

LIMITED PUBLICATION IN THE FOURTH AND SIXTH CIRCUITS

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It is commonplace to remark that the workload of the United States Circuit Courts of Appeals has become unmanageable. In the last fifteen years, filings have increased more than threefold, while judgeships have increased only minimally.¹ To deal with this staggering increase in workload, the courts have experimented with various techniques. Jurisdictional contractions have been urged,² use of a central staff has been augmented,³ summary and screening procedures have been instituted,⁴ and oral argument has been reduced or elimi-

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

Reynolds & Richman, *Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) [hereinafter cited as Reynolds & Richman];

ADVISORY COUNCIL FOR APPELLATE JUSTICE, FJC RESEARCH SERIES NO. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973) [hereinafter cited as STANDARDS];

[1977] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. [hereinafter cited as 1977 ANNUAL REPORT].

1. In fiscal 1963, 5,437 cases were filed in the courts of appeals. By 1977, the number had increased to 19,118. 1977 ANNUAL REPORT 164. In the same time period authorized judgeships increased from 78 to 97. *Id.*

2. See, e.g., H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

3. See D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974); Federal Judicial Center, Central Legal Staffs in the United States Courts of Appeals: A Survey of Internal Operating Procedures (April 1978).

4. For a careful explanation of the screening procedures used in the United States Circuit Court of Appeals for the Fifth Circuit, see NLRB v. Amalgamated Clothing Workers, 430 F.2d 966 (5th Cir. 1970). See also Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257.

nated.⁵

One of the most dramatic steps taken by the courts in recent years has been to reduce significantly the number of opinions that are published. The movement toward limited publication began in earnest in 1971, following a report by the Federal Judicial Center.⁶ The report spurred both study and action; in 1972, the Judicial Conference of the United States requested that each circuit develop a plan to limit the publication of opinions.⁷ By 1974, each circuit had such a plan.⁸ The effect of the plans on the practices of the courts of appeals was immediate: between 1973 and 1977, the percentage of opinions published by the circuits fell from 48.4% to 37.2%.⁹

Proponents of the limited publication plans believe that limiting publication will make it easier for the judges to accomplish their important work since time and effort will not be expended in publishing decisions in trivial cases. The argument for limited publication rests on three premises.¹⁰ The first of these is that not all appellate opinions need to be published. This premise relies on a distinction between "law making" opinions and "dispute-settling" opinions. Law making opinions announce new law, apply settled law to new facts, or include important discussion or criticism of settled rules. Dispute-settling opinions apply uncontroversial rules of law to ordinary cases and have no value to the public. The second premise of the limited publication argument is that the cost of full publication is excessive. Published opinions, on which judges expend more time and effort, cost significantly more to produce than do unpublished ones. Similarly, the cost of consuming the mass of published law is high; libraries must be larger, and research time is increased. The third and perhaps most crucial premise of the argument is that the judges can determine before writing an opinion whether it will be a "law making" opinion or simply a "dispute-settling" one.

Many of the limited publication plans contain what might be termed a no-citation corollary, a rule prohibiting citation to the court of its own unpublished opinions. There are two principal arguments for this corollary. First, many of the cost savings of limited publication are lost if unpublished opinions may be cited. Judges must draft them

5. For a review of some of the literature concerning the need for oral argument, see 2 ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, at 2-32 (1975).

6. [1971] FEDERAL JUDICIAL CENTER, ANN. REP. 8.

7. [1972] JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 33.

8. [1974] JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 12-13.

9. 1977 ANNUAL REPORT 3.

10. We have discussed the arguments behind the limited publication, no-citation rules in much more detail in Reynolds & Richman. *See also* STANDARDS.

more carefully, libraries must accommodate them, and lawyers must include them in their research. Second, citation of unpublished opinions produces serious unfairness since unpublished opinions are more readily available to some lawyers than to other lawyers.

The premises of the limited publication argument are subject to serious theoretical attack; similarly, the arguments for the no-citation corollary are conceptually vulnerable.¹¹ Empirical justification for the factual claims of all the arguments is limited.¹² Further, the plans are anything but foolproof; significant numbers of "law making" opinions go unpublished.¹³

Powerful counterarguments have been advanced against the limited publication, no-citation plans. The plans diminish judicial responsibility and accountability. Courts are more free to be arbitrary if their past pronouncements cannot be cited to them to guide and restrict their future action. Review of the courts' work by the United States Supreme Court, the bar, and the academic community is hampered by limited access to all of the courts' opinions.¹⁴

Full exposure and consideration of the arguments reveal that neither the case for nor the case against limited publication is conclusive. Instead, the arguments on each side have considerable merit, and a verdict on the plans requires an evaluation of the trade-offs that are in fact made, an evaluation based on empirical study of experience under the plans.

Because the limited publication, no-citation schemes represent a marked change in the operations of the courts of appeals, it is somewhat surprising that the judicial establishment has not undertaken a thorough empirical investigation.¹⁵ There have been studies from outside the judiciary, but they have mainly been surveys of the unpublished products of a particular court in search of opinions that arguably should have been reported.¹⁶ Although those studies show that such

11. See Reynolds & Richman 1194-1204.

12. *Id.* 1206.

13. In addition, inconsistencies have appeared among published and unpublished opinions. For examples of inconsistencies and suppressed precedent in the federal circuit courts, see Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224, 1225 (1975); Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977). These phenomena have also been observed in the opinions of state courts that have adopted limited publication plans. See Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 386 (1973); Newbern & Wilson, *Rule 21: Unprecedented and the Disappearing Court*, 32 ARK. L. REV. 37, 48-56 (1978).

14. See Reynolds & Richman 1200.

15. There is one limited study but it has received little distribution. See Remarks of John P. Frank Before the Ninth Circuit Judicial Conference (July 29, 1976).

16. See *id.* and authorities cited in note 13 *supra*.

opinions do exist, there remain a number of significant questions that can be answered only by systematic investigation. Are there important opinions that go unreported? In addition, are there cases that might have generated important opinions but for an early decision not to publish? Are the circuits following their nonpublication rules? How does the reversal rate in unpublished opinions compare with that in published opinions? What of dissents in unpublished opinions? What types of cases typically result in unpublished decisions? What role does judicial support staff play in producing unpublished opinions?

This Article will address some of these questions. Since the rules of the circuits vary in scope and detail, it is important to examine the effect of the individual variations. Accordingly, we have chosen to examine the experience of the Fourth and Sixth Circuits because these courts take significantly different approaches to the limited publication, no-citation problem. To put the study on a systematic basis, we have confined our investigation to an examination of all the opinions—published and unpublished—that were produced by the respective courts during the time necessary for those courts to render two hundred unpublished opinions.

I. THE PLANS

As discussed above,¹⁷ the chief goal of limited publication plans is judicial efficiency. The main criticisms of the plans center on the possibility of judicial error, judicial irresponsibility, and lack of judicial accountability. Recognizing these competing considerations, it is clear that the objective of a limited publication plan ought to be to promote efficient use of judicial resources while minimizing the risks of errors in classification, of judicial irresponsibility, and of judicial unaccountability. The circuits have not adopted identical strategies toward the ultimate end. The plans of some circuits have stressed the goals of the limited publication program, while the plans of others have focused on avoiding the possible dangers. For convenience, the former, of which the Sixth Circuit is a good example, may be called “radical” limited publication plans; the latter, of which the Fourth Circuit is a sample, will be called “conservative” plans.

The difference between the Fourth and Sixth Circuit approaches is clearly demonstrated by their different treatment of criteria for publication.¹⁸ Both plans provide for publication of any decision of an appeal

17. See text accompanying notes 1-9 *supra*.

18. For a general discussion of the rules in the various circuits, see Reynolds & Richman 1173-81. An abbreviated discussion is available in Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 129-35 (1977).

of a proceeding that was reported below.¹⁹ The rationale for this provision is quite clear. The bar uses reported opinions of district courts and administrative agencies for guidance in planning and prediction. Any review of a reported decision should be published so that the readers of the initial decision will know if it has been reversed or affirmed upon a different rationale. Publication assures that readers will not be misled by reliance upon the reported decision of the initial tribunal.

Aside from this common feature, the two plans have radically different criteria for publication. The Sixth Circuit Plan's entire statement on the matter reads as follows: "[I]t is the policy of this court to publish only those opinions which are considered to be of precedential value."²⁰ This standard—"precedential value"—gives the individual judges unfettered discretion. The Sixth Circuit Plan, in this instance, can clearly be classed among the radical limited publication plans,²¹ for it has not attempted to elucidate criteria to control the publication decision. By providing the deciding panel with this leeway, the Sixth Circuit seeks to accomplish the economies of limited publication seemingly without great concern for a major potential drawback—the danger of important decisions going unreported.²²

In contrast, the Fourth Circuit Plan provides the judges detailed criteria to use when deciding whether to publish an opinion. An opinion shall not be published unless it satisfies one of the following criteria:

- (i) It establishes, alters, modifies, clarifies, or explains a rule of law within this circuit; or
- (ii) It involves a legal issue of continuing public interest; or
- (iii) It criticizes existing law; or
- (iv) It contains an historical review of a legal rule that is not duplicative; or
- (v) It resolves a conflict between panels of this court, or creates a conflict with a decision in another circuit; or
- (vi) It is in a case in which there is a published opinion below.²³

19. 4TH CIR. R. 18(a)(vi); Proposed Plan of United States Court of Appeals for the Sixth Circuit Concerning the Publication of Opinions, which along with the Publication Plans of all the other circuits, is contained in appendix C of J. SPANIOL, REPORT ON THE OPERATION OF CIRCUIT OPINION PUBLICATION PLANS FOR 1977 (1977). Mr. Spaniol is the Deputy Director of the Administrative Office of the United States Courts. He prepared similar reports for the years 1973-76. All other plans not incorporated in the circuits' local rules are referred to hereinafter as Circuit Plan.

20. Sixth Circuit Plan, *supra* note 19, ¶ 2.

21. Other circuits have similarly general standards: *see* 1ST CIR. R. app. B, ¶(a); 2D CIR. R. O.23; Third Circuit Plan, *supra* note 19, ¶ (1); 5TH CIR. R. 21.

22. The practice of providing only general criteria for publication has been widely criticized. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 36 (1976); Reynolds & Richman 1176-77; Note, *supra* note 18, at 132.

23. 4TH CIR. R. 18(a). Several other circuits have adopted the approach of providing detailed publication criteria. *See* District of Columbia Plan, *supra* note 19, at 2; 7TH CIR. R. 35(c);

These standards elaborate the views of the court as a whole on the question of when its "law making" or institutional function, as opposed to its purely "dispute-settling" function, is implicated. The more detailed criteria should result in fewer errors of omission—fewer instances of "law making" cases going unpublished. Concern for avoiding these errors of omission indicates that the Fourth Circuit has chosen what has been designated the conservative approach to limited publication.²⁴

With regard to who makes the decision to publish, the Sixth Circuit Plan is plainly more radical than that of the Fourth. The Sixth Circuit Plan provides: "No opinion of the court shall be published in the Federal Reporter except when authorized by the affirmative vote of the majority of judges participating in the decision."²⁵ The Fourth Circuit Plan, on the other hand, lessens the likelihood that a significant opinion will go unpublished, by permitting a positive publication decision from either the author of an opinion or the majority of judges joining in it.²⁶

The most controversial features of the circuits' limited publication plans have been the no-citation provisions.²⁷ As noted earlier these provisions are designed to accomplish two ends. First, they seek to safeguard the economies generated by the limited publication plans; the courts fear that if unpublished opinions can be cited, economies of production and consumption will disappear.²⁸ Second, they aim to avoid the unfairness of unequal access; proponents of the rules feared

8TH CIR. R. app. ¶ 4; 9TH CIR. R. 21(b). These criteria are all basically descendants of a list of criteria originally suggested by the Advisory Council for Appellate Justice in STANDARDS.

24. This more cautious approach of providing detailed criteria for publication has won the approval of several commentators. See JUSTICE ON APPEAL, *supra* note 22, at 36; Reynolds & Richman 1176-77.

25. Sixth Circuit Plan, *supra* note 19, ¶ 2.

26. Both plans create a presumption against publication. The Fourth Circuit Plan provides that "[a]n opinion shall not be published unless it meets one of the following standards for publication." 4TH CIR. R. 18(a). The Sixth Circuit Plan enunciates that "it is the policy of this court to publish only those opinions which are considered to be of precedential value." Sixth Circuit Plan, *supra* note 19, ¶ 2.

27. The no-citation provisions have been viewed by some as the *sine qua non* for success of the whole limited publication regime.

The Commission is, of course, aware of the problems which result from non-publication. Perhaps the thorniest involves the question whether or not to allow unpublished opinions to be cited as precedent. To allow litigants to cite opinions which the court has designated as "not for publication" invites publication by private publishers, thus defeating the basic purpose of the program.

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 51 (1975). See also Seigson & Warnlof, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37, 51-54 (1972). Others have regarded no-citation rules as a threat to the entire tradition of common law judging. See, e.g., Kanner, *supra* note 13, at 445; Note, *supra* note 18, at 146; Comment, *supra* note 13, at 339-40.

28. See STANDARDS 19.

that some lawyers would have greater access to unpublished opinions than would others.²⁹ No-citation rules create several problems, however, chief among which is the danger of judicial irresponsibility. One of the principal controls over common law judges is the requirement that what they say today be consistent with what they said yesterday. The no-citation provisions remove that constraint.

The Sixth Circuit's approach to the question of citation is the most stringent among the circuits. Local Rule 11³⁰ flatly forbids citation of unpublished opinions to the court:

Decisions of this court designated as not for publication should never be cited to this court or in any material prepared for this court. No such decision should be published by any publisher unless this rule is quoted at a prominent place on the first page of the decision so published.³¹

The Fourth Circuit's position is considerably more cautious. The court will not cite its own unpublished opinions "[i]n the absence of unusual circumstances,"³² and has indicated that the citation of those opinions to the court is disfavored.³³ Citation is, however, permitted with appropriate safeguards:

If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the court.³⁴

Related to the rules against citation of unpublished opinions are the circulation rules, which limit access to the unpublished opinions in the first place. The arguments for and against circulation roughly parallel the arguments concerning citation. The prohibition of circulation, it is argued, preserves the economies of limited publication and reduces the problem of unequal access.³⁵

29. *Id.*

30. 6TH CIR. R. 11.

31. *Id.*

32. 4TH CIR. R. 18(d)(i).

33. *Id.* 18(d)(ii). An exception is made if citation is for the purpose of establishing *res judicata*, collateral estoppel, or the law of the case.

34. *Id.* 18(d)(iii).

35. In many cases, distribution only to the parties—a provision included in each plan—is sufficient to produce a serious problem of unequal access. For example, the United States Department of Justice is a party in every criminal case in the federal courts. Circulation and discussion of unpublished opinions within the Department is not unlikely; the result is that the prosecution always will have access to the courts' unpublished products while the defense rarely will have access. Similar types of informal circulation could easily be accomplished by other habitual litigants—legal aid, trade associations, or the public defenders' offices.

The Tenth Circuit has adopted measures to alleviate even this inequality. It prepares a biannual subject matter digest of its unpublished opinions. Anyone may subscribe to the index at the

Predictably, the Fourth and Sixth Circuits have taken opposite stands on the question of circulation. The Sixth Circuit does not routinely circulate unpublished opinions; in the typical case, only counsel and the district court or administrative agency below receive copies of the decision.³⁶ The Fourth Circuit, by contrast, circulates unpublished opinions "on a subscription basis upon the payment of a reasonable fee . . ." to anyone who wishes to receive them.³⁷

These plans are the formal criteria established to guide the judges in deciding whether to publish a particular opinion. The Fourth and Sixth Circuit Plans take different paths with respect to their content. The question then is, has either plan succeeded in promoting the efficient use of judicial resources while minimizing the risks inherent in nonpublication and noncitation? Have the plans worked?

II. RESULTS OF THE STUDY³⁸

A. *Published Versus Unpublished—Relative Percentages.*

We might expect a conservative plan to generate a high ratio of published to unpublished opinions, since, by hypothesis, a conservative plan reflects more concern for the dangers of limited publication and, therefore, should result in fewer nonpublication decisions. Conversely,

annual rate of \$5.00. Approximately 60 law libraries in the circuit have been designated depositories for the index. Letter from Emory G. Hatcher, Circuit Executive, United States Court of Appeals for the Tenth Circuit, to William M. Richman (Aug. 24, 1977).

36. Letter from James A. Higgins, Circuit Executive, United States Court of Appeals for the Sixth Circuit, to William M. Richman (Aug. 30, 1977). Mr. Higgins indicates, however, that on occasion "unpublished opinions are designated for distribution to all circuit and district judges in the circuit for information purposes." *Id.*

37. 4TH CIR. R. 18(c)(ii).

38. The burden under which the courts work, *see, e.g.*, Reynolds & Richman 1167-68 and authorities cited therein, can be seen from our survey. For the Fourth Circuit, we used a study period of January 1, 1978, to March 1, 1978, a span containing approximately 40 working days. The study period for the Sixth Circuit was January 1, 1978, to April 18, 1978—approximately 80 working days. (The sample period for each circuit was picked simply by choosing that amount of time necessary for the court to produce 200 unpublished opinions.) The Fourth Circuit produced 200 unpublished and 45 published opinions — a total of 245 cases decided after submission or argument. Since the judges generally sit in panels of three, that figure must be multiplied by three in order to determine the total number of judicial votes cast to decide the 245 cases; hence, there were 735 votes cast during the two months studied. Seven authorized judgeships and 40 working days indicate that the total number of judge-days during the test period was 280. Simple division shows that each active judge on the Fourth Circuit must have decided more than two and one-half cases per day.

The situation in the Sixth Circuit is somewhat less pressing, but still overwhelming. In the 80-day study period, that court disposed of 95 cases by published opinion and 200 cases by unpublished opinion. Thus there were 885 votes. Nine judges and 80 workdays yields 720 judge-days; each judge must have prepared an average of 1.5 decisions each day. This figure, although lower than that in the Fourth Circuit, is still far from optimum.

a radical plan should generate a relatively low ratio of published to unpublished opinions since it demonstrates more concern with achieving the goals of limited publication.³⁹

The trend observable in the available data⁴⁰ suggests this hypothesis is invalid. In every year except 1976,⁴¹ the Sixth Circuit, which has the radical plan, has produced a higher ratio of published to unpublished decisions than has the Fourth Circuit. The following table illustrates the data.⁴²

TABLE I⁴³
PUBLICATION/NONPUBLICATION DATA

| | | <u>Fourth Circuit</u> | <u>Sixth Circuit</u> |
|-----------------|-------------|-----------------------|-----------------------|
| | | Number of Opinions | Number of Opinions |
| <u>1978</u> | Published | 45 | 97 |
| (Sample period) | Unpublished | 200 | 200 |
| <u>1977</u> | Published | 209 | 199 |
| | Unpublished | 777 | 546 |
| <u>1976</u> | Published | 365 | 270 |
| | Unpublished | 586 | 636 |
| <u>1975</u> | Published | 298 | 388 |
| | Unpublished | 839 | 563 |
| <u>1974</u> | Published | 295 | 340 |
| | Unpublished | 864 | 532 |

One explanation for this result is that the Fourth Circuit has a significantly greater volume of state prisoner litigation than does the Sixth. In the Fourth Circuit in 1977, prisoner cases accounted for nearly a quarter of the entire appellate docket, while in the Sixth Cir-

39. See text accompanying note 16 *supra*.

40. The available data consist of the annual reports made by Joseph F. Spaniol, Executive Assistant to the Director of the Administrative Office of the United States Courts, on the performance of the eleven circuit courts under their limited publication plans. See note 19 *supra*. The relevant portion of each report is Appendix A, in which Mr. Spaniol has tabulated the number of dispositions by each circuit by published opinion, by unpublished opinion, and by order. The data for 1978 were compiled by the authors by actual count of the opinions of each circuit.

It should be noted that the Fourth Circuit records no dispositions by order, while the Sixth Circuit records a substantial number by that method. This difference turns out to be largely semantic. The Sixth Circuit distinguishes between unpublished opinions and orders. Unpublished opinions are typically longer and contain more of the facts of the case and a more complete statement of the holding and rationale. The Fourth Circuit does not make this distinction among its unpublished products. For the sake of uniformity, we will refer to all unpublished dispositions of both circuits as "unpublished opinions."

41. There is no readily apparent explanation for this exception.

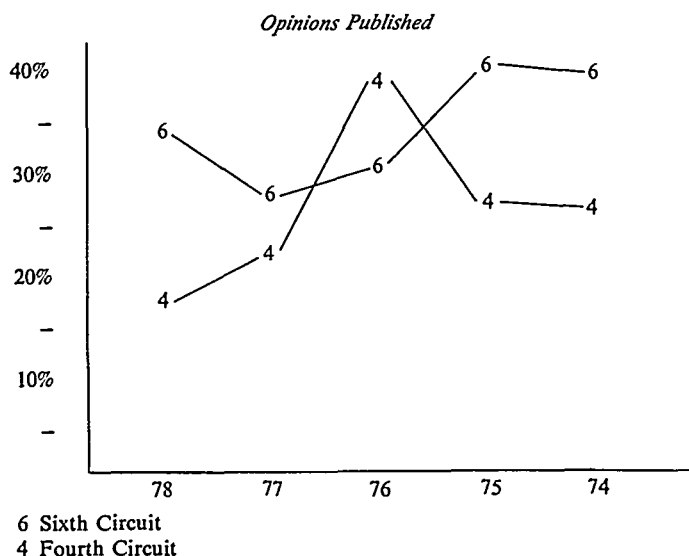
cuit the percentage was just below ten.⁴⁴ Prisoner cases are perceived by many to be repetitive and unenlightening;⁴⁵ the Fourth Circuit's high volume of prisoner litigation may be responsible for the unexpectedly low ratio of published to unpublished opinions.⁴⁶

Another possible explanation, one that tends to undermine the radical/conservative classification system, is that the system itself is simply what Karl Llewellyn would call a "paper rule"—a seemingly rational generalization that is in fact nonpredictive.⁴⁷ Of course, it is also possible that factors unrelated to the criteria for publication influence the percentage of opinions actually published.⁴⁸

B. *Quality.*

A major goal of limited publication plans is to restrict the amount

42. A graph might make the data more intelligible. The vertical axis in the graph below represents percentage of opinions published, the horizontal axis the year in question.



43. See note 40 *supra*.

44. 1977 ANNUAL REPORT 174 Fig. 1.

45. See sources cited in note 125 *infra*.

46. See Table VII and text accompanying notes 123-29 *infra* for a subject matter breakdown of the unpublished and published opinions of the two circuits.

47. See Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 447-53 (1930).

48. The possible variables are numerous. One that comes to mind most readily is relative workload. In 1977, the Fourth Circuit disposed of 237 appeals for each of seven active judgeships; the Sixth Circuit disposed of 203 appeals for each of nine active judgeships. J. SPANIOL, REPORT, *supra* note 19. The difference in workload could well account for significant pressure against publication. Another possible factor is the attitude of the judges toward nonpublication. While the Fourth Circuit's rule appears more conservative, it may be that the Fourth Circuit's judges are more enthusiastic about the benefits of nonpublication than are their fellow judges in the Sixth Circuit.

of judicial time devoted to writing opinions. We should expect unpublished opinions, therefore, to be relatively short. The data in Table II confirm this hypothesis: over eighty percent of the unpublished opinions in each circuit were shorter than two pages.

TABLE II
LENGTH⁴⁹ OF UNPUBLISHED OPINIONS
(percentages)

| Number of pages | ½ or less | ½-1 | 1-2 | 2-3 | 3-4 | 4-6 | 6-8 | more than 8 |
|-----------------|-----------|------|-----|-----|-----|-----|-----|-------------|
| Fourth Circuit | 56 | 13.5 | 17 | 5.5 | 3.5 | 3 | 1 | .5 |
| Sixth Circuit | 40 | 24 | 27 | 5.5 | 1 | 1.5 | .5 | .5 |

Since those opinions are considerably shorter than their published counterparts,⁵⁰ it would seem that substantial time savings have been effected in both circuits.⁵¹

Less clear, however, is the price paid to save the time. The data from the sample seem to indicate that the circuits are not suppressing many opinions that, *as drafted*, would be a valuable addition to legal literature. The traditional question raised with regard to nonpublication is, how many *opinions* that do make new law will be suppressed? This could well be the wrong question to ask. Given the excessive brevity of many of the opinions, the proper question to ask is, how many *cases* might have generated precedential opinions had they not been handled in so cursory a fashion? An opinion that in effect reads: "The court is familiar with the facts of this case and the contentions of the petitioner and finds them to be without merit," surely should not be published. The question is, rather, should the case have generated an opinion concerning one of those contentions that would have been wor-

49. Length was measured by the number of pages of text (not including the caption); in both circuits the opinions are issued on 8 1/2 by 11 inch paper. The reference to pages may be a bit misleading, for neither court crams a great many words on a page. An unpublished opinion in the Fourth Circuit contains between 160 and 180 words per page. The Sixth Circuit pages generally contain about 225 words, being printed with a different typeface. Table II is based on an approximation of Sixth Circuit pages "equivalent" to Fourth Circuit pages.

50. The data below show the mean number of words in the opinions issued during the study period (data for unpublished opinions based on sampling of half).

| | Published | Unpublished |
|----------------|-----------|-------------|
| Fourth Circuit | 1663 | 145 |
| Sixth Circuit | 1724 | 229 |

Another way of illustrating the extreme brevity of unpublished opinions is by noting that less than 20% of the published opinions were shorter than 300 words, but over 80% of the unpublished opinions were shorter than 300 words.

51. It is arguable that, considering the nature of the cases in which opinions are not published, opinions in these cases would be rather short even if they were published. This argument suggests that the judicial time saved is not as great as imagined.

thy of publication? An excessively short⁵² opinion raises the possibility of judicial irresponsibility: is a panel (or a single judge) that produces a one sentence decision doing its job properly?

Reflection upon the purposes served by an appellate opinion helps answer that question. An opinion has several possible objectives: to advise the litigants and the tribunal below of the disposition and the reasons for that decision (the "dispute-settling" function), to provide a basis for review by a higher court, and to establish or reinforce legal rules (the "law making" function).⁵³ The limited publication plans expressly abrogate the last of those goals, so the relevant inquiry is whether unpublished opinions adequately perform the first two functions. Many authorities have commented, with a good deal of agreement, on the minimum standards necessary for an opinion to serve those functions adequately. The American Bar Association, for example, recommends that

[e]very decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based. When the lower court decision was based on a written opinion that adequately expresses the appellate court's view of the law, the reviewing court should incorporate that opinion or such portions of it as are deemed pertinent, or, if it has been published, affirm on the basis of that opinion.⁵⁴

52. A lengthy unpublished opinion raises a different concern, that of suppressed precedent. "Important" opinions—those that should be published—generally require more factual exposition and more carefully explained reasoning. All of this requires more words, so the existence of *any* lengthy unpublished opinions is a possible source of worry. Examination of the longer opinions from both circuits relieves this anxiety. In most cases, the lengthy opinions contain an unusually long recitation of facts as a prelude to application of well-settled law, *e.g.*, *United States v. Stacy*, No. 77-1827 (4th Cir. Jan. 11, 1978) (lengthy recitation of facts that led the district court to revoke appellant's probation), or an extensive quotation from statutory materials, *e.g.*, *Pannell v. Califano*, No. 77-2095 (4th Cir. Jan. 10, 1978) (quoting at length from regulations relevant to a "black lung" case).

53. The phrases are from Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319 (1971).

54. A.B.A. COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 58 (1977). Karl Llewellyn said much the same thing in his own style:

The deciding is, in the main, done under felt pressure or even compulsion to follow up with a published "opinion" which tells any interested person what the cause is and why the decision—under the authorities—is right, and perhaps why it is wise.

This opinion is addressed also to the losing party and counsel in an effort to make them feel at least that they have had a fair break

K. LLEWELLYN, *THE COMMON LAW TRADITION* 26 (1960). See also JUSTICE ON APPEAL, *supra* note 22 (discussing the most abbreviated type of opinion, the "memorandum decision"):

It is essential that the memorandum decision convey at least three elements: (1) the identity of the case that the judges were deciding; (2) the ultimate result or disposition; (3) the reasons for the result. In addition, it is often desirable that the issues—or the appellant's contentions—be explicitly stated.

Id. 34.

One survey of attorneys found that more than two-thirds of the respondents believed that

Unfortunately, as shown in Table III, a large percentage of the unpublished opinions in both circuits fail to satisfy even that minimum standard. An opinion was categorized as a "Reasoned Opinion" if the opinion gave some indication of what the case was about, and some reason for the disposition, even if only a citation to precedent.⁵⁵ On the other hand, an opinion stating only that there were no grounds for reversal, that the appeal was frivolous, that the court below had not abused its discretion, or that there was substantial evidence to convict, did *not* satisfy minimum standards.

TABLE III⁵⁶
SATISFACTION OF MINIMUM STANDARDS
(percentages)

| | "Minimum Standards" Reasoned Opinions | Cases Decided on Basis of Opinion Below | Decisions with No Discernible Justification |
|----------------|--|---|---|
| Fourth Circuit | 42 | 42 | 16 |
| Sixth Circuit | 52 | 14 | 34 |

Over a quarter of the four hundred cases examined fell into the second category, "affirmed on the basis of the decision below." Although that procedure does not satisfy the ABA Minimum Standards,⁵⁷

"the due process clause of the Constitution should be held to require courts of appeals to write 'at least a brief statement of the reasons for their decisions.'" COMMISSION ON REVISION, *supra* note 27, at 49.

55. Decision only by citation to precedent was fairly frequent. That practice is also satisfactory, since the grounds for the decision can reasonably be inferred from the cited case—at least if there has been an adequate statement of facts in the case at bar. An opinion was also classified as "Reasoned" if there was a dissent or concurrence that provided a basis for understanding what the court had done. Such an opinion seems sufficient to demonstrate the majority's reasoning or justification.

As Table III shows, see text accompanying note 56 *infra*, the Fourth Circuit had three times as many decisions by reference to the opinion below as did the Sixth. No explanation for this phenomenon comes to mind; certainly no hypothesis based on the content of the limited publication plans seems tenable. It may simply be that some judges—not all—in the Fourth Circuit have a preference for this type of opinion.

56. The data in Table III were compiled by one of the authors on the basis of all 400 opinions. The reliability of coding the opinions in the three categories listed in this text was established by the following method: the coding in the text was done by one author; the other author, using the textual description of the coding method, applied it to 50 randomly selected opinions from each circuit. We agreed on the coding of 46 of the 50 opinions in the Fourth Circuit and 48 of the 50 in the Sixth.

57. The ABA Minimum Standards are satisfied if the decision below was published. See note 54 *supra* and accompanying text.

it does provide some basis upon which to review the decision.⁵⁸ Because the litigants are the ones most likely to be aware of the issues in the case—and most interested in their resolution—the “decision by reference” also serves as some check upon possible arbitrary behavior on review. That check is limited, however, to those who may have access to the opinion of the court below, perhaps a very small group. Further, a “decision by reference” does not assuage the uneasy feeling that the court has not thought carefully about the case and its reason for believing that the court or agency below handled it adequately. If the court were to explain in its own language, however briefly, its reasons for affirmance, it might help assure that proper attention had been given to the appeal.⁵⁹

The third category in Table III, “Decisions with No Discernible Justification,” is the most disturbing category. An example of impermissible brevity is *Gray v. Devine*.⁶⁰ The entire opinion in that case is:

“PER CURIAM:

After consideration of the briefs, the oral argument and the record, we see no reversible error.

AFFIRMED.”⁶¹

The opinion takes sixteen words to say what could be said in one: “Affirmed.” We sympathize with the courts that issue such decisions; they *are* overworked,⁶² and a great many appeals *are* frivolous. Nonetheless, opinions such as *Gray v. Devine* give cause for concern for the quality of the court’s work. Consider a conclusory affirmance of a criminal conviction challenged for lack of sufficient evidence to support the verdict. Instead of baldly concluding that the evidence was sufficient, the court could have taken time to identify references in the transcript to the crucial eyewitness testimony,⁶³ to give a signal to the

58. The Supreme Court will have a basis for review if the tribunal from which the appeal was taken to a circuit court has sufficiently articulated the factual and legal issues.

59. See R. WASSERSTROM, *THE JUDICIAL DECISION* (1961), for a thorough analysis of the benefits of the justification process.

60. No. 76-1630 (4th Cir. Feb. 2, 1978).

61. *Id.*

62. See note 38 *supra*.

63. The example is hypothetical, but could have been the situation in any number of such affirmances. *Williams v. United States Dist. Court*, No. 77-3577 (6th Cir. Feb. 2, 1978), provides another example. In that case, the court declined to issue a writ of mandamus to compel the district court to rule upon pending motions on the ground that “the Court does not find the petition to allege such circumstances to warrant the extraordinary relief sought.” *Id.* The court also referred to a Supreme Court decision that had stated the same general proposition. The court in *Williams* could have explained briefly why mandamus was not appropriate: perhaps the motions were complex, or the district judge had been ill. To pass on the petition the court had to make such an inquiry; there is no reason why it could not have elucidated the basis of its decision.

An example of more responsible behavior is *Moore v. Mathews*, No. 76-1951 (6th Cir. Feb. 8,

litigants and to the tribunal below that the court had examined the case and had been cognizant of what transpired below. Further, it would have provided a basis for review. A court's assurance that it "has studied the record and is fully advised in the premises,"⁶⁴ says, in effect, "trust me." A court should do better than that.

Opinions that do not reveal any basis for the decision do not differ in effect from the practice in several circuits of issuing Judgment Orders. Common in the Fifth, Eighth, and Tenth Circuits,⁶⁵ the Judgment Order is a one-word decision—"Affirmed"—that does not purport to be an opinion. The Judgment Order procedure has been widely criticized for failing to provide even the most minimal explanation of the court's decision.⁶⁶ Neither the Fourth nor the Sixth Circuit provides in its local rules for the Judgment Order practice, but many of the opinions examined cannot be distinguished from such orders. In fact, when an excessively truncated or conclusory opinion is coupled with the absence of oral argument and a no-citation rule, the result is indistinguishable in appearance and effect from a denial of certiorari—a strange position for a court with mandatory appellate jurisdiction.⁶⁷

The failure of sixteen percent of the Fourth and thirty-four percent of the Sixth⁶⁸ Circuit cases to provide *any* basis for the decision gives rise to concern for the effect of limited publication rules on the quality of a court's work. To put it another way, when the number of no-basis decisions and reference-only decisions was combined, fewer than half the opinions we examined gave the appearance that justice was being done; if that result is a function of limited publication rules, then very careful thought must be given to whether the game is worth that particular candle.

C. *Reversals.*

The core notion behind the movement toward limited publication is that many judicial opinions do not merit publication. They are straightforward applications of settled law to garden variety facts. Accordingly, they serve only to settle the dispute between the parties and

1978), in which the court quoted from the testimony of a pathologist to support an affirmation that plaintiff's husband had not been totally disabled just prior to his death. *Id.* at 2.

64. *E.g.*, *Soefker v. Massachusetts Mut. Life Ins. Co.*, No. 76-2295 (6th Cir. Feb. 15, 1978).

65. *See Reynolds & Richman* 1173-74.

66. *See id.* 1174-75.

67. *See, e.g.*, 28 U.S.C. § 1291 (1976).

68. The higher percentage of opinions that failed to provide any basis for the decision in the Sixth Circuit does not necessarily suggest less care by that court. The Fourth Circuit, had it not made so many decisions by reference, might have had a comparable figure. Indeed, the Sixth Circuit had more opinions that satisfied minimum standards.

are of no interest to the bench, the bar, or the public.

Whether this basic premise can justify nonpublication when the court of appeals reverses a district court or an administrative agency decision is problematic because reversals are inherently interesting: by definition, something has gone wrong.⁶⁹ The interest in the phenomenon of reversal suggests three hypotheses: first, that the reversal rate in unpublished opinions would be lower than that in published opinions; second, that most reversals would be published; and third, considering the radical/conservative dichotomy, that the reversal rate in the unpublished opinions of the Fourth Circuit would be lower than that in the Sixth Circuit. The data confirm all three hypotheses.⁷⁰

TABLE IV
FOURTH CIRCUIT REVERSALS

| <u>Total Published</u> | <u>Number</u> | <u>Percentage</u> |
|--|---------------|-------------------|
| Orders & Opinions | 45 | 100 |
| Affirmances | 32 | 71.1 |
| Reversals | 13 | 28.9 |
| <u>Total Unpublished</u> | | |
| Orders & Opinions | 200 | 100 |
| Affirmed | 192 | 96 |
| Reversed | 8 | 4 |
| <u>Combined Published or Unpublished</u> | | |
| | 245 | 100 |
| Affirmed | 224 | 91.4 |
| Reversed | 21 | 8.6 |

69. From the point of view of the legal formalist, for example, the law can be regarded as a closed logical system in which correct legal decisions can be deduced from clear predetermined legal rules. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601 n.25, 608 (1958). See also R. DIAS, JURISPRUDENCE 451 (4th ed. 1976). The reversal is interesting because it shows that the "rule," the major premise of the legal syllogism, may not be as clear as it should be. Equally interesting is the alternative explanation of a reversal, that the district court or administrative agency simply made an elementary error. Elementary errors by the primary decisionmakers in the federal judicial system also merit attention.

To the legal realist, the law is not an algorithm for deducing results from the facts and clear legal rules. Rather the decision results from the judge's "hunch," see, e.g., J. FRANK, LAW AND THE MODERN MIND (1930), pt. 1, ch. 12; Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274 (1929), or from his "situational sense," K. LEWELLYN, *supra* note 54, at 121, and the opinion is the judicial advocate's argument for the decision reached. From this point of view, the reversal may be more interesting still, since it may reflect the fact that the sonorous generalizations intoned by appellate courts are inadequate to deal with the facts daily encountered by the trial judge.

70. The χ^2 in each hypothesis is, respectively, with 1 d.f.: 41.688, 1.8947, 8.696. Each is significant at the 95% level.

TABLE V
SIXTH CIRCUIT REVERSALS

| <u>Total Published</u> | <u>Number</u> | <u>Percentage</u> |
|--|---------------|-------------------|
| Orders & Opinions | 97 | 100 |
| Affirmed | 66 | 68 |
| Reversed | 31 | 32 |
| <u>Total Unpublished</u> | | |
| Orders & Opinions | 200 | 100 |
| Affirmed | 176 | 88 |
| Reversed | 24 | 12 |
| <u>Combined Published or Unpublished</u> | | |
| | 297 | 100 |
| Affirmed | 242 | 81.5 |
| Reversed | 55 | 18.5 |

Tables IV and V strongly support the first hypothesis: the unpublished opinions of both circuits show a low percentage of reversal; that is, most reversals are published. In the Fourth Circuit the reversal rate in published opinions (28.9%) is over seven times as great as is the reversal rate in unpublished opinions (4%). In the Sixth Circuit the percentages are somewhat closer (32% reversal rate in published opinions, 12% reversal rate in unpublished opinions), but the ratio is still nearly three to one.

Support for the second hypothesis, that most reversals *would* be published, is less apparent; thirty-eight percent of the reversals in the Fourth Circuit and forty-three percent of those in the Sixth Circuit are unpublished. The most plausible explanation of those somewhat high figures is a high rate of reversal for elementary error. If this explanation is the correct one, it is information that should be shared with the public.

The third hypothesis is more problematic. The Fourth Circuit's conservative publication plan would be expected to generate a smaller percentage of unpublished reversals than would the Sixth Circuit's radical plan. The data seem to support the hypothesis. Only four percent of the Fourth Circuit's unpublished opinions were reversals while the corresponding figure for the Sixth Circuit is twelve percent. The inference that the hypothesis is correct can only be tentative, however, since the overall reversal rate (including both published and unpublished

opinions) is significantly higher in the Sixth Circuit than in the Fourth (18.5% as against 8.6%).⁷¹ The Sixth Circuit's higher reversal rate in unpublished opinions may simply reflect its higher overall reversal rate and not the failure of its publication plan to select reversals for publication.

A serious question posed by these data, and by the very nature of the phenomenon of reversal, is whether all reversals should be published. A survey of the unpublished reversals of the Fourth and Sixth Circuits indicates that publication of some of these opinions would clearly serve no purpose. Among them are cases in which an event—a change in the relevant facts or the appropriate legal standard—subsequent to the district court's decision required reversal. Consider *Rutherford v. Blankenship*.⁷² In that case the district court entered an order dismissing Rutherford's petition for habeas corpus relief because Rutherford had failed to exhaust all his available state remedies.⁷³ Two days later the Supreme Court of Virginia denied Rutherford's petition for state habeas corpus relief—his last available state court remedy. Accordingly, the Fourth Circuit vacated the district court's judgment and remanded the case for consideration in light of the altered facts. Publication of such an opinion would serve no real purpose; it does not reveal any interesting development in the law, nor even an interesting or controversial error by the district court.⁷⁴

71. The reversal rates for both circuits were tabulated by counting as an affirmance any decision that is a partial affirmance and partial reversal. This procedure was followed because it is the one used by the Administrative Office of the United States Courts. See 1977 ANNUAL REPORT 175. Isolating the partial affirmances changes the percentages somewhat, but not a great deal. During the study period, the Fourth Circuit produced 13 partial affirmances—6 published, 7 unpublished; the Sixth Circuit produced 9 partial affirmances—5 published, 4 unpublished.

Adding these figures to the reversals for each circuit, it is possible to generate "nonaffirmance" rates. The nonaffirmance rate in the Fourth Circuit is 42% among published opinions and 7.5% among unpublished opinions. In the Sixth Circuit the nonaffirmance rate is 37% among published opinions and 14% among unpublished opinions.

The reversal rates are within the approximate range of reversal rates typically noted for the United States Circuit Courts of Appeal in 1976. See *id.*

72. No. 78-6050 (4th Cir. Feb. 9, 1978).

73. See 28 U.S.C. § 2254 (1976); see generally Wells, *Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307, 1335-37.

74. A similar case is *Sloan v. Mathews*, No. 76-2628 (6th Cir. Mar. 14, 1978), in which plaintiff had been denied benefits that he claimed under the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-941 (1976). The denial of benefits by the Administrative Law Judge, the Secretary, and the district court occurred prior to the Sixth Circuit's holding in *Ansel v. Weinberger*, 529 F.2d 304 (6th Cir. 1976), in which the standards of proof of black lung disease were changed. This change in the applicable standard of proof required reversal for factual determinations based upon the new test. See also *Dayton Malleable Iron Co. v. United Steelworkers Local 3664*, No. 76-2011 (6th Cir. Mar. 20, 1978) in which the Sixth Circuit reversed the district court's civil contempt citation of a local union. After the district court's ruling, but before the decision on appeal, the Sixth Circuit decided *Peabody Coal Co. v. Local 1734, UMW*, 543 F.2d 10 (6th Cir. 1976), *cert.*

Another group of cases, which probably deserves no general dissemination, consists of those cases in which the appellate court disagrees with the tribunal below concerning inferences to be drawn from the facts. In *Davis v. Mathews*,⁷⁵ for example, the Secretary of HEW determined that a miner's widow was not entitled to black lung benefits. His ruling, with which the district court agreed, was based on the finding that the miner was not totally disabled at the time of his death. The Sixth Circuit reviewed the evidence before the Secretary and the district court and came to the opposite conclusion. The appellate court did not find fault with the district court's standard for review of administrative rulings (substantial evidence), but simply disagreed with the lower court that the test had been met.⁷⁶ Upon the same facts, the appellate court made the inference of total disability, while the Secretary and the district court did not.

A more troublesome kind of reversal occurs when the district court has made a trivial and perhaps embarrassing error. In *Kendall v. Zahradnick*,⁷⁷ a pro se prisoner civil rights action, the Fourth Circuit reversed the district court's grant of the correctional officers' summary judgment motion. Three years before *Kendall*, in *Roseboro v. Garrison*,⁷⁸ the Fourth Circuit had held that summary judgment is inappropriate unless the prisoner has been "advised of his right to file counter-affidavits or other responsive material and alerted to the fact that his failure to so respond might result in the entry of summary judgment against him."⁷⁹ In *Kendall*, the district court failed to send the required notification. In *United States v. Inman*,⁸⁰ a similar mistake seems to have occurred. The district court dismissed the information against the defendant because he had been denied his constitutional right to a speedy trial. The Sixth Circuit reversed, "noting that it does not appear

denied, 430 U.S. 940 (1977), in which it held that mass wildcat action of the union members (absent, or in violation of, union orders) was not sufficient to hold the unions in civil contempt.

75. No. 76-1811 (6th Cir. Jan. 30, 1978).

76. See also *Groves v. Secretary of HEW*, No. 76-1687 (6th Cir. Mar. 21, 1978) (Secretary's denial of disability benefits "not sustained by substantial evidence on the record considered as a whole").

77. No. 77-2089 (4th Cir. Jan. 23, 1978).

78. 528 F.2d 309 (4th Cir. 1975).

79. *Id.* at 310. One of the more intriguing ironies in the limited publication debate is that the rule of *Roseboro* was first announced in an unpublished opinion. *Daye v. Turner*, No. 74-1153 (4th Cir. July 1, 1975). *Daye* was regarded as so important at the time that several district courts began composing form letters to pro se prisoner litigants that informed them of their rights and obligations under FED. R. CIV. P. 56(e). The Fourth Circuit apparently recognized that it had suppressed a law making opinion and remedied the problem by publishing *Roseboro*. *Roseboro*, however, makes no reference to *Daye*.

80. No. 77-5256 (6th Cir. Feb. 15, 1978).

that the District Judge founded his decision upon the controlling precedent on the constitutional right to a speedy trial, *Barker v. Wingo* . . . or made findings of fact in relation to its four standards"⁸¹ This is a fundamental error; *Barker v. Wingo*⁸² is the central case on the question and the district judge appears to have ignored it.

The argument that these cases should be published is strong. In the first place they are not as rare as might be hoped.⁸³ The bench and the bar ought to know if and when such rudimentary errors are made.⁸⁴ Litigation strategy may be influenced by the litigants' appraisal of the judge's or the agency's likelihood of making an obvious mistake. Furthermore, the present emphasis on governmental candor seems to require that the courts be the last branch to bury their mistakes.

81. *Id.*

82. 407 U.S. 514 (1972).

83. *See, e.g.*, *Jackson v. Tennessee Valley Auth.*, No. 76-1841 (6th Cir. Feb. 17, 1978) (district court failed to notice the absence of subject matter jurisdiction: "[t]his order should also represent an admonition to the district court not to accept the parties' unsupported assertions that federal jurisdiction exists in this, or any other, case."); *Holoviak v. Califano*, No. 77-3096 (6th Cir. Feb. 9, 1978) (district court entered a default judgment against the United States without requiring evidence of claimant's entitlement—a direct violation of FED. R. CIV. P. 55(e)); *Baskin v. Jago*, No. 77-3417 (6th Cir. Jan. 10, 1978) (district court treated a habeas corpus petition as though petitioner had entered a guilty plea, which petitioner stated he had, when in fact the petitioner had been found guilty in a trial to the court); *United States v. Winstead*, No. 77-1941 (4th Cir. Jan. 6, 1978) (district court failed to comply literally with FED. R. CRIM. P. 11—the court did not "personally inform" defendant of charges against him on the record).

84. A similar though distinguishable phenomenon can be discerned in the district courts' treatment of summary judgment motions in prisoner civil rights cases. The problem, particularly in the Fourth Circuit, seems not to be one of embarrassing error, but rather of silent revolt. The Fourth Circuit has clearly articulated a strict standard for the granting of summary judgment. There can, of course, be no dispute as to any material fact, and a further "inquiry into the facts [must not be] desirable to clarify the application of the law." *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). Moreover, the court has indicated that a dispute about inferences from undisputed fact is sufficient to require denial of the motion:

Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances, the case is not one to be decided on a motion for summary judgment.

American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co., 354 F.2d 214, 216 (4th Cir. 1965) (citations omitted); *see Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967). Furthermore, the court has held that the district courts should be especially reluctant to grant summary judgment against a pro se prisoner litigant. *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976). Nevertheless, the district courts continue to grant summary judgment against pro se prisoner civil rights litigants, and the Fourth Circuit continues to reverse—principally by unpublished opinion. *See, e.g.*, *Jones v. Collins*, No. 77-2233 (4th Cir. Feb. 28, 1978); *Easter v. Zahradnick*, No. 77-2323 (4th Cir. Feb. 8, 1978); *O'Connor v. Jarvis*, No. 77-1559 (4th Cir. Jan. 17, 1978); *Sykes v. Williams*, No. 77-1531 (4th Cir. Jan. 16, 1978). Speculation concerning why the district courts and the circuit court cannot seem to agree on this matter is unnecessary; it seems sufficient to conclude that this is not the sort of recurrent problem that should be submerged in unpublished opinions.

The most troublesome reversals in the sample were those that warranted publication because they were controversial or novel. Indeed, two decisions of the Sixth Circuit were sufficiently controversial to provoke dissents,⁸⁵ yet the opinions remained unreported.

The Sixth Circuit missed a significant opportunity to give guidance to the district courts by failing to publish *Moorer v. Griffin*.⁸⁶ In that case, the appellant, a pro se prisoner litigant, failed to comply with rule 4(a) of the Federal Rules of Appellate Procedure by not filing notice of appeal in the district court within thirty days of entry of judgment against him. When notice of appeal was finally filed—about fifteen days late—the district court denied appellant's motion for a certificate of probable cause for the appeal. The Sixth Circuit indicated that rule 4(a) is "mandatory and jurisdictional";⁸⁷ the court noted, however, that rule 4(a) permits the district court to grant a thirty-day extension of the time limit upon a showing of excusable neglect. It then held that the district courts should not treat notices of appeal by pro se litigants as untimely until the litigant has been advised of the permissible extension period under rule 4(a) and of the requirement of a showing of excusable neglect.⁸⁸ This rule is good law;⁸⁹ it concerns a problem with which district courts must deal regularly; there apparently is no published Sixth Circuit case on point. Thus, *Moorer* is a clear-cut case of suppressed precedent.

Examples of suppressed precedent appear among the Fourth Circuit's reversals as well. In *Woodard v. Shannon*,⁹⁰ a prisoner civil rights action, plaintiff sued his jailers, alleging "that they had circulated a memorandum inaccurately describing petitioner as a security risk."⁹¹ The district court dismissed the complaint as frivolous. The Fourth Circuit reversed, noting that plaintiff was apparently asserting "a constitutional right to inspect his prison file on the ground that his due process rights may have been violated by the inclusion of the misinfor-

85. See *United States v. 150.89 Acres of Land*, No. 76-1874 (6th Cir. Mar. 29, 1978); *Usery v. Michigan Nat'l Bank*, No. 76-2159 (6th Cir. Feb. 10, 1978). See notes 98-122 *infra* and accompanying text for a discussion of separate opinions.

86. No. 77-3580 (6th Cir. Apr. 6, 1978).

87. *Id.* at 3 (citing *United States v. Robinson*, 361 U.S. 220, 229 (1960)). This proposition is well settled. *Browder v. Director*, 434 U.S. 257 (1978).

88. *Moorer v. Griffin*, No. 77-3580, at 4 (6th Cir. Apr. 6, 1978) (citing *Craig v. Garrison*, 549 F.2d 306, 307 (4th Cir. 1977)).

89. Four other circuits have approved the rule. See *Craig v. Garrison*, 549 F.2d 306, 307 (4th Cir. 1977); *Stirling v. Chemical Bank*, 511 F.2d 1030 (2d Cir. 1975); *Alley v. Dodge Hotel*, 501 F.2d 880 (D.C. Cir. 1974); *Bryant v. Elliott*, 467 F.2d 1109 (5th Cir. 1972).

90. No. 77-2112 (4th Cir. Feb. 21, 1978).

91. *Id.* at 2.

mation in his record."⁹² The existence *vel non* of such a right is a controversial and novel issue,⁹³ one that should have been exposed to scrutiny by publication. The issue is not entirely novel in the Fourth Circuit, however; it was raised in *Wilkins v. Fleshood*,⁹⁴ in which the court enumerated the elements that a prisoner must prove to show the deprivation claimed. The court in *Shannon* cited *Wilkins* to the district court as the standard to use upon remand. But *Wilkins* also is unpublished. The Fourth Circuit, then, has been confronted with a controversial and novel issue that it has twice decided without issuing an opinion for public consumption.

The original question⁹⁵ motivating the survey of reversals was whether all reversals should be published, that is, whether the fact of reversal should be added to the list of criteria for publication. A strong case can be made for that addition. First, the total number of unpublished reversals in both circuits has been low, so the added burden on the court of preparing the extra opinions for publication will not be large. Further, many of the reversals canvassed⁹⁶ did contain a great deal of discussion and information that would have been useful to the bench and bar. Finally, reversal as a criterion for publication has an additional benefit—ease of application. While many of the present standards are difficult to apply,⁹⁷ it is easy to determine whether a case has been reversed. In sum, a fairly strong argument can be made that the circuits should add to their list of publication standards one requiring publication of an opinion that reverses entirely or in part the district court or administrative agency decision below.

D. *Separate Opinions.*

Examination of the role of separate opinions in our judicial system⁹⁸ leads to the hypothesis that few cases that generate separate opinions will go unpublished. A concurring or dissenting opinion criticizes

92. *Id.* at 3.

93. See, e.g., *Kelsey v. Minnesota*, 554 F.2d 895 (8th Cir. 1977); *State v. Rhodes*, 54 Ohio St. 2d 41, 374 N.E.2d 641 (1978). For a digest of recent cases, see CORRECTIONAL L. DIG. 1978 at 147 (F. Merritt ed. 1979).

94. No. 74-2214 (4th Cir. July 24, 1975).

95. See text accompanying notes 72-74 *supra*.

96. See text accompanying notes 77-94 *supra*.

97. Consider, for example, one of the Fourth Circuit's standards. 4TH CIR. R. 18(a)(ii), provides for publication of an opinion if it "involves a legal issue of continuing public interest." Determining whether an issue is of continuing public interest might be a good deal more difficult than deciding how the court should rule on the issue.

98. See generally Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952); ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959).

the position taken by the majority and asks for correction from those with power to do so—a higher court, the Congress, or “the intelligence of a later day.”⁹⁹ If the criticism is not published, those with the power to correct the mistake of the majority may remain unaware of the problem and thus not be impelled to action. We should, therefore, expect a judge who writes a separate opinion to seek its publication in order to vindicate his views. The expected publication of dissident views can also be explained in terms of judicial dynamics; separate opinions are a rare enough phenomenon on most courts¹⁰⁰ so that the normal pattern of collegiality will be disrupted only in publishable cases—“important” ones—those significant enough to arouse a judge’s “fighting conviction.”¹⁰¹

The hypothesis received strong support from the data produced by our sample. Although neither circuit expressly provides for publication in the event of a separate opinion,¹⁰² the unpublished list of both circuits contained few opinions rendered by a divided court; only seven of the four hundred cases in the sample contained a separate opinion. Moreover, as Table VI illustrates, the frequency of dissidence was a good deal higher among published than unpublished decisions.

TABLE VI
SEPARATE OPINIONS

| | Published | | | | Unpublished | | | |
|----------------|-------------|---------|----------------|-----------------------------|-------------|---------|----------------|-----------------------------|
| | Concurrence | Dissent | Total Opinions | Frequency of Split on Court | Concurrence | Dissent | Total Opinions | Frequency of Split on Court |
| Fourth Circuit | 2 | 8 | 45 | 22% | 1 | 0 | 200 | 0.5% |
| Sixth Circuit | 4 | 6 | 97 | 10% | 2 | 4 | 200 | 3% |

The important question here, as in the discussion of reversals, is whether all opinions accompanied by a dissent or a concurrence should be published. A careful look at the separate opinions in the sample helps to answer the question. Some of the separate opinions reveal disagreement over the present state of the law, thus clearly implicating the

99. The phrase is part of a comment on dissents by Chief Justice Stone: A dissent, he wrote, “is an appeal to the brooding spirit of the law, to the intelligence of a later day” C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

100. We know of no comprehensive data on frequency of separate opinions from the courts of appeals. Only 5% of the 532 opinions in the study period contained one. Data from other courts, along with a discussion of frequency of dissent, can be found in Reynolds, *The Court of Appeals of Maryland: Roles, Work and Performance*, 37 MD. L. REV. 1, 33 & n.148 (1977).

101. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 9 (1966).

102. The Ninth Circuit, however, does provide for publication if there is a separate opinion. 9TH CIR. R. 21(b)(6).

court's law-declaring function. In *Branham v. General Electric Co.*,¹⁰³ for example, the two sides split on whether the Tennessee statute of limitations applied to a suit for injunctive as well as monetary relief under the federal civil rights acts. The issue is important since the Tennessee statute addresses itself specifically to the federal civil rights acts;¹⁰⁴ the question of injunctive relief comes up quite frequently and is a matter of great public concern. Furthermore, the issue is a difficult and novel one: the statute speaks of actions for "compensatory or punitive damages"¹⁰⁵ but does not mention injunctive relief. Finally, a review of the available case law reveals no authority on the question.¹⁰⁶ Here was a case, then, that generated disagreement on an important, novel, and potentially recurrent issue, yet that went unpublished.¹⁰⁷

Other separate opinions are valuable because of their probing criticism of the current state of the decisional or statutory law. In *United States v. Battista*,¹⁰⁸ for example, the district court, following defendant's conviction on an obscenity offense, set his bail at \$12,500 and imposed the additional condition that defendant not distribute or be associated with the distribution of any obscene literature.¹⁰⁹ The Sixth Circuit affirmed the order setting bail, but modified it by deleting the additional condition. Judge Engel recognized in his thought-provoking concurrence that the condition attached to defendant's release was not permissible under the relevant statutes.¹¹⁰ He found it anomalous,

103. No. 76-2471 (6th Cir. Apr. 14, 1978).

104. See TENN. CODE ANN. § 28-304 (Cum. Supp. 1978). In most cases, of course, state statutes of limitations do not provide directly for federal civil rights cases. Nevertheless, the federal courts use the closest analogous state statute in determining the limitations period for civil rights claims. See *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973), *aff'd*, 421 U.S. 454 (1975).

105. TENN. CODE ANN. § 28-304 (Cum. Supp. 1978).

106. The annotations to the Tennessee Code reveal no case that has treated the issue. *Id.* Neither the majority nor the dissent cites any controlling precedent. *Branham v. General Electric Co.*, No. 76-2471 (6th Cir. Apr. 14, 1978). As far as can be determined, the case was one of first impression.

107. Another disagreement over the present state of the law, or perhaps the direction the law should develop, occurred in *Usery v. Michigan Nat'l Bank*. No. 76-2159 (6th Cir. Feb. 10, 1978). The dispute in that case grew out of the Department of Labor's investigation of a sex discrimination complaint against the bank. In the course of discovery, the district court ordered the Secretary to give the bank the names of all present and former employees of the bank who had given information to the Secretary. On appeal, the majority reversed, citing *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977). Judge Merritt dissented. He read the treatment of the informer's privilege in *Dunlop* to be dictum and expressed a strong feeling that the court should be reluctant to create any new evidentiary privileges or extend any old ones. *Usery* presents a clear disagreement over the present state of the law, or at least over the direction in which the law should develop.

108. No. 78-5008 (6th Cir. Mar. 8, 1978).

109. *Id.*

110. See 18 U.S.C. §§ 3146, 3148 (1976). Section 3146 indicates five permissible restrictions

however, that a district judge "cannot, after a defendant has been convicted, impose as a condition of his freedom pending appeal a requirement that he refrain from the same type of conduct which brought about his conviction . . ."¹¹¹ The concurrence raises several troubling questions: Are the federal bail statutes correct in directing the judge's attention almost exclusively to the possibility of flight? Does the exception for "danger to . . . the community"¹¹² include the kind of danger obscene materials are thought to pose? Surely these serious questions about the federal bail statutes should not have been suppressed by nonpublication. Their exposure might have drawn the attention of the Congress—those with the power to correct the problem.

A judge may dissent not because he disagrees about the state of the law or about the merits of the law, but because he thinks the law has been improperly applied. An example is *Helm v. Mathews*,¹¹³ an appeal from a denial of black lung benefits.¹¹⁴ The majority affirmed on the basis of the opinion below that the miner had been denied benefits because his pulmonary dysfunction was not job related. The district court and the majority reached this conclusion based upon the length of time after the plaintiff left the mines before his symptoms began to appear.¹¹⁵ Judge Edwards disagreed and cited "the medically accepted fact that pneumoconiosis is a progressive disease which advances with age."¹¹⁶ The mere fact that symptoms were delayed in appearing was not sufficient, in his view, to overcome the administrative presumption¹¹⁷ that the miner was disabled by pneumoconiosis. Judge Ed-

on a defendant's right to bail. All seem to be addressed to insuring his appearance at trial. Section 3148 makes the conditions of section 3146 applicable to bail after defendant's conviction. It also permits denial of release on bail when no condition will prevent the defendant's flight or protect the community from the danger he poses.

111. *United States v. Battista*, No. 78-5008, at 3 (6th Cir. Mar. 8, 1978) (Engel, J., concurring).

112. 18 U.S.C. § 3148 (1976).

113. No. 76-2257 (6th Cir. Feb. 15, 1978). *See also Kantor v. Dunn*, No. 76-2165 (6th Cir. Feb. 7, 1978). That case involved a complaint by a Jewish person that Saturday employment testing violated her first amendment right to the free exercise of her religion. The district court found that the burden on plaintiff was "minimal" and was counterbalanced by the state's substantial administrative and financial interests. In dissent, Judge Merritt argued that the state's only reason for failing to provide an alternative testing date was "bureaucratic stubbornness—which is not a legitimate reason, much less the kind of 'compelling reason' required by the First Amendment." *Id.* at 2.

It is not clear whether the dispute in *Kantor* was over the standard to be applied, or over whether that standard "had been satisfied." Perhaps that uncertainty is another argument for publication of cases with separate opinions.

114. *See* 30 U.S.C. §§ 901-941 (1976).

115. No. 76-2257 (6th Cir. Feb. 15, 1978).

116. *Id.* at 2 (Edwards, J., dissenting).

117. *Id.* The presumption is triggered by pulmonary dysfunction tests and the miner's having worked in the nation's coal mines for at least 15 years. 20 C.F.R. § 410.490(b)(1)(ii) (1978) (in-

wards' disagreement is important; because this question of law recurs¹¹⁸ and is of great public interest in the region, disagreement on it should be brought to the attention of the public.

Two cases in the sample, despite their separate opinions, can claim no real legal significance or public interest.¹¹⁹ Even these cases may warrant publication, however; the separate opinion serves as a kind of safety valve,¹²⁰ permitting the dissenting judge to blow off steam. While such opinions break no new ground, they do reveal the presence of intellectual ferment and independent thought on the court.¹²¹ These are phenomena that the bar and the public should be able to observe.

The results of the study suggest that it would be wise to require publication in all cases in which there is a dissent or concurrence. Because the number of unpublished decisions with separate opinions is small (in our sample at least), such a rule would cost little in terms of judicial resources expended, yet would insure publication of a group of opinions that in all likelihood should be available—to guide litigants and planners, to provoke critical commentary, and to assure a forum for any issue about which a judge feels strongly enough to dissent or

terim rule for claims filed before July 1, 1973, or for survivor where miner died before Jan. 1, 1974). It can be rebutted only by "persuasive" evidence. *Id.* § 410.416.

118. See Table VII *infra* and text accompanying notes 127-28 *infra* for an indication of how numerous black lung appeals are in the Sixth Circuit.

119. In *United States v. 150.89 Acres of Land*, No. 76-1874 (6th Cir. Mar. 29, 1978), the majority granted a new trial in a condemnation case because of an uncorrected, unintentional error by the government's expert witness. Judge Engel dissented on the ground that the district judge had ample discretion to grant or deny the new trial motion. The law in this area is quite well settled. See generally F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 7.18 (2d ed. 1977).

In *United States v. McCartney*, No. 76-1933 (4th Cir. Feb. 8, 1978), the plaintiff asked that a West Virginia Democratic primary election for Magistrate be set aside. The district court dismissed the complaint for failure to state a claim upon which relief can be granted. The majority affirmed, noting that "plaintiff does not recite or even allude to a single illegal practice, or federal or state law violated, or refer to a single fact to support his claim." *Id.* at 2. Judge Haynsworth concurred. He agreed that the complaint should have been dismissed, but thought that the proper basis for the dismissal was lack of subject matter jurisdiction. *Id.* at 3. One can only guess, but it seems possible that Judge Haynsworth questioned the appropriateness of a dismissal for failure to state a claim upon which relief can be granted because the accepted rule for such a dismissal is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citation omitted). Judge Haynsworth may have relied on the conventional wisdom that the standards for pleading subject matter jurisdiction are somewhat higher than those for pleading on the merits. See generally FED. R. CIV. P. 8(a)(1)-(2); C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* (1969) (compare § 1206 and § 1350 with §§ 1216-1220 and §§ 1356-1357).

120. See Stephens, *supra* note 98, at 398-401.

121. Cf. *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 170 (D. Danelski & J. Tulchia, eds., 1973) ("Justice Harlan was disturbed by the serenity of the Court and complained to me that there were too few dissents.").

concur.¹²²E. *Subject Matter Classification.*

Subject matter classification of the published and unpublished opinions in the sample produced some interesting, though not unpredictable, results. They are summarized in Table VII.

TABLE VII

SUBJECT MATTER CLASSIFICATION OF FOURTH & SIXTH CIRCUIT PUBLISHED & UNPUBLISHED OPINIONS

| | Fourth Circuit Published | Fourth Circuit Unpublished | Sixth Circuit Published | Sixth Circuit Unpublished |
|-------------------------------|-----------------------------|-------------------------------|----------------------------|------------------------------|
| Total Cases | 45 | 200 | 97 | 200 |
| Total Criminal | 6 | 26 | 27 | 57 |
| Total Civil | 39 | 174 | 70 | 143 |
| Total U.S. Cases | 16 | 26 | 30 | 63 |
| U.S. Plaintiff | 7 | 2 | 12 | 9 |
| Contract actions | 1 | | | |
| Condem. of land | 1 | | | 2 |
| Civil Rights | 2 | | | |
| Fair Labor Standards Act | | | | 1 |
| Labor Mgt. Relations Act | 1 | 2 | 10 | 2 |
| Securities, Commodities, etc. | | | | 1 |
| Tax suit | | | | 2 |
| Other | 2 | | 2 | 1 |
| U.S. Defendant | 9 | 24 | 18 | 54 |
| Tort actions | 3 | | | 1 |
| Prisoner petitions: | | | | |
| Motions to vacate | | 6 | | 8 |
| Prisoner civil rights | | | | 2 |
| Social Security | 1 | 4 | 2 | 16 |
| Black lung | 1 | 5 | | 15 |
| Tax suits | 1 | 1 | 5 | 1 |
| All other | 3 | 8 | 11 | 11 |
| Private Cases | 23 | 146 | 40 | 78 |
| Federal Question | 19 | 135 | 32 | 57 |
| Contract actions | | | 2 | |
| Employer's Liability Act | | | 1 | 1 |
| Marine Injury | | 1 | 3 | 1 |
| Other tort actions | 1 | | 2 | |
| Civil Rights | 3 | 4 | 12 | 19 |
| Antitrust | 2 | | 1 | |
| Prisoner Petitions: | | | | |
| habeas corpus | 5 | 51 | 3 | 17 |
| prisoner civil rights | 5 | 77 | | 11 |
| unclassified | | 2 | | |
| Labor Mgt. Relations Act | | | 1 | |
| Patent | | | 1 | |
| Securities, Commodities, etc. | 2 | | 1 | |
| All other | 1 | | 5 | 8 |
| Diversity of Citizenship | 4 | 11 | 8 | 21 |
| Insurance | 1 | 2 | 4 | 6 |
| Other contract actions | 2 | 7 | 3 | 7 |
| Real Property Action | | 1 | | |
| Personal injury (not auto) | 1 | | | 4 |
| Other tort actions | | 1 | 1 | 3 |
| All other | | | | 1 |

122. A rule requiring publication only when at least one judge believes it desirable is insufficient because the dissident may feel collegial pressure not to make his views public. Further, a two-judge requirement provides a mechanism by which dissent can be stifled. *See Musmanno v. Eldredge*, 382 Pa. 167, 114 A.2d 511 (1955), for an extreme example. Kurt Nadelmann, in *Nadelmann, The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMP. L. 415 (1959), traced the history of the struggle to obtain the right to publish a dissent. After mentioning great Supreme Court dissents, Nadelmann concluded: "Happily, views such as these have not been lost in the secret of the *Chambre du Conseil* or buried in a secret *Protokoll* or file." *Id.* 432.

| | | | | |
|--------------------------|---|----|----|----|
| Civil Unclassifiable | | 2 | | 2 |
| Total Criminal Cases | 6 | 26 | 27 | 57 |
| Homicide | | | | 1 |
| Robbery (bank) | 2 | 1 | 3 | 10 |
| Assault | | | 1 | 2 |
| Larceny & theft: | | | | |
| Interstate shipment | | | | 1 |
| Trans. stolen prop. | | | 2 | 3 |
| Other | | | | 1 |
| Fraud: | | | | |
| Income tax | | | | |
| Mail | | | 3 | |
| Other | | 1 | | 1 |
| Trans.—Forged Securities | | 2 | 1 | 2 |
| Forgery | | | 2 | 1 |
| Counterfeiting | | | | 1 |
| Narcotics: | | | | |
| DAPCA narcotics | | | 1 | 1 |
| DAPCA controlled sub. | 2 | 3 | 6 | 2 |
| Miscellaneous concern: | | | | |
| Extortion | | | 1 | 2 |
| Gambling | 1 | 1 | | |
| Kidnapping | | | | 1 |
| Firearms | 1 | 3 | 5 | 5 |
| Other | | | 1 | 1 |
| Federal Statutes | | | 1 | 2 |
| Criminal Unclassifiable | | 15 | | 18 |

The overall unpublished to published ratio in the sample period is approximately four to one in the Fourth Circuit and two to one in the Sixth Circuit. Subject matter classifications that vary significantly from this ratio provoke inquiry and speculation.

The most striking deviation from the normal ratio occurs in prisoner cases, including federal and state habeas corpus petitions and federal and state civil rights complaints: the Fourth Circuit published ten and left unpublished 134; the Sixth Circuit published three and left unpublished thirty-eight.¹²³ In each circuit the unpublished/published ratio was, therefore, about thirteen to one—a wide deviation from the normal ratio.¹²⁴ One possible explanation for this deviation is simply that prisoner cases are (or at least are regarded by the judges as) repeti-

123. The Fourth Circuit total of 144 prisoner cases is significantly higher than that of the Sixth Circuit—43. Those figures become more surprising with the realization that the Fourth Circuit sample period was considerably shorter than the sample period for the Sixth Circuit. See note 38 *supra*. A bit of research discloses, however, that this extraordinarily high number of prisoner cases is typical for the Fourth Circuit. In 1977, for example, the total number of state prisoner petition appeals filed in the United States Courts of Appeals was 1,650—406 of which (nearly 25%) came from the Fourth Circuit. See 1977 ANNUAL REPORT 174. There is no ready explanation for this flood of prison litigation in the Fourth Circuit. The state prison population of the Fourth Circuit is approximately the same as that of the Sixth, although the per capita incarceration rates of the Fourth Circuit states are higher than the corresponding rates of the Sixth Circuit states.

124. It has been suggested that the use of unpublished opinions in prisoner cases poses serious constitutional problems. The Chicago Council of Lawyers filed an Amicus Brief in *Browder v. Director*, 434 U.S. 257 (1978), in which it argued that the Seventh Circuit's limited-publication policy violated the first amendment and the right of equal access to and treatment by the courts. Amicus argued that the effects of the plan were likely to be felt most acutely by indigent or prisoner litigants, or those geographically distant from the courts. The Supreme Court did not consider any of these issues.

The sample provides some support for the equal access argument. The disproportionate

tive and trivial. Several judges have remarked on "the absurdity of invoking the full panoply of the federal judicial system in a dispute regarding a prisoner's right to seven packages of cigarettes."¹²⁵ A possible explanation for the perceived frivolity of these cases is the lack of disincentives to appeal.¹²⁶ Most prisoners proceed in forma pauperis and pro se (although some have appointed counsel); once past the district court, the prisoner appellant need make no additional investment in money and very little additional investment in time. The sentiment must therefore be, "why not appeal?" This situation is likely to produce many frivolous appeals, appeals that, according to all publication plans, do not merit general dissemination.¹²⁷

Another category with a deviant ratio is social security (including black lung) cases. Here the Fourth Circuit's ratio is almost typical—9:2. The Sixth Circuit's ratio, however, is significantly above normal. That court published two decisions in the area and left thirty-one unpublished to produce a ratio of 15:1—significantly greater than the typical 2:1 ratio for the Sixth Circuit sample.

One possible explanation for both of these deviant ratios is that the judges feel pressured in these kinds of cases. In each instance the number of filings in the case category is high and has been the subject of recent and dramatic increase.¹²⁸ The flood of cases of a specific type—particularly when that flood is a comparatively new phenome-

number of prisoner petitions that are unpublished means that the prisoner litigant has less law in his field to rely on than does, say, the patent or tax litigant.

There is, however, an immediate problem with this argument. It may be that infrequent publication of prison litigation aids the prisoner litigant rather than harming him. It may be, in other words, that the cases that are published (and that may be cited) are the unusual cases in which the prisoner has prevailed, while the cases that are unpublished are the typical ones in which the prisoner's contentions either amount to no deprivation or are unprovable. This possibility is one that could clearly be proved or disproved by empirical research.

For a more complete discussion of *Browder* and the constitutional argument, see Amicus Brief, *supra*; Note, *supra* note 18.

125. Friendly, *Averting the Flood*, *supra* note 2, at 643; see Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1128 (1973).

126. See generally Note, *Disincentives to Frivolous Appeals: An Evaluation of an ABA Task Force Proposal*, 64 U. VA. L. REV. 605 (1978).

127. This hypothesis can be tested by comparing the "deviant" ratio in prisoner cases to that observed in criminal appeals. Once again the criminal defendant often bears little of the cost of his appeal, so economic disincentives to appeal are low. The sample data, however, show very typical ratios in criminal appeals: 26:6 in the Fourth Circuit and 57:27 in the Sixth Circuit. In both cases the unpublished ratio is almost exactly normal for each circuit—4:1 and 2:1 respectively. Almost all criminal defendants have counsel who can advise them on the pointlessness of an appeal. Further, the positive incentives for appeal are often lower for them than for prisoner litigants. Many convicted defendants are sentenced to probation or fines or very short prison terms; for them, getting on with the business of life may be much more attractive than writing.

128. The Fourth Circuit is the national leader in prisoner petitions by a wide margin. See

non—may push the judges toward the use of shortcuts.

Perhaps the most significant question to ask about deviant ratios is whether the bare existence of the phenomenon should be a cause for concern. In other words, should there be anxiety simply because some kinds of cases get published much more frequently than do other kinds? Karl Llewellyn argued that by asking the right questions and by examining the court's efforts, the average lawyer could increase his predictive skills and decrease his cynicism considerably.

I submit that the average lawyer has only to shift his focus for a few hours from "*what was held*" in a series of opinions to what those opinions suggest or show about *what was bothering and what was helping the court as it decided*.

. . . For the ordinary lawyer I submit that there can be no question as to the gain in predictive power. Spend a single thoughtful weekend with a couple of recent volumes of reports from your own supreme court, read this way, and you can never again, with fervor or despair, make that remark about never knowing where an appellate court will hang its hat.¹²⁹

It is clear that if much of a court's product is suppressed and selectively suppressed as to subject matter, this kind of exercise cannot be performed. "What was bothering" the circuit courts was likely their excessive workload—and perhaps particularly that segment of it that they found unworthy of publication. So the deviant publication/nonpublication ratios do cause concern. They limit the ability of the bar to examine systematically or even casually all of the court's work to get some feel for its distribution across various subject matter areas. To the extent, then, that reckonability of result is aided by the possibility of examining all or a representative sample of the court's work, the existence in some areas of law of extremely deviant publication/nonpublication ratios is disturbing.

F. *The Role of the Central Staff.*

Both the Fourth and Sixth Circuit Plans involve central staff¹³⁰ in the decisionmaking process.¹³¹ That involvement is particularly heavy in the areas of pro se litigation, where the staff may recommend (in the

1977 ANNUAL REPORT 174. Prisoner litigation has shown a fairly steady increase in the circuit courts in general. *Id.* 173. Social security appeals similarly have shown a significant rise. *Id.*

129. K. LLEWELLYN, *supra* note 54, at 178-79.

130. "Central" staff is a group of law clerks, generally young and non-professional, who are assigned to no individual judge, but instead perform tasks for the court as a whole. *See generally* JUSTICE ON APPEAL, *supra* note 22, at 46-55; A.B.A. COMMISSION, *supra* note 54, at 96-99. A detailed description of the involvement of staff in a state intermediate appellate court is given in Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211 (1973).

131. *See generally* CENTRAL LEGAL STAFFS, *supra* note 3.

Fourth Circuit) that a case be decided by submission on brief rather than oral argument,¹³² and where (in both circuits) a draft opinion is prepared by staff and circulated to the panel hearing the case.¹³³

Heavy staff involvement of course saves a great deal of time. It also reduces the possibility that the judges will give the case a fresh, inquiring look;¹³⁴ if the staff is competent, a judge may not be able to challenge the correctness of the pigeonhole in which the staff has placed the case. That possibility is further reduced if the court, when it reviews the case, expects that the opinion will not be published. Hence, the coincidence of overworked courts, substantial contribution of central staff, and limited publication may lead to what Judge Robert Thompson of the California Courts of Appeal has called the "no-judge" decision.¹³⁵

No outsider can know, of course, whether this is a real danger in the circuit courts of appeal. We suspect from our knowledge, personal and hearsay, of the judges on these courts that it is not. But the great number of opinions that do not meet "minimum" standards¹³⁶ is a source of significant concern, and at the very least does not foster confidence that the *court* has taken a good hard look at the case at bar before disposing of it.

III. A MODEL RULE

We have suggested several ways to minimize the dangers posed by unpublished opinions, dangers both of suppressed precedent and of withholding from the public information it should have concerning the operation of the courts. At the same time the suggestions do not appear

132. *Id.*

133. [1971] FEDERAL JUDICIAL CENTER, ANN. REP. 17.

134. A perceptive practitioner has observed:

I am not sympathetic to the notion that we can identify the easy appellate cases, *a priori*, then switch them to a track reserved for dull boxcars in order to make both room and time on the mainline for the swift and shiny streamliners—the cases that are going to make new law. It is doubtful to me that the system can identify the law-making decisions before the opinions are written. The same judicial result can be reached by several routes. It is often the route to decision selected rather than the destination reached which is novel and law-making.

Statement of Robert E. Hinerfeld to the Advisory Committee for an Effective Publication Rule of the Judicial Council of the State of California 24 (Nov. 2, 1978).

One student of the California system believes that reliance on central staff has led to bad decisions in published opinions. Johnson, *The Supreme Court of California 1975-76, Foreword: The Accidental Decision and How It Happens*, 65 CAL. L. REV. 231 (1977).

135. Thompson, *Mitigating the Damage: One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476 (1975).

136. See text accompanying notes 54-68 *supra*. The unpublished opinions often do not appear well crafted. There are, for example, spelling mistakes. Although not very significant, they are perhaps symbolic of uneven quality control.

to undercut significantly the primary value of the limited publication rules, conservation of judicial resources. These suggestions have been incorporated into a model rule. Our model is a "conservative" one, and in fact loosely based on our paradigm conservative rule, that of the Fourth Circuit.¹³⁷ The conservative approach was chosen as the model because we believe it best, when possible, to restrict the discretion of judges.¹³⁸ In addition, a conservative rule has more potential for insuring that all important cases are published, and we believe it best to err on the side of insuring publication.

Rule —: OPINIONS¹³⁹

1. *Minimum Standards*:¹⁴⁰

Every disposition will be accompanied by an opinion that sufficiently states the facts of the case, its procedural stance and history, and the relevant legal authority so that the basis for the disposition can be understood from the opinion and the authority cited.

If the decision is based on the opinion below, sufficient portions of that opinion should be incorporated into the opinion of this court so that the basis for this court's disposition can be understood from a reading of this court's opinion.

2. *Publication of Opinions*:

a. *Criteria for Publication*: An opinion will be published if it:

- (1) establishes a new rule of law, or alters or modifies an existing rule of law, or calls attention to an existing rule of law which appears to have been generally overlooked;¹⁴¹
- (2) applies an established rule of law to facts significantly

137. The Fourth Circuit approach is based, in turn, on the Model Rule found in STANDARDS. See also the plans of the District of Columbia Circuit, the Seventh Circuit, and the Ninth Circuit. These plans, also conservative, provided parts of our model rule; for individual citations, see notes 141-46 *infra*.

138. Some confession is perhaps in order here: we both believe that rules are useful and desirable devices for controlling judicial behavior. While we join the American realists in realizing that rules are not the unique determinants of judicial action, neither of us is a complete "rule skeptic."

139. The Model Rule does not mention the no-citation "corollary" to the limited publication plans. See text accompanying notes 27-34 *supra*. We have not addressed the impact of such rules in this study because their impact is a function of the success of the limited publication plans. That is, if all law making opinions were published there would be no need to cite unpublished opinions to a court. If, on the other hand, significant numbers of important opinions went unpublished, then the impact of the no-citation rule could be severe. Our views on the question of citation are fully exposed in Reynolds & Richman.

140. This section of the Model Rule does not address directly the subject of publication. Rather it concerns the *writing* of opinions. Its fairly strict standards reflect serious concern that the excessively brief, conclusory opinion is an abdication of judicial responsibility. See text accompanying notes 49-68 *supra*; Reynolds & Richman 1173-76.

141. The first clause of this rule was included in the guidelines for opinion publication suggested by the Federal Judicial Center. See STANDARDS 15. It has subsequently been included in some variant form in several circuit plans. See District of Columbia Circuit Plan, *supra* note 18, ¶ a; 4TH CIR. R. 18(a)(i); 7TH CIR. R. 35(c)(1)(i); 8TH CIR. R. app. ¶ 4(a); 9TH CIR. R. 21(b)(1).

- different from those in previous published applications of the rule;¹⁴²
- (3) explains, criticizes, or reviews the history of existing decisional or enacted law;¹⁴³
 - (4) creates or resolves a conflict of authority either within the circuit or between this circuit and another;¹⁴⁴
 - (5) concerns or discusses a factual or legal issue of significant public interest;¹⁴⁵
 - (6) is accompanied by a concurring or dissenting opinion;
 - (7) reverses the decision below or affirms it upon different grounds;
 - (8) addresses a lower court or administrative agency decision that has been published,¹⁴⁶ or
 - (9) is an opinion in a disposition that
 - (a) has been reviewed by the United States Supreme Court, or
 - (b) is a remand of a case from the United States Supreme Court.¹⁴⁷
- b. *Publication Decision:* There shall be a presumption in favor of publication. An opinion shall be published unless each member of the panel deciding the case determines that it fails to meet the criteria for publication.
- c. *Circulation and Availability of Unpublished Opinions:*
- (1) All unpublished opinions shall be part of the public record.
 - (2) Unpublished opinions shall be circulated to the parties, to all courts in this circuit, and to all depository libraries in this circuit. Upon payment of a reasonable fee, others may either purchase individual opinions or subscribe on a continuing basis.

The last clause, the resurrection rule, seems to be the unique property of the Ninth Circuit. 9TH CIR. R. 21 (b)(2).

142. Similar provisions are contained in the plans of the District of Columbia Circuit and the Eighth Circuit. See District of Columbia Circuit Plan, *supra* note 19, ¶ e; 8TH CIR. R. app. ¶ 4(c).

143. Similar provisions are included in the plans of the District of Columbia Circuit, the Fourth, Seventh, and Ninth Circuits. See District of Columbia Circuit Plan, *supra* note 19, ¶ c; 4TH CIR. R. 18(a)(iii); 7TH CIR. R. 35(c)(1)(iii); 9TH CIR. R. 21(b)(3).

144. See District of Columbia Circuit Plan, *supra* note 19, ¶ d; 4TH CIR. R. 18 (a)(v); 7TH CIR. R. 35(c)(1)(iv)(C); 8TH CIR. R. app. ¶ 4(f); 10TH CIR. R. 17(d)(1).

145. Similar provisions are included in the plans of several circuits. See District of Columbia Circuit Plan, *supra* note 19, ¶ (b); 4TH CIR. R. 18(a)(ii); 7TH CIR. R. 35(c)(1)(ii); 8TH CIR. R. app. ¶ 4(d); 9TH CIR. R. 21(b)(4).

146. For similar provisions, see 4TH CIR. R. 18(a)(vi); Sixth Circuit Plan, *supra* note 19, ¶ (1); 7TH CIR. R. 35(c)(1)(v); 8TH CIR. R. app. ¶ 4(e); 9TH CIR. R. 21(b)(5).

147. This provision is surely a desirable one. A case that has generated a full United States Supreme Court opinion clearly should be published at the circuit court level—even if the publication order is retroactive. A circuit court opinion following a remand from the Supreme Court should also be published. Even if the opinion is simply a reference back to the district court, the public should have ready access to the entire record of every Supreme Court case. See Comment, *supra* note 13.

Most of the provisions of the Model Rule are explained in the notes¹⁴⁸ and cross-referenced to existing rules. Several sections warrant more extended discussion. Perhaps the most novel suggestion is to include in the Model Rule minimum standards for the writing of opinions. The need for this provision is amply demonstrated by the study: between twenty and thirty percent of the opinions reviewed arguably did not satisfy minimum standards.¹⁴⁹

Sections 2(a)(7) and (8) are also new. The study suggests that a rule requiring publication of all reversals and all cases generating multiple opinions is a useful prophylactic device.¹⁵⁰ These opinions are likely to be interesting; they are few and easily identified.

Section 2(b) of the Model Rule provides for a presumption *in favor* of publication, while most existing court rules provide for an opposite presumption. The point of this change is simply that before an opinion is suppressed, the members of the panel should have to address directly and answer in the negative the question of its importance. Opinions should not be suppressed by default. This section also requires a unanimous decision in order not to publish.

Finally, section 2(c) of the Model Rule calls for full circulation of unpublished opinions.¹⁵¹ The aim here is to minimize the possibility that nonpublication plans will create two classes of litigants and lawyers—those with access only to published opinions, and the habitual litigant or his counsel who knows the entire product of the court.

No rule can insure perfection; under any nonpublication scheme, some precedent will be lost, and some poor quality judicial work will slip through. Nevertheless, a well-framed rule can focus the court's attention on its difficult task—maximization of judicial efficiency without a concomitant loss in judicial responsibility and accountability. The proposed Model Rule will, it is hoped, help the courts meet the challenge.

IV. CONCLUSION

Our study of two circuits' experience with limited publication has been the first systematic attempt to evaluate the product of those plans. We have addressed a number of discrete questions concerning the operation of the plans, inquiries that led us to make several suggestions to correct perceived malfunctions. In addition, we posited a hypothesis

148. See notes 139-47 *supra*.

149. See text accompanying notes 54-66 *supra*.

150. See text accompanying notes 95-122 *supra*. The suggestion that all multiple opinion cases warrant publication is not new. See 9TH CIR. R. 21(b)(6).

151. See text accompanying notes 35-37 *supra*.

involving a radical/conservative dichotomy to be tested in the course of looking at those questions. We have found little to suggest that the dichotomy is valid, at least for these two courts. Still we believe—as witnessed by our Model Rule—that a conservative rule will more likely insure that the problem of suppressed precedent does not become a serious one.¹⁵²

Previous commentary on limited publication focused on the problem of suppressed precedent—law making decisions that were not being published¹⁵³—not a significant problem in the Fourth and Sixth Circuit courts. The panels typically follow their own rules,¹⁵⁴ and few opinions in our sample contained material that should have been made public. In addition, feasible methods exist, as we have suggested, for insuring publication of many opinions that should be published but that at present are not.

This study, however, did uncover a serious problem. The unpublished opinions *as they are written* contain little that conceivably would be of interest to anyone other than litigants. The key phrase in that observation is “as they are written.” What cannot be ascertained from the opinions is whether they *could have been* interesting. In other words, the case may have contained material from which new law *could* have been made (or old law reexamined, or an old precedent rediscovered), but the court declined the opportunity to do so. The presence of so many “opinions that do not opine”¹⁵⁵ may reflect a growing tendency to make the courts into the antithesis of what we expect, to make them into a bureaucracy where decisions are routine and the prime goal is to shuffle paper. That is a danger that must be guarded against with vigilance. A court must continually be alert to new pressures, responsive to changing needs, if it is to carry out its mandate of justice under law.

We could not determine from our examination the extent of “lost” precedent—to do so properly would require an extraordinary immersion in the jurisprudence of the circuits and the record of each case. It is only when that job is done, however, that the true price paid for limited publication can be learned, and a proper accounting of the costs and benefits of limited publication made.

152. Most draftsmen of models in this area have chosen conservative rules. *See, e.g.*, STANDARDS.

153. *See, e.g.*, note 13 *supra* and authorities cited therein; Reynolds & Richman 1192 nn. 128-29 and authorities cited therein.

154. One problem, not mentioned elsewhere in this Article, is the occasional failure of a court to follow its own rule prohibiting citation of unpublished opinions. *See, e.g.*, Woodard v. Shannon, No. 77-2112 (4th Cir. Feb. 21, 1978), discussed at text accompanying notes 90-94 *supra*.

155. The phrase is from Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 n.6 (1957).

