpublished opinions.

¶16 Since the 1970s, the federal courts of appeals have experimented with a variety of rules governing the limitation of publication of opinions and the citation of those unpublished decisions. The Tenth Circuit limited publication rule<sup>15</sup> notes that “[d]isposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.”<sup>16</sup> Despite the fact that an unpublished decision is, by definition, not “a valuable precedent,” the Tenth Circuit allows attorneys to cite such an opinion if it has “persuasive value with respect to a material issue that has not been addressed in a published opinion; and it would assist the court in its disposition.”<sup>17</sup> Nevertheless, the Tenth Circuit notes that “[c]itation

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10. *Id.* at 17.

11. STIENSTRA, *supra* note 4, at 13.

12. SUBCOMM. ON FED. JURISDICTION, JUDICIAL CONFERENCE OF THE U.S., OPINION PUBLICATION PLANS IN THE UNITED STATES COURTS OF APPEALS 10 (1978).

13. STIENSTRA, *supra* note 4, at 14.

14. *Id.* at 16; Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 945 (1989).

15. 10TH CIR. R. 36.

16. 10TH CIR. R. 36.1.

17. 10TH CIR. R. 36.3(B).

of an unpublished decision is disfavored.”<sup>18</sup> Additionally, the Tenth Circuit requires attorneys who cite an unpublished opinion to provide a copy of the opinion to the court and opposing parties.<sup>19</sup> Tenth Circuit rule 36 is interesting as it establishes the court’s right to determine whether a decision is “valuable precedent” based on whether it requires “application of new points of law.” Theoretically, all “valuable” decisions are published. Nonetheless, the circuit’s rule acknowledges that attorneys may wish to cite decisions that the circuit has deemed unnecessary to publish.

¶17 The Eighth Circuit’s limited publication rule is quite similar to the Tenth Circuit rule. The former’s rule notes that “unpublished opinions are not precedent and parties generally should not cite them” unless the opinion is cited as part of the law of the case or “if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.”<sup>20</sup> Unlike the Tenth Circuit, the Eighth Circuit’s rule is augmented by a Plan for Publication of Opinions contained in an appendix to the rule. In this plan, the Eighth Circuit lays out the criteria for determining whether a decision is to be published. Paragraph four of the plan indicates that opinions should be published when the case establishes new law or changes existing law,<sup>21</sup> creates a new interpretation of or conflict with another federal or state decision,<sup>22</sup> applies a rule to a new fact pattern,<sup>23</sup> involves a legal or factual issue of unusual public or legal interest,<sup>24</sup> conflicts with the rationale of a previously published opinion,<sup>25</sup> or “is a significant contribution to legal literature through historical review or resolution of an apparent conflict.”<sup>26</sup>

¶18 The other circuits have rules that differ somewhat from those in the Eighth and Tenth Circuits. The D.C. Circuit’s rule does not allow litigants to cite unpublished decisions as precedent, but provides that “[c]ounsel may refer to an unpublished disposition . . . when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant.”<sup>27</sup> The D.C. Circuit’s rule 36, dealing with the decisions of the court, is similar to the Eighth Circuit’s Publication Plan except that it does not call for the publication of cases where new fact patterns are applied to an existing rule of law. The First Circuit’s rule 36 states the policy of the circuit, noting that “the court thinks it desirable that opinions be published and thus be available for citation” but that it is appropriate not to publish “where an opinion does not articulate a new rule of law, modify an established

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18. *Id.*

19. 10TH CIR. R. 36.3(C).

20. 8TH CIR. R. 28(A)(i).

21. 8TH CIR. R. app. 1, 4(a).

22. *Id.* at 4(b).

23. *Id.* at 4(c).

24. *Id.* at 4(d).

25. *Id.* at 4(e).

26. *Id.* at 4(f).

27. D.C. CIR. R. 28(c).

rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. (Most opinions dealing with claims for benefits under the Social Security Act, §42 U.S.C. S 205(g), will clearly fall within the exception.)”<sup>28</sup> The First Circuit also forbids the citation of unpublished decisions except in related cases.<sup>29</sup> The Fourth Circuit’s rule is also similar to that of the Eighth, but it does not include a standard calling for the publication of cases where new facts are applied to existing rules of law.<sup>30</sup> The Fourth Circuit’s rule 36(c) allows counsel to cite unpublished opinions if the opinion is relevant to a material issue and no published opinion would serve as well, although the rule notes that such citation is “disfavored.”<sup>31</sup> The Fifth Circuit’s rule is similar to the Eighth Circuit rule but also includes a provision that an opinion may be published if it is “accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.”<sup>32</sup> The Fifth Circuit presumes publication unless the panel determines that publication is unnecessary.<sup>33</sup> Given these broad presumptions toward publication, the Fifth Circuit only allows citation of unpublished opinions where the doctrine of res judicata, collateral estoppel, or law of the case is applicable.<sup>34</sup> The Sixth Circuit is markedly similar to the Eighth and Tenth Circuits in that its rule allows parties to cite unpublished decisions that have “precedential value in relation to a material issue” and “there is not published opinion that would serve as well.”<sup>35</sup> The Ninth Circuit’s rule<sup>36</sup> is similar to the Eighth Circuit’s Publication Plan, but it forbids citing unpublished dispositions except where relevant to the law of the case.<sup>37</sup> Finally, the Eleventh Circuit allows citation of unpublished opinions as persuasive authority, so long as a copy of the opinion is attached. It also requires that “[a]n opinion shall be unpublished unless a majority of the panel decides to publish it.”<sup>38</sup>

¶19 All limited publication rules rest on the assumption that the federal courts of appeals are able to distinguish between important, rule-making cases and routine ones that merely apply existing case law.<sup>39</sup> The idea that the courts of appeals have the power to define the precedential authority of an opinion was challenged recently in the Eighth Circuit’s decision in *Anastasoff v. United States*.<sup>40</sup> In *Anastasoff*, the government in a tax case relied on *Christie v. United States*,<sup>41</sup> an

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28. 1ST CIR. R. 36(b)(1).

29. 1ST CIR. R. 36(f).

30. 4TH CIR. R. 36(a).

31. 4TH CIR. R. 36(c).

32. 5TH CIR. R. 47.5.1.

33. 5TH CIR. R. 47.5.2.

34. 5TH CIR. R. 47.5.3.

35. 6TH CIR. R. 28(g).

36. 9TH CIR. R. 36-2.

37. 9TH CIR. R. 36-3.

38. 11TH CIR. R. 36-2.

39. Robel, *supra* note 14, at 941.

40. 223 F.3d 898 (8th Cir.), *vacated on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000).

41. No. 91-2375MN (8th Cir. Mar. 20, 1992).

unpublished tax procedure decision of the Eighth Circuit. *Anastasoff* argued that the Eighth Circuit was not bound by the unpublished decision in *Christie* and should instead adopt the opposite holding of *Weisbart v. United States*.<sup>42</sup> As the case hinged on whether the unpublished decision in *Christie* was precedent in the Eighth Circuit, Judge Arnold took the opportunity to write an opinion holding that the Eighth Circuit's rule 28A(i) was unconstitutional to the extent that it defined unpublished opinions as nonprecedential. Through a historical analysis of the Article III powers of the federal judiciary, Judge Arnold reasoned that the courts do not have the constitutional authority to deem some opinions as nonprecedential. The critical issue in *Anastasoff* was whether opinions can be nonprecedential rather than whether it is proper not to publish some opinions; but, as Judge Arnold noted, limited publication and citation prohibition rules are directly tied to the assumption that some cases can be declared nonprecedential:

Before concluding, we wish to indicate what this case is not about. It is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision. The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not. . . . It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat.<sup>43</sup>

¶10 In a subsequent en banc rehearing, the substantive taxation issue was found to be moot as the Internal Revenue Service had acquiesced to the Second Circuit's holding in *Weisbart*. Consequently, the Eighth Circuit vacated the previous decision, with Judge Arnold writing for the court and noting that "[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions

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42. 222 F.3d 93 (2d Cir. 2000).

43. *Anastasoff*, 223 F.3d at 904.

have no precedential effect remains an open question in this Circuit.”<sup>44</sup> Although the precedential value of unpublished decisions remains an open question in the Eighth Circuit, Judge Arnold’s initial opinion in *Anastasoff* has reignited the debate over limited publication rules in the federal courts of appeals.

### Arguments for and against Limited Publication and Citation Prohibition Policies

¶11 The primary critique of limited publication rules is that they interfere with the doctrine of stare decisis by defining some judicial opinions, those that are not published, as nonprecedential. The idea that some opinions have no precedential value is alien to many practicing attorneys as “[p]recedent, buttressed by the doctrine of stare decisis, is the anchor of our adjudicatory system.”<sup>45</sup> Indeed, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* noted that “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”<sup>46</sup> Arthur Spitzer and Charles Wilson, litigators for the American Civil Liberties Union, echo the sentiments of many attorneys regarding the anomaly of nonprecedential opinions by asserting that “precedent and stare decisis are too important to the preservation of our rule of law to be sacrificed on the altar of expediency.”<sup>47</sup>

¶12 In addition to this general reliance on the importance of preserving stare decisis, opponents of limited publication offer four additional critiques: (1) limited publication is no longer necessary due to electronic publication; (2) limited publication limits the ability of attorneys to provide counsel to their clients regarding the law on an issue; (3) limited publication is fundamentally unfair both to individual litigants whose cases are not published and to broad categories of litigants who are not likely to have their appeal receive full consideration by a federal court of appeals; and (4) limited publication erodes the legitimacy of the federal courts.

¶13 The most recent criticism of limited publication rules is that they are no longer necessary given the electronic publication of all courts of appeals decisions. Because Westlaw, LexisNexis, and court Web sites all include unpublished courts of appeals opinions in their databases, practitioners and the public now have access to these opinions regardless of whether they are published in the *Federal Reporter*. Spitzer and Wilson argue that “[w]hile the various electronic media have not yet evolved to the point that they are universally available at reasonable cost, their existence and predictable development should make courts cautious about

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44. *Anastasoff*, 235 F.3d at 1056 (“We sit to decide cases, not issues, and whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax-refund case.”).

45. Arthur B. Spitzer & Charles H. Wilson, *The Mischief of the Unpublished Opinion*, LITIG., Summer 1995, at 3.

46. 505 U.S. 833, 854 (1992).

47. Spitzer & Wilson, *supra* note 45, at 61.



restricting access to their opinions because of antiquated notions of how the written word is ‘published.’”<sup>48</sup> Nevertheless, other commentators contend that electronic publication of unpublished decisions forces attorneys to use costly databases such as Westlaw and LexisNexis in order to conduct legal research.<sup>49</sup> Consequently, the argument runs, the circuits should publish most or all opinions to give equal access to case law. This view has lost force as the circuits have begun placing their opinions, both published and unpublished, on free court Web sites, but the corresponding justification for citation prohibition—unequal access—is also less forceful. As electronic storage and research costs decrease, the overall costs of the creation and use of court opinion databases decreases for both the circuits and attorneys.<sup>50</sup> Unfortunately, electronic publication of decisions does little to relieve the federal bench of the caseload pressure that originally caused limited publication rules to be enacted.

¶14 Another complaint directed at limited publication rules is that they create confusion as to the current state of the law on an issue, thus limiting the ability of attorneys to provide legal counsel to their clients. Martha Dragich asserts that “[p]erhaps the most troublesome manner in which selective publication, summary dispositions, and vacatur weaken the development of the law is their failure to provide guidance for future conduct and for resolving future disputes.”<sup>51</sup> The existence of unpublished summary dispositions of questionable precedential value weakens the bar’s ability to accurately predict the law of a circuit on an issue.<sup>52</sup> Spitzer and Wilson explain that “[i]f we do not know why a court acts, our adjudicatory system will be reduced to a series of irreconcilable ad hoc judgments.”<sup>53</sup> Conflicting nonprecedential opinions from a circuit on the same point of law would make it impossible for counsel to predict the circuit’s likely treatment of an issue. Limited publication rules make such a quandary possible.

¶15 Perhaps the strongest critique of limited publication is that it is fundamentally unfair both to individual litigants whose opinions are not published, and to broad classes of litigants, who are allegedly more likely to receive only limited review from the courts of appeals. Litigants whose opinions are brief and unpublished have limited insight into the court’s reasoning for purposes of appeal. Additionally, in response to the practice of using clerks and staff attorneys to screen cases for likely precedential value, Reynolds argues that “[m]ost people think if you have an appeal, your lawyer argues the case and a judge decides.

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48. *Id.* at 4.

49. Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 AM. UNIV. L. REV. 757, 787 (1995).

50. See Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541, 559–61 (1997).

51. Dragich, *supra* note 49, at 797.

52. *Id.* at 787.

53. Spitzer & Wilson, *supra* note 45, at 4.

That’s not what we have. We have a system where there is often no argument, there is no requirement for a judge to write a decision and the decision making is largely done by people who are not judges.”<sup>54</sup> The potential adverse impact of not publishing a litigant’s opinion is troubling and raises doubts regarding equal protection and due process of law as the courts are treating similar litigants in dissimilar ways.

¶16 The fundamental fairness of limited publication rules is also called into question when categories of litigants are compared. Criminal defense lawyers are concerned that the government has an unjust advantage due to the existence of unpublished opinions:

The problem is even more pronounced when one considers the numbers of times that the Government cites unpublished decisions in its briefs and motions. Not only does the Government seem to have greater access to the vast body of unpublished decisions, some of which are not even available on services such as Westlaw, its use of those cases seems to be governed by a totally different standard than that which applies to defense counsel. There are no statistical studies of which we are aware that highlight the number of times the Government cites unpublished decisions; but it has become common practice for the Government to cite unpublished decisions, particularly in sentencing memoranda where downward departures are at stake, despite court rules that prohibit the use of such unpublished decisions. While defense counsel is frequently upbraided for citing such unpublished decisions, we have yet to see a case in which the courts openly chastise the prosecutors for citing such cases.<sup>55</sup>

¶17 The perception by members of the bar that unpublished decisions are unfairly used against criminal defendants is troubling. The concern is amplified by the fact that most unpublished decisions seem to involve “review of agency determinations in immigration and social security cases, Federal Tort Claims Act cases, criminal and habeas appeals, civil rights actions, and employment discrimination complaints against the federal government.”<sup>56</sup> If unpublished decisions are used primarily where the government is a litigant, it raises serious questions regarding the bar and the public’s perception of the neutrality of the federal bench.

¶18 Given the breadth of the critiques of limited publication rules, opponents have advanced a final, encompassing one: that limited publication rules erode the legitimacy of the federal courts. Judge Patricia Wald of the Federal Circuit finds that limited publication rules have “an obvious bearing on judicial accountability. Although unpublished opinions may indeed save time, they limit the public’s ability to evaluate the correctness of judicial actions and give rise to uncertainties about the integrity of the courts.”<sup>57</sup> Another commentator argues that judicial legit-

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54. William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999, at A1 (quoting William Reynolds, professor of law, University of Maryland).

55. *Quote of the Week: Unpublished Decisions—The Background*, 7 PUNCH & JURISTS WKLY NEWSL. (Aug. 7, 2000), at <http://www.fedcrimlaw.com/visitors/punchltd/2000/08-07-00.html>. This quotation is offered not so much for the truth of the matter asserted but rather to demonstrate the defense bar’s perception of the use of unpublished opinions in federal court.

56. Robel, *supra* note 14, at 953.

57. Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?* 42 UNIV. OF MD. L. REV. 766, 783 (1983).

imacy is centered in the court's ability to prepare and publish "opinions that explain and justify their reasoning."<sup>58</sup> The chief judge for the Seventh Circuit admitted that "[i]t is sort of a formula for irresponsibility. . . . Most judges, myself included, are not nearly as careful in dealing with unpublished decisions."<sup>59</sup> Proponents of limited publication rules respond that the near exponential growth of federal caseloads and the resulting backlog is more damaging to the reputation of the courts than issuance of summary unpublished decisions applying settled points of law. Opponents retort that a court system clogged by a growing society is best remedied by the hiring of additional federal judges rather than the diluting of opinions in routine cases.<sup>60</sup> Additionally, opponents of limited publication rules contend that even routine cases may have fact patterns that are useful for litigants in similar situations. The application of highly specific facts to a routine rule of law in a habeas corpus or social security case may be exactly what a future litigant with a similar case needs.<sup>61</sup>

¶19 Nevertheless, the need to somehow limit the work in deciding the sheer volume of cases heard by the federal courts makes limited publication rules attractive to many federal judges. Judges Alex Kozinski and Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit recently explained their support for that circuit's prohibition against citing unpublished memorandum dispositions ("memdispos").

Writing a memdispos is straightforward. After carefully reviewing the briefs and record, we can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases. Writing an opinion is much harder. The facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it is important to omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case before us yet broad enough to provide useful guidance in future

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58. Dragich, *supra* note 49, at 758–59.

59. Glaberson, *supra* note 54 (quoting Richard Posner, chief judge of the United States Court of Appeals for the Seventh Circuit).

60. Wald, *supra* note 57, at 785 ("Judges are in the business of making decisions, accurately and promptly. An increasingly complex society means more cases of increasing complexity."); Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir.), *vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) ("It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.").

61. Dragich, *supra* note 49, at 782 ("Unless the instant case and the precedent case are identical, the rule formulated in the precedent case is transformed by application to a new and relevantly different situation.").

cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule and rejecting others. We must also make sure that the new rule does not conflict with precedent or sweep beyond the questions fairly presented.<sup>62</sup>

¶120 Due to the effort inherent in the drafting of opinions, Kozinski and Reinhardt argue that “[w]riting 20 opinions a year is like writing a law review article every two and a half weeks,” whereas “memdispos get written a lot faster than opinions—about one every other day.”<sup>63</sup> Because of the time saved by writing unpublished memdispos, Kozinski and Reinhardt contend that “[n]ot worrying about making law in 3,800 memdispos frees us to concentrate on those dispositions that affect others besides the parties to the appeal—the published opinions. If memdispos could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording.”<sup>64</sup> Furthermore, because 40% of the memdispos are in screening cases prepared by the Ninth Circuit’s central staff and are seldom edited or rewritten by judges, “[u]sing the language of the memdispos to predict how the court would decide a different case would be highly misleading.”<sup>65</sup>

¶121 Sixth Circuit Judge Danny Boggs and Brian Brooks believe that the Kozinski-Reinhardt article and Judge Arnold’s decisions in *Anastasoff* represent two competing views of the precedential weight of opinions. Boggs and Brooks contend that the underlying presupposition of the Kozinski-Reinhardt article is that “judges—like legislators—have the power to define the law prospectively through the use of particular authoritative language.”<sup>66</sup> Essentially, Kozinski and Reinhardt believe that judges have the inherent power and duty to determine which opinions should “make law” and which opinions are simply settlements of routine cases. Conversely, say Boggs and Brooks, in *Anastasoff* Judge Arnold held that a federal court does not have the constitutional authority under Article III to decline to follow its own precedent, regardless of whether a previous decision was declared unpublished. Thus, the key debate surrounding limited publication rules is whether all federal judicial decisions within a circuit are truly binding upon that circuit.

¶122 Boggs and Brooks assert that while both views of precedent are correct in different types of cases, they should not be viewed as absolute rules. In their view, cases that require resolution of a rule-setting question are cases in which judges should invoke the “circuit precedent rule,” whereas other cases are more akin to traditional common-law dispute resolution based on application of facts to established legal rules. Furthermore, they argue, the key issue underlying limited publication rules is judicial efficiency<sup>67</sup> and “[u]npublished opinions would be on

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62. Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 43.

63. *Id.* at 44.

64. *Id.*

65. *Id.*

66. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2d 17, 22 (2000).

67. *Id.* at 18 (“The unpublished opinion is tolerated for reasons involving such pedestrian considerations as efficiency in judicial administrations.”).

surer footing if the legal community stopped searching for deeply theoretical explanations of the practice.”<sup>68</sup> They conclude that the “solution to this conundrum” is for circuits to adopt the rule that unpublished decisions can be cited as persuasive authority, as “such a rule retains the common-law virtues associated with analogical reasoning. And when a case presents a rule-setting question, the fact that the previous opinion was unpublished signals to the court that a prior panel did not intend to invoke the circuit precedent rule, and that even in the absence of any identifiable distinction in the circumstances of the case the court is free to rethink the rule suggested in the previous opinion.”<sup>69</sup>

¶23 Some scholars agree with Boggs and Brooks that banning the prohibition of citation of unpublished decisions would alleviate much of the alleged injustice caused by limited publication rules. Spitzer and Wilson contend that “[t]he do not cite rules employed by some circuits do far greater violence to the concept of precedent than the do not publish rules. The former rules place off limits the very stuff of precedent—the reasoning of the court and the explanation of why it reached the result it did.”<sup>70</sup> They suggest that “[a] preferred alternative to the current do not publish—do not cite rules would be for the courts of appeals to issue summary dispositions without written opinions in cases where neither the results of an appeal nor the disposition of the issues it presents, in the court’s opinion, significantly adds to the body of law.”<sup>71</sup> Other opponents of limited publication disagree, arguing that summary dispositions suffer the same defects as other unpublished decisions in that they “also contribute to the difficulty of finding the law by providing insufficient information about what the court actually decided.”<sup>72</sup>

¶24 Before a solution to the problems caused by limited publication policies can be forged, more research is needed to determine if the practice is as damaging as the opponents suggest. In a recent article, Deborah Jones Merritt and James J. Brudney examined the particular impact of limited publication on labor law, examining all of the unfair labor practice cases in the circuits between 1986 and 1993.<sup>73</sup> They concluded that judges within the circuits implement publication criteria quite differently in comparable claims under a single statute, but note that “[w]ithout an increase in the number of sitting judges or a reduction in the courts’ caseload, it is unimaginable that the courts could publish detailed deliberative opinions in every case they decide.”<sup>74</sup> The key question regarding the worth of limited publication rules is whether the concerns over fairness and consistency outweigh the judicial efficiency arguments in favor of the policy.

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68. *Id.* at 25.

69. *Id.*

70. Spitzer & Wilson, *supra* note 45, at 4.

71. *Id.* at 61.

72. Dragich, *supra* note 49, at 787.

73. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001).

74. *Id.* at 121.

### Publication Practices in the Eighth and Tenth Circuits

¶125 The remainder of this article examines the factual basis for two critiques of limited publication rules: that they are applied unfairly to broad categories of litigants and that limited publication rules are not necessarily applied in a manner such that only routine cases in settled areas of law are disposed of in unpublished decisions. An examination of the cases decided in the Eighth and Tenth Circuits in the first six months of 2000 shows that there is merit to both critiques. There is a significant difference in the outcome of the Eighth and Tenth Circuit’s limited publication rules, despite the fact that the circuits have similar rules.

¶126 To analyze the publication practices of each circuit, I categorized the unpublished and published opinions of each by broad substantive areas of law. Occasionally, this method required difficult judgments, such as whether a criminal action in a tax case should be included in the criminal category or the tax category. I decided to group civil litigation cases (other than those involving a few specific substantive areas such as employment or labor law) in a single general category, since the fairness criticism is usually directed toward unpublished decisions in criminal, poverty, governmental, employment, and labor cases. Secondly, in categorizing the cases, I also analyzed the court’s treatment of the district court’s ruling. If the court of appeals reversed or gave a mixed treatment of the lower court’s decision, it indicates that either the law applied by the lower court or the facts of the case are such that the case should not necessarily be considered routine in nature. At a technical level, I compared the results of the same searches conducted on Westlaw, LexisNexis, and the court Web sites for the Eighth and Tenth Circuit opinions. Although there was a slight variance in the number of opinions contained in each system during a given short period of time, due to the different treatment of withdrawn or amended opinions in each database, each service ultimately included the same published and unpublished opinions for the period examined.<sup>75</sup>

¶127 As shown in table 1, during the six-month period, January–June 2000, the Tenth Circuit released 836 decisions. Seventeen of these simply withdrew or amended a previously released opinion and were not considered in this analysis. Of the 821 new decisions released, 171, or 20.83%, were published in the *Federal Reporter*; 650 or 79.17%, were unpublished and thus only available in an electronic format. Of the unpublished decisions, 59, or 7.19% of the total of new decisions, either reversed or partially reversed the lower court. Essentially, the Tenth Circuit only published one-fifth of its decisions during the period examined and chose not to publish a large number of decisions that reversed or partially reversed

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75. It should be noted that an initial search for published opinions on LexisNexis will result in a dramatically different number of opinions than the same search conducted on Westlaw or on a circuit Web site. This difference is due solely to the fact that LexisNexis includes each published circuit opinion in its database twice, once as a slip opinion, with a LexisNexis citation, and once as an official published opinion, with a citation from the *Federal Reporter*. When this difference is accounted for, LexisNexis, Westlaw, and the circuit Web sites contain the exact same published and unpublished opinions.

the lower court. Forty of the 59 unpublished decisions that reversed or partially reversed the court below occurred in fields of law where a government entity was a party, namely habeas, criminal, constitutional, Social Security, and civil forfeiture actions. Fortunately, the Tenth Circuit allows attorneys to cite these unpublished decisions reversing the lower court, but it does not view them as controlling authority, since they were not published.<sup>76</sup> Other circuits, including the First and Ninth Circuits, will not even allow attorneys to cite cases in which the panel reverses the lower court but chooses not to publish the decision.<sup>77</sup>

¶28 The Tenth Circuit's unpublished decisions during the first six months of 2000 include a number of rather long decisions that create law, apply existing law to new factual situations, or adopt decisions from other circuits as authority. For example, two unpublished Tenth Circuit decisions during the first half of 2000 deal with Social Security disability appeals for individuals with intelligence quotients (IQ) in the low 70s. In *Dover v. Apfel*<sup>78</sup> and *Callins v. Apfel*,<sup>79</sup> the panels considered appeals from Social Security claimants, with IQs in the low 70s, who were determined to not be severely enough disabled to meet the eligibility standard of an IQ of 70 or below, as required by federal regulation.<sup>80</sup> In both *Dover* and *Callins*, the key issue is whether a Social Security administrative law judge can consider an applicant's low IQ even though it does not quite drop below the regulatory threshold IQ of 70. Both *Dover* and *Callins* cite *Cockerham v. Sullivan*,<sup>81</sup> a decision from the Eighth Circuit, as authority, but for different propositions. *Dover* uses *Cockerham* as an example of a case where an individual with a 71 IQ did not receive benefits. *Callins* uses it for the proposition that individuals with IQs between 70 and 79 should have their low intelligence considered as a factor, along with any physical or emotional disabilities, in determining whether they retain enough residual functional capacity to make them capable of working. *Callins* cites two other unpublished Tenth Circuit decisions, *Fries v. Chater*<sup>82</sup> and *Turner v. United States Department of Health & Human Services*,<sup>83</sup> as relying on *Cockerham* and then reverses the administrative decision below, holding that "[i]n light of *Cockerham*, the ALJ erred as a matter of law in deciding that appellant's low IQ scores (the lowest of which was only 76) did not constitute a severe impairment and did not warrant consideration in determining what work he could do."<sup>84</sup> *Dover* simply holds that the claimant's IQ scores were not low enough, without the

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76. 10TH CIR. R. 36.3(B).

77. 1ST CIR. R. 36(f); 9th Cir. R. 36-3.

78. No. 99-5035, 2000 WL 135170, 203 F.3d 834 (10th Cir. Feb. 7, 2000) (unpublished table decision).

79. No. 98-6415, 2000 WL 6193, 202 F.3d 281 (10th Cir. Jan. 6, 2000) (unpublished table decision).

80. 20 C.F.R. pt. 404, subpt. P., app. 1, 12.05(c).

81. 895 F.2d 492, 496 (8th Cir. 1990) (holding that claimant with IQ of 71 was not disabled, but "[a] claimant whose alleged impairment is an I.Q. of 70-79 inclusive has alleged a severe impairment and may be considered disabled after consideration of vocational factors").

82. No. 96-2047, 1997 WL 31561, 106 F.3d 413 (10th Cir. Jan. 28, 1997) (unpublished table decision).

83. No. 94-6202, 1995 WL 339402, 57 F.3d 1081 (10th Cir. June 7, 1995) (unpublished table decision).

84. *Callins*, 2000 WL 6193, at \*3.

addition of other disabling conditions, to entitle him to benefits. In essence, the Tenth Circuit has a complex line of cases, based on an Eighth Circuit decision, that determine whether, as a matter of law, low IQ can be considered in Social Security disputes even if it is not low enough to meet the federal threshold. Surprisingly, none of these Tenth Circuit cases are published, despite the fact that they address a new issue of law for the circuit. Consequently, they are not binding precedent in future cases before the Tenth Circuit.

**Table 1**  
*Tenth Circuit Opinions, January–June, 2000*<sup>85</sup>

Case Type	Published Opinions				Unpublished Opinions			
	Pub. Affirm.	Pub. Mixed	Pub. Revers.	% of Total	Unpub. Affirm.	Unpub. Mixed	Unpub. Revers.	% of Total
Habeas Corpus	18	3	2	2.80	175	3	7	22.53
Criminal Sentencing	29	5	8	5.16	149	3	4	19.00
§1983, <i>Bivens</i> , Constitutional	10	3	4	2.07	80	5	8	11.33
Civil	17	9	3	3.53	53	4	6	7.67
Immigration	0	0	2	0.24	7	0	0	0.85
Bankruptcy	0	0	1	0.12	3	1	1	0.06
Patent	1	0	0	0.12	0	0	0	0.00
Tax	3	0	1	0.49	17	0	0	2.07
Medicaid/Medicare	3	0	1	0.49	0	0	0	0.00
Social Security	1	0	1	0.24	18	2	6	3.17
Employment/ADEA/ ADA/ Title 7/ERISA	17	5	5	3.29	61	3	4	8.28
Labor	1	0	1	0.24	3	0	0	0.37
IDEA & Education	0	0	0	0.00	2	0	0	0.24
Attorney Fees	1	0	2	0.37	3	0	0	0.37
Environment/Land	3	2	3	0.97	4	0	0	0.49
Native American	3	0	0	0.37	1	0	0	0.12
Civil Forfeiture	0	0	0	0.00	6	0	2	0.97
Pro Se	0	0	0	0.00	4	0	0	0.49
Antitrust	1	0	0	0.12	0	0	0	0.00
Securities/FTC	0	0	1	0.12	2	0	0	0.24
FCC/FAA/FERC/DEA	1	0	0	0.12	3	0	0	0.37
FOIA	0	0	0	0.00	0	0	0	0.00
Fair Debt/TILA	0	0	0	0.00	0	0	0	0.00
<b>% of Total</b>	<b>13.28</b>	<b>3.29</b>	<b>4.26</b>	<b>20.83</b>	<b>71.99</b>	<b>2.56</b>	<b>4.63</b>	<b>79.17</b>

85. The total percentages do not include seventeen decisions reported on Westlaw that simply withdraw or amend a previous opinion. The Pro Se case type category is reserved for cases filed by pro se litigants which the court cannot attribute to a particular type of pleading. *See, e.g., Springer v. State of Alabama*, No. 99- 5227, 2000 WL 305492, 208 F.3d 227 (10th Cir. Mar. 24, 2000) (unpublished table decision).



¶29 *Dover* and *Callins* represent a relatively commonplace occurrence in the unpublished decisions of the Tenth Circuit and many other federal courts of appeals. Many unpublished opinions either create new law or apply new factual situations to existing law, yet they remain unpublished at the discretion of the panel. As compared to the Tenth Circuit, however, the Eighth Circuit has both fewer unpublished decisions and fewer that create new law or apply law to new factual situations. The unpublished decisions from the Eighth Circuit tend to be simple statements of decision rather than shortened versions of a regular opinion.<sup>86</sup> For example, the entirety of the decision in *Bryant v. Norris*<sup>87</sup> is simply:

Dale E. Bryant, an Arkansas prisoner, appeals the district court's adverse grant of summary judgment in his 42 U.S.C. § 1983 action claiming deliberate indifference to his serious medical needs. Upon careful review of the record and the parties' submissions, we conclude that the district court properly granted summary judgment for the reasons relied upon in its order. Accordingly, we affirm. See 8th Cir. R. 47B.<sup>88</sup>

¶30 Because most Eighth Circuit unpublished opinions simply affirm the lower court rather than explain the facts and apply the law to those facts, they are less likely to be useful to future litigants. The opponents of limited publication are split as to whether such summary dispositions are superior to lengthier unpublished decisions.<sup>89</sup> Summary dispositions do prevent situations where circuits create new rules of law but fail to give them precedential authority by choosing not to publish the dispositions.

¶31 In addition to releasing summary dispositions in most unpublished opinions, the Eighth Circuit also publishes a much higher percentage of cases than the Tenth Circuit. Table 2 shows the Eighth Circuit decisions for the same six-month period, January–June 2000. The Eighth Circuit released 729 decisions. Three simply withdrew or amended a previously released decision and thus were not considered in this analysis. Of the 726 new decisions released, 322, or 44.35%, were published in the *Federal Reporter*; 404, or 55.65%, were unpublished and thus only available in an electronic format. Of the unpublished decisions, 20, or 4.95% of the total unpublished decisions, either reversed or partially reversed the lower court. The Eighth Circuit published a little under one-half of its decisions during the period examined. Nonetheless, the Eighth Circuit chose not to publish twenty decisions that partially or completely reversed the lower court, and seventeen of these were in cases where the government was a party.

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86. There are, of course, exceptions to this generalization. See, e.g., *Windsong Enterprises, Inc. v. Eden Isle Corporation*, No. 99-3603, 2000 WL 426594, 210 F.3d 380 (8th Cir. Apr. 19, 2000) (unpublished table decision) (Eighth Circuit panel applied “exceptional circumstances” test for federal judicial abstention from *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) to new factual situation); *Garrison v. U.S. Trustee*, 98-2714, 2000 WL 276975, 208 F.3d 217 (8th Cir. Mar. 15, 2000) (unpublished table decision) (uncharacteristically thorough recitation of the facts and discussion of controlling law for an unpublished decision from the Eighth Circuit).

87. No. 98-2805, 2000 WL 127498, 205 F.3d 1344 (8th Cir. Jan. 5, 2000).

88. *Bryant*, 2000 WL 127498, at \*1.

89. See *supra* ¶ 23.

**Table 2**  
*Eighth Circuit Opinions, January–June, 2000*<sup>90</sup>

Case Type	Published Opinions				Unpublished Opinions			
	Pub. Affirm.	Pub. Mixed	Pub. Revers.	% of Total	Unpub. Affirm.	Unpub. Mixed	Unpub. Revers.	% of Total
Habeas Corpus	23	2	2	3.72	18	0	2	2.75
Criminal Sentencing	86	5	17	14.88	132	0	5	18.87
§1983, <i>Bivens</i> , Constitutional	24	6	8	5.23	75	5	4	4.90
Civil	25	4	7	4.97	45	1	1	6.47
Immigration	0	0	0	0	6	0	0	0.83
Bankruptcy	7	0	0	0.96	2	0	0	0.28
Patent	0	0	0	0.00	1	0	0	0.14
Tax	3	1	0	0.55	3	0	0	0.41
Medicaid/Medicare	1	0	0	0.01	0	0	0	0
Social Security	8	0	9	2.34	23	0	1	3.31
Employment/ADEA/ ADA/ Title 7/ERISA	38	7	8	7.30	57	0	1	7.99
Labor	7	0	2	1.24	2	0	0	0.28
IDEA & Education	0	0	4	0.55	1	0	0	0.14
Attorney Fees	2	1	0	0.41	2	0	0	0.28
Environment/Land	3	0	2	0.69	2	0	0	0.28
Native American	1	0	0	0.14	2	0	0	0.28
Civil Forfeiture	0	1	0	0.14	0	0	0	0
Pro Se	1	0	0	0.14	8	0	0	1.10
Antitrust	0	0	1	0.14	0	0	0	0.00
Securities/FTC	0	0	0	0	1	0	0	0.14
FCC/FAA/FERC/DEA	1	1	0	0.28	2	0	0	0.28
FOIA	0	0	1	0.14	2	0	0	0.28
Fair Debt/TILA	2	0	1	0.41	0	0	0	0
<b>% of Total</b>	<b>31.96</b>	<b>3.86</b>	<b>8.54</b>	<b>44.35</b>	<b>52.89</b>	<b>0.83</b>	<b>1.93</b>	<b>55.65</b>

¶32 In comparison, the Tenth and Eighth Circuits released a similar number of decisions, 836 and 729 respectively. The Eighth Circuit’s publication rate during the period studied was more than twice that of the Tenth Circuit, 44.35% to 20.83%. What’s more, table 3 highlights several case types in which the Eighth Circuit published a much higher percentage of opinions than the Tenth Circuit. The fact that the Eighth Circuit had a substantially higher number of published

90. The total percentages do not include three decisions reported on Westlaw that simply withdraw or amend a previous opinion. The Pro Se case type category is reserved for cases filed by pro se litigants which the court cannot attribute to a particular type of pleading. *See, e.g.*, Springer v. State of Alabama, No. 99-5227, 2000 WL 305492, 208 F.3d 227 (10th Cir. Mar. 24, 2000) (unpublished table decision).

**Table 3***Percentage of Cases Published by Selected Category, January–June, 2000*

Case Type	8th Circuit Court of Appeals	10th Circuit Court of Appeals
Habeas	57.47% (27 of 47 cases)	11.06% (23 of 208 cases)
Criminal Sentencing	44.08% (108 of 245)	21.21% (42 of 198)
§1983, Bivens, Constitutional	31.15% (38 of 122)	15.45% (17 of 110)
Social Security	41.46% (17 of 41)	7.14% (2 of 28)

decisions in such key categories supports the view that limited publication rules are not handled in a uniform manner by the various courts of appeals. This lack of uniformity, despite the fact that the limited publication rules of the Eighth and Tenth Circuits are quite similar,<sup>91</sup> gives credence to the fairness criticism leveled at limited publication rules.

¶33 The fact that the Eighth Circuit augments its limited publication rule with a Plan for Publication of Opinions is the only significant difference between the limited publication policies in the two circuits. The Tenth Circuit simply allows panels to choose not to publish cases that do “not require application of new points of law that would make the decision a valuable precedent.”<sup>92</sup> The Eighth Circuit’s Plan calls for publication if a case establishes new law, changes existing law, interprets an existing opinion, conflicts with an existing opinion, applies a rule to a new fact pattern, involves a legal or factual issue with unusual public or legal interest, conflicts with the rationale of a previously published opinion, or is a significant contribution to the legal literature.<sup>93</sup> Essentially, the Eighth Circuit has much more explicit criteria for determining whether a given case should be published. Because of the implications of publication on fairness to particular categories of litigants and on the public’s perception of the integrity of the federal courts, a stricter criteria for determining whether a case should be published, such as that employed by the Eighth Circuit, is advisable.

¶34 Surprisingly, both the Eighth and the Tenth Circuits affirmed the lower court decision in the vast majority of unpublished decisions, 95.05% and 90.92% respectively. This suggests that concerns of opponents of limited publication rules regarding the nonpublication of law-making decisions that reverse lower court decisions may be somewhat exaggerated. Nonetheless, the Eighth Circuit chose not to publish twenty decisions reversing or partially reversing the lower court, and the Tenth Circuit chose not to publish fifty-nine such decisions, numbers that should not be overlooked.

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91. *See supra* ¶¶ 6–7.

92. 10TH CIR. R. 36.1.

93. *See supra* ¶ 7.

### Conclusion

¶135 Although the research conducted for this article is not sufficient by itself to determine whether the United States Courts of Appeals should substantially alter existing limited publication rules, it does support the fairness critique that is directed toward such rules. Essentially, it shows that two circuits with nearly identical rules have dramatically different rates of publication, especially in particular key categories. Further, both circuits had a number of unpublished decisions that made new law or applied existing law to new factual situations, thus making them important to future litigants as authority. The research shows a dramatic variance in publication decisions between the Eighth and Tenth Circuit Courts of Appeals, especially in the areas of habeas corpus, criminal sentencing, Social Security, and various constitutional causes of action—all areas where governments are a party in the case. Hemingway’s warning to avoid omitting key information so as to avoid “hollow places” rings clear. The current application of limited publication rules creates “icebergs” of unpublished law that vary in scope and size between the circuits. Fair application of federal law between the circuits would seem to require the federal judiciary to address the disparity caused by limited publication rules. Additionally, to avoid the appearance of bias, the federal judiciary should address the high prevalence of unpublished opinions in areas of law where governments are parties. Even if limited publication policies are ultimately held to be constitutional, a national limited publication policy, including the adoption of specific criteria such as those used by the Eighth Circuit for determining whether or not to publish a decision, seems necessary.

¶136 As I examined only two circuits for a six-month period of time, further research should be conducted to examine the publication patterns of all the United States Courts of Appeals by category over an extended period. Additionally, subject-specific research, such as that of Merritt and Brudney in labor law,<sup>94</sup> should be conducted by specialists to determine the impact of unpublished opinions on their fields of law. Such additional research would allow a conclusive determination as to whether limited publication rules are unfair to certain classes of litigants in particular circuits. The policy debate regarding the appropriateness of limited publication rules is unlikely to subside until the fairness critique and the constitutionality issues advanced by Judge Arnold in *Anastasoff* are fully addressed. During the course of this debate, perhaps Judge Wald offered the best advice to the federal bench: “They must take care, however, that their reactions to a stepped-up work load do not corrode the essence of their judicial functions—reading and listening to the arguments of the parties, being familiar with the record, making and explaining their decisions, generally for publication.”<sup>95</sup>

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94. Merritt & Brudney, *supra* note 73.

95. Wald, *supra* note 57, at 785–86.