

A CLOSER LOOK AT UNPUBLISHED OPINIONS IN THE UNITED STATES COURTS OF APPEALS

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Litigants file an enormous number of cases in American federal courts every year. In 2000, more than 320,000¹ cases were commenced in United States district courts, and more than 55,000 appeals were filed in United States courts of appeals.² In addition, there were well over one million bankruptcy filings in 2000.³ Such a large number of filings results in more and more court opinions being issued each year. Due to the very large number of cases found in West's *Federal Reporter*, in specialty reporters, and on Westlaw and LEXIS, some legal researchers may assume that all cases decided by federal courts are published. However, this assumption is far from true.

This article focuses on unpublished decisions from the United States courts of appeals because such an unpublished

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1. There were 259,517 civil filings and 62,745 criminal filings in United States district courts during the 12-month period ending September 30, 2000. Statistics Div., Admin. Off. U.S. Cts., *Judicial Business of the United States Courts: 2000 Annual Report of the Director* 48 tbl. S-7 & 185 tbl. D <<http://www.uscourts.gov/judbus2000/contents.html>> (accessed Apr. 1, 2001) (combined civil and criminal filings totaled 322,262 for this 12-month period).

2. There were 54,697 appeals filed in federal circuit courts during the 12-month period ending September 30, 2000. See *Judicial Business 2000*, *supra* n. 1, at 110 tbl. B-6. This figure excludes the Federal Circuit. There were 1,509 cases filed in the Federal Circuit during the 12-month period ending September 30, 2000. *Id.* at 119 tbl. B-8. The combined total of federal appellate court filings in 2000 was 56,206.

3. There were 1,262,102 bankruptcy filings in U.S. bankruptcy courts during the 12-month period ending September 30, 2000. *Judicial Business 2000*, *supra* n. 1, at 268 tbl. F. The total number of court filings in 2000 for the federal district courts, federal circuit courts, and bankruptcy courts was 1,640,570.

decision was at issue in *Anastasoff v. United States*.⁴ Furthermore, the opinions of the United States courts of appeals are a fundamentally important source of law. These courts are very often the courts of last resort for most litigants because “most legal decisions never make it to the Supreme Court.”⁵

I. PUBLICATION PRACTICES OF THE UNITED STATES COURTS OF APPEALS

The United States courts of appeals have experienced a significant increase in their caseload in this century.⁶ Much has been written over the years about this increasing caseload and the proliferation of published opinions that flows from the increase.⁷ The rising amount of litigation and the concomitant number of published opinions have prompted some legal commentators to call for limitations on the number of opinions to be published.⁸ As early as 1947, the Fifth and Third Circuits actively studied the need to reduce the number of published opinions.⁹ The first official federal movement of national scope toward unpublished opinions occurred in 1964, when the Judicial Conference of the United States directed the judges of the courts of appeals and district courts to publish “only those opinions which are of general precedential value.”¹⁰

However, it was not until 1972 that the Judicial Conference requested each circuit to establish criteria to limit case

4. 223 F.3d 898 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

5. Ashlyn K. Kuersten & Donald R. Songer, *Decisions on the U.S. Courts of Appeals* 1-2 (Garland Publ'g., Inc. 2001).

6. The number of federal appeals in 1930 was 2,874. Admin. Off. U.S. Cts., *Workload Statistics for the Decade of the 1970's* ii (1980). By 2000, this number had increased to 56,206. *See supra* n. 2. (Note: The 1930 statistic was for the period ending June 30, 1930, and the 2000 statistic was for the period ending September 30, 2000.)

7. For a history of this issue, see William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978).

8. *See id.*

9. Francis P. Whitehair, *Opinions of Courts: Fifth Circuit Acts against Unneeded Publication*, 33 ABA J. 751 (1947); *Opinions of Courts: Should Number Published Be Reduced?* 34 ABA J. 668 (1948).

10. *Annual Report of the Director of the Administrative Office of the United States Courts* 11 (1964), in *Reports of the Proceedings of the Judicial Conference of the United States* (1964).

publication.¹¹ Eventually, each court of appeals created its own publication rules.¹² The establishment of publication rules has proven to be a watershed event in the history of federal court case law. Prior to this time, all or very nearly all federal appellate court opinions in the United States were published in print.¹³ However, the publication rules have so systematically reduced the number of published opinions that currently more than 79 percent of federal circuit court opinions are unpublished.¹⁴

11. *Reports of the Proceedings of the Judicial Conference of the United States*, 33 (1972).

12. Reynolds & Richman, *supra* n. 7, at 1171 (stating that by 1974, the federal circuit courts had submitted proposed publication plans to the Judicial Conference).

13. One commentator writes, "It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small." Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 *Judicature* 307, 308 (1990).

A brief summary of my research methodology is in order. I conducted research on Westlaw and LEXIS to try to determine the earliest unpublished cases on these legal databases. The earliest unpublished opinion I found is *District of Columbia v. Equitable Life Ins. Co.*, 1966 U.S. App. LEXIS 7118 (D.C. 1966). Two other cases appear before 1970, but these cases have the wrong dates (confirmed with LEXIS). In addition, LEXIS contained seven unpublished cases prior to 1972 (using search terms DATE < 1972 and NOTICE (unpublish!) in GENFED; USAPP) (search conducted Feb. 15, 2001). A search in Westlaw's CTA database (federal appellate courts after 1944) indicates no unpublished federal appellate cases on Westlaw prior to 1970 (using search terms CI, PR (UNPUBLISH! "TABLE OF DECISIONS WITHOUT REPORTED OPINIONS") & PR ("COURT OF APPEALS") & DA (BEF 1970)). One case did appear before 1970 on Westlaw, but it had the wrong date. However, several cases on Westlaw's CTA database referred to early opinions that the courts identified as unpublished. For example, in *Clark v. Campbell*, 501 F.2d 108, 115 (5th Cir. 1974), the court cites a 1938 case that it says was dismissed by the Second Circuit in an unpublished dismissal (*Ludwig Littauer & Co. v. Commr.*, 37 B.T.A. 840, *appeal dismissed* (2d Cir. 1938)). In *Hooper v. Nash*, 323 F.2d 995, 996 (8th Cir. 1963), the court refers to "*Knicker v. Nash*, 8 Cir., Misc. No. 218 (unpublished order dated September 6, 1963)." A reference in *Waugaman v. U.S.*, 331 F.2d 189, 190 (5th Cir. 1964), says the "Sixth Circuit denied leave to appeal in forma pauperis by unpublished order dated April 24, 1963." Another reference to an early unpublished opinion is found in *Moran v. U.S.*, 360 F.2d 920, 921 (7th Cir. 1966), where the court cites an unpublished per curiam opinion, *Moran v. Penan*, No. 6487 (1st Cir. 1965), *cert. denied*, 382 U.S. 943 (1965).

For this article, all LEXIS research was done using LEXIS-NEXIS Research Software 7.2 (Graphical Interface). All Westlaw research was done using Westmate 6.32 and 6.31 Software. The web versions of both LEXIS and Westlaw, as well as the newer versions of Westlaw's software, will not allow the large search results that are documented throughout this article. All searches were run in Westlaw's CTA database (U.S. Court of Appeals Cases after 1944) unless otherwise noted.

14. See Tbl. 1, *infra*.

The dramatic changes in the publication practices of the federal appellate courts are perhaps best illustrated by statistics. Two sources of statistics help to illustrate the changes brought by publication rules. The Administrative Office of the United States Courts has compiled statistics for most years on the publication practices of federal circuit courts. Statistics can also be compiled by searching Westlaw and LEXIS for various aspects of unpublished opinions. While they do not offer a complete picture, these online legal research services can provide information about unpublished opinions that cannot be located from any other source.

Using Administrative Office statistics, Table 1 shows the total number of opinions issued, the number of unpublished opinions and the percentage that they represent, along with the courts issuing the highest and lowest percentages of unpublished opinions for each year:¹⁵

TABLE 1: STATISTICS FROM ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1990-2000

Year	Total Opinions or Orders	Number of Unpublished Opinions (Per Cent of Total)	Circuit with Highest Percentage	Circuit with Lowest Percentage
2000 ¹⁶	27,516	21,895 (79.8%)	4th (90.5%)	7th (56.5%)
1999 ¹⁷	26,727	20,769 (78.1%)	4th (90.1%)	1st (45.5%)
1998 ¹⁸	24,910	18,581 (74.9%)	4th (90.6%)	7th (49.4%)
1997 ¹⁹	25,840	19,663 (76.5%)	4th (88.4%)	1st (48.7%)

15. The courts vary significantly in the percentage of unpublished opinions that they issue. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 72 (2001).

16. *Judicial Business of the United States Courts: 2000 Annual Report of the Director* 44, tbl. S-3 (available at <<http://www.uscourts.gov/judbus2000/contents.html>>). (Note: Each year there are oral opinions or orders reported only for the Sixth Circuit that are counted for the total number of opinions or orders, but which are not counted as unpublished opinions. Each year these tables do not include data for the Federal Circuit.)

17. *Judicial Business of the United States Courts: 1999 Annual Report of the Director* 49, tbl. S-3 (available at <<http://www.uscourts.gov/judbus1999/contents.html>>).

18. *Judicial Business of the United States Courts: 1998 Annual Report of the Director* 54, tbl. S-3 (available at <<http://www.uscourts.gov/dirrpt98/>>).

19. *Judicial Business of the United States Courts: 1997 Annual Report of the Director* 40, tbl. S-3 (available at <http://www.uscourts.gov/judicial_business/contents.html>).

Year	Total Opinions or Orders	Number of Unpublished Opinions (Per Cent of Total)	Circuit with Highest Percentage	Circuit with Lowest Percentage
1996 ²⁰	27,326	20,689 (76%)	4th (90.3%)	1st (51.4%)
1995 ²¹	27,772	20,984 (75.9%)	4th (88.9%)	1st (47%)
1994 ²²	27,219	20,114 (74.2%)	4th (86.6%)	1st (46.6%)
1993 ²³	25,761	18,955 (73.8%)	4th (85.1%)	1st (38.2%)
1992 ²⁴	23,597	16,551 (70.3%)	4th (83.8%)	1st (42.1%)
1991 ²⁵	23,018	15,877 (69.3%)	4th (83.6%)	1st (30.9%)
1990 ²⁶	21,006	14,268 (68.4%)	4th (84.2%)	1st (36.4%)

In addition, the Administrative Office of the United States Courts keeps unpublished statistics for the federal courts. These statistics include the percentage of unpublished federal appellate opinions for the years 1981 to 1999 (but not the years 1988-1990) for the 12-month period ending December 31.²⁷ As seen in Table 2, *infra*, these statistics show a significant increase in the percentage of unpublished opinions during this period.

20. *Judicial Business of the United States Courts: 1996 Annual Report of the Director* tbl. S-3.

21. *Judicial Business of the United States Courts: 1995 Annual Report of the Director* tbl. S-3.

22. *Judicial Business of the United States Courts: 1994 Annual Report of the Director* tbl. S-3.

23. *Judicial Business of the United States Courts: 1993 Annual Report of the Director* tbl. S-3.

24. *Judicial Business of the United States Courts: 1992 Annual Report of the Director* tbl. S-3.

25. *Judicial Business of the United States Courts: 1991 Annual Report of the Director* tbl. S-3.

26. *Judicial Business of the United States Courts: 1990 Annual Report of the Director* tbl. S-3.

27. Statistics Div., Admin. Off. U.S. Cts., *Table S-3: U.S. Courts of Appeals, Type of Opinion or Order Filed in Cases Terminated on the Merits after Oral Hearing or Submission on Briefs* (for years 1981-1999) (copies on file with *The Journal of Appellate Practice and Process*). The lack of statistics for 1988-1990 is apparently due to a change in the way the statistics were compiled. (Note: Each year oral opinions or orders from the Sixth Circuit are counted for the total number of opinions or orders but are not counted as unpublished opinions. Note also that Table 2, *infra*, has no data for the U.S. Court of Appeals for the Federal Circuit.)

TABLE 2: UNPUBLISHED STATISTICS FROM ADMINISTRATIVE
OFFICE OF THE UNITED STATES COURTS, 1981-1999

Year	Total Opinions or Orders	Number of Unpublished Opinions (Per Cent of Total)	Circuit with Highest Percentage	Circuit with Lowest Percentage
1999	26,732	20,981 (78.6%)	4th (90%)	1st (43.3%)
1998	25,020	18,725 (75.3%)	4th (90.8%)	1st (45.9%)
1997	25,592	19,555 (76.8%)	4th (89.1%)	1st (51.2%)
1996	27,506	20,841 (76.1%)	4th (89.6%)	7th (50.9%)
1995	27,152	20,520 (75.8%)	4th (89.1%)	1st (46.2%)
1994	27,550	20,518 (74.8%)	4th (87.5%)	7th (47.9%)
1993	25,948	19,036 (73.7%)	4th (85.1%)	1st (40.8%)
1992	24,466	17,488 (71.7%)	4th (84.7%)	1st (42.3%)
1991	23,071	15,995 (69.6%)	4th (83.6%)	1st (32%)
<i>Statistics not available for years 1988-1990</i>				
1987	19,088	11,967 (63.4%)	6th (79.9%)	1st (33.9%)
1986	18,355	11,137 (61.3%)	4th (79.3%)	7th (36.7%)
1985	17,118	10,014 (59.4%)	4th (77.9%)	1st (40.7%)
1984	15,533	5,857 (38.8%)	10th (54.9%)	D.C. (23.9%)
1983	13,838	1,896 (14.5%)	10th (35.5%)	7th (3.4%)
1982	12,658	1,313 (10.6%)	8th (22.2%)	7th, 9th (3.2%)
1981	12,070	1,303 (11.2%)	8th (24%)	7th (3.7%)

Approximate statistics can be pieced together from other sources to estimate the number of unpublished opinions issued since courts began this practice. This task requires estimating the number of unpublished opinions issued during the periods not covered by the statistics listed above. A study of unpublished opinions in the federal appellate courts for the reporting year 1978-79 states there were 7,720 unpublished opinions for that period.²⁸ To cover the period between that study and 1981, I ran a search on Westlaw, retrieving 7,446 unpublished opinions issued during 1980.²⁹ A search for the period June 30, 1979 to

28. William L. Reynolds & William M. Richman, *Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 586 tbl. 1 (covering the "Reporting Year," July 1, 1978 through June 30, 1979).

29. The search query used the fields and terms CI, PR (UNPUBLISH! "TABLE OF DECISIONS WITHOUT REPORTED OPINIONS") & PR ("COURT OF APPEALS") &

December 30, 1979 retrieved 3,290 unpublished opinions.³⁰ A search to cover the period from 1970 to June 30, 1978 retrieved 26,646 unpublished opinions.³¹ A separate search for opinions from the Federal Circuit revealed that from 1970 to September 30, 2000, approximately 14,723 unpublished Federal Circuit opinions have been issued.³² The combined totals from these statistics equal 59,825 unpublished opinions. This number will be added to the numbers compiled below.

Adding the statistics for 1981-1999 (excluding the missing years 1988-90) reveals a total of 217,146 unpublished opinions for this period. Adding an estimate for the missing years (13,000 for 1988, 14,000 for 1989 and 15,000 for 1990) brings the total to approximately 259,146 for the period 1981-1999. The latest figures for the year 2000³³ show 21,895 unpublished opinions, raising the total to about 281,041 unpublished opinions. When the 59,825 opinions listed above are added to this amount, the estimate rises to 340,866 unpublished opinions for the entire period through October 2000.³⁴

II. WHAT DOES “UNPUBLISHED” MEAN?

Many thousands of unpublished federal appellate opinions have been issued since the mid-1970s. But the term “unpublished” is not synonymous with “unavailable.” In regard

DA (AFT 12/31/1979 & BEF 1/1/1981) (search conducted Apr. 1, 2001) (also listed in Tbl. 3, *infra*). Note that this total is probably less than the actual number of opinions, because there were 7,720 unpublished opinions for the period mentioned in the 1978-79 study. See Reynolds & Richman, *supra* n. 28.

30. CI, PR (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED OPINIONS”) & DA (AFT 06/30/1979 & BEF 12/31/1979) & PR (“COURT OF APPEALS”) % CO (C.A.FED.) (search conducted Apr. 1, 2001).

31. CI, PR (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED OPINIONS”) & PR (“COURT OF APPEALS”) & DA (AFT 1969 & BEF 7/1/1978) % CO (C.A.FED.). This search excluded any federal circuit opinions, in case any were listed during this time.

32. CI, PR (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED OPINIONS”) & DA (AFT 1969 & BEF 10/1/2000) & CO (C.A.FED.) (search conducted in West’s CTAF database Apr. 1, 2001).

33. 2000 *Annual Report of the Director*, *supra* n. 16, at 44, tbl. S-3.

34. This total is a rough approximation. There are many discrepancies between the number of opinions reported on Westlaw and those reported by the Administrative Office of the United States Courts for different periods. The approximate number of unpublished opinions recorded on Westlaw is given in Tbl. 4, *infra*.

to federal circuit court opinions, “unpublished” appears to mean that the opinion is not available in print.³⁵ Judge Richard S. Arnold, author of the *Anastasoff* opinion, explains that calling an opinion “unpublished”

means only that the opinion is not to be published in a book, a printed medium. It means that the opinion is not mailed (or otherwise transmitted) to West Publishing Company or any other legal publisher with the intention that it be printed in a book commercially available.³⁶

The definition of “unpublished opinion” is probably even narrower because it generally means that the opinion is not published in one of the standard reporters, which in the case of federal appellate court opinions is the *Federal Reporter*. This narrower definition means that opinions published only in specialty reporters are still considered unpublished.³⁷ Furthermore, many of the thousands of unpublished federal appellate decisions are available on Westlaw and LEXIS, but this availability does not affect their publication status. While it is not possible to ascertain the exact statistics about unpublished opinions available on these online legal research services, approximations can be made as to the number. These approximations provide further insight into the practice of issuing unpublished opinions by the federal circuit courts.

A. Unpublished Opinions on Westlaw and LEXIS

Below is a brief timeline of the history of unpublished opinions in the federal circuit courts. This timeline is followed by Table 3, *infra*, which documents the number of unpublished federal circuit court opinions reported on Westlaw and LEXIS for the years shown. While not purporting to be a complete

35. Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U. L. Rev. 757, 791-92 (1995).

36. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 220 (1999); *see also* 1st Cir. R. 36(b)(2)(F) (“Unpublished means the opinion is not published in the printed West reporter.”).

37. Reynolds & Richman, *supra* n. 28, at 577 n. 12 (stating that “[u]npublished opinions may be ‘published’ in other sources, such as specialty reporters, or placed in the memory of a computerized legal research system such as LEXIS”).

record of unpublished opinions,³⁸ the timeline and Table 3 illustrate the rapid rise of the use of unpublished opinions by the federal circuit courts from 1970 until the year 1980. In particular, the Westlaw statistics from Table 3 illustrate the significant increase in the use of unpublished opinions that occurred near the time the publication rules were created (1973-1974).

TIMELINE FOR FEDERAL COURT PUBLICATION RULES

1964: Judicial Conference passes resolution directing federal district and appellate courts to limit publication of opinions to those “which are of general precedential value.”³⁹

1971: Federal Judicial Center report notes widespread consensus that too many court opinions are being published.⁴⁰

1972: Federal Judicial Center recommends to Judicial Conference that each circuit review its publication policy and focus on limiting publication. Judicial Conference requests each circuit to develop and submit publication plans.⁴¹

1973: Advisory Council for Appellate Justice’s *Standards for Publication of Judicial Opinions* report is published, containing Model Rule for subsequent publication rules of United States Courts of Appeals.⁴²

1974: Judicial Conference receives proposed publication plans from courts of appeals.⁴³

1974-1975: Commission on Revision of Federal Court Appellate System, operating under congressional mandate,

38. Complete data cannot be compiled due to the Third, Fifth and Eleventh Circuit practices of not releasing unpublished opinions and to differences in publication practices of Westlaw and LEXIS.

39. *Reports of the Proceedings, supra* n. 11, at 11.

40. Reynolds & Richman, *supra* n. 7, at 1170 (citing *Federal Judicial Center Annual Report* 7-8 (1971)).

41. *Id.*

42. *Id.* at 1171 (citing *Advisory Council for Appellate Justice, FJC Research Series No. 73-2, Standards for Publication of Judicial Opinions* (1973)).

43. *Id.*

holds hearings and issues report. Majority recommends selective publication and no-citation rules but withholds judgment and defers to Judicial Conference.⁴⁴

TABLE 3: WESTLAW⁴⁵ AND LEXIS⁴⁶ (PRE-1970 TO 1980)⁴⁷

<i>Year</i>	<i>Westlaw</i>	<i>LEXIS</i>
1980	7,446	1,732
1979	6,291	1,362
1978	5,555	276
1977	5,536	21
1976	5,206	222
1975	4,184	394
1974	3,877	133
1973	3,717	28
1972	934	24
1971	104	5
1970	5	0
Pre-1970	0	1

Westlaw and LEXIS often show markedly different statistics in their coverage, both in regard to the number of unpublished opinions and the total number of opinions that they contain, as illustrated below. Table 4, *infra*, compares the total number of

44. *Id.* at 1172 (citing *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change* (1975)).

45. The following represents a search query for unpublished opinions for the year 1980: CI, PR (UNPUBLISH! "TABLE OF DECISIONS WITHOUT REPORTED OPINIONS") & PR ("COURT OF APPEALS") & DA (AFT 12/31/1979 & BEF 1/1/1981) (search conducted Feb. 15, 2001).

46. To search for unpublished opinions in 1979, I used the query NOTICE (UNPUBLISH!) AND DATE AFT 12/31/1978 AND DATE BEF 01/01/1980 in LEXIS's GENFED;USAPP (search conducted Feb. 15, 2001). Three cases appear as unpublished before 1970, but two of them have the wrong date (search results double-checked with other sources and confirmed with LEXIS).

47. There are large discrepancies between the number of unreported cases on Westlaw and LEXIS during these early years and the statistics from the Administrative Office of the Courts and other sources. The 1978-79 study indicated 7,720 unpublished opinions for the period. Reynolds & Richman, *supra* n. 28. A search on Westlaw for that same period retrieves 5,458 unpublished opinions using the query CI, PR (UNPUBLISH! "TABLE OF DECISIONS WITHOUT REPORTED OPINIONS") & PR ("COURT OF APPEALS") & DA (AFT 06/30/1978 & BEF 07/01/1979).

unpublished opinions with the total number of opinions issued for each circuit as reported in Westlaw's individual circuit court databases. Totals for all circuits are from the CTA database.

TABLE 4: CIRCUIT COURT OPINIONS ON WESTLAW

<i>Circuit Court</i>	<i>Total Number of Unpublished Opinions</i>	<i>Total Number of Opinions</i>
1st	5,706	16,631
2d	20,385	44,276
3d	29,384	44,676
4th	52,760	67,420
5th	44,503	90,191
6th	39,264	58,193
7th	13,530	36,867
8th	13,754	39,976
9th	50,342	86,710
10th	11,471	84,197
11th	41,572	84,197
Federal	15,128	19,474
District of Columbia	6,532	26,123
All Circuit Courts	335,100 ⁴⁸	684,576 ⁴⁹

Table 5, *infra*, compares the total number of unpublished opinions for each circuit with the total number of opinions issued for each circuit as reported on LEXIS (GENFED; USAPP).⁵⁰

48. Westlaw estimates there are about 336,000 unpublished federal appellate opinions in its case databases. E-mail from Kate MacEachern, Director, Cases Publishing Center of West Group (Dec. 29, 2000) (research done during December 2000).

49. There are 605,074 cases in the CTA database (courts of appeals cases after 1944), 79,473 more cases in CTA-OLD (cases from 1891-1945), and 26 cases in the DCT-OLD (1789-1944). (Westlaw tells researchers to use the DCT-OLD database to find circuit court opinions from 1789-1911.) Thus, the total number of cases is 684,576. A search in CTA for all cases after 1970 (published and unpublished) retrieved 534,363 cases (search conducted Feb. 25, 2001).

50. A search for unpublished opinions from the First Circuit used the query NOTICE (unpublish!) and COURT ("first circuit") (search conducted Feb. 25, 2001).

TABLE 5: CIRCUIT COURT OPINIONS ON LEXIS

<i>Circuit Court</i>	<i>Total Number of Unpublished Opinions</i>	<i>Total Number of Opinions</i>
1st	5,298	21,433
2d	17,028	58,905
3d	12,604	44,906
4th	50,295	83,948
5th	21,202	93,907
6th	2,836	83,275
7th	10,752	51,231
8th	14,224	60,292
9th	22,503	116,262
10th	8,779	41,059
11th	17,731	43,384
Federal Circuit	14,675	27,426
District of Columbia	6,741	35,929
All Circuit Courts	204,668	759,250 ⁵¹

B. Unpublished Opinions Available Online but Not in Print

Many unpublished federal court opinions are documented as table decisions. Table decisions are cases that were “disposed of by unpublished order or memorandum.”⁵² This is a practice that has “come to dominate appellate courts’ disposition of all types of cases.”⁵³ West Publishing began to publish tables in its *Federal Reporter* in 1972.⁵⁴ However, the reporter tables do not contain any information about the legal dispute nor do they give reasons for the disposition; in fact, these tables contain only the names of the lead petitioner and respondent, the docket number, the date and disposition of the appellate court’s decision, and the agency or court from which the appeal was taken.⁵⁵ Beginning in

51. This database contains U.S. Courts of Appeals decisions since the inception of each court. Limiting the LEXIS search to all cases after 1970 retrieves 600,774 cases.

52. Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L. J. 984, 1000-01 (1990).

53. *Id.* at 1000.

54. *Id.* at 1001.

55. *Id.* at 1000.

the mid-1980s, some of the federal circuits began to provide Westlaw and LEXIS with memoranda and opinion information for these table decisions.⁵⁶ Many thousands of these unpublished tables decisions, however, appear to be what are called “Orders,” *i.e.*, dispositions with “no explanation at all.”⁵⁷

It is generally considered that the Third, Fifth and Eleventh circuits have banned electronic dissemination of unpublished opinions, and these cases are neither added to Westlaw or LEXIS nor available from the courts’ websites.⁵⁸ However, a very large number of unpublished opinions from these three circuits are in fact recorded on Westlaw. The total number of unpublished opinions contained in Westlaw’s CTA database is approximately 335,100. Approximately 105,568 of these unpublished opinions are from the Third, Fifth and Eleventh Circuits, although the vast majority of them do not contain opinion text.⁵⁹ Subtracting the number of unpublished opinions from these three circuits from the total number of unpublished opinions leaves about 230,000 unpublished opinions on Westlaw. However, this does not mean that there are 230,000 unpublished opinions with the full text of the opinion.

56. *Id.* n. 38.

57. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 285 (1996).

58. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. Civ. Rights-Civ. Libs. L. Rev. 99, 105 (1999) (stating that these three circuits “do not make their unpublished opinions available to any electronic source.”); *see also* Eileen Gonyeau, ed., *Comprehensive Coverage of Federal Cases Includes Unpublished Opinions*, Key Points (July/Aug. 2000) (containing chart indicating Westlaw does not have Third, Fifth and Eleventh circuit unpublished opinions in its federal databases) (available at <<http://www.westgroup.com/documentation/westlaw/keypts/kp7800.pdf>>). However, I did find two unpublished Third Circuit cases (from 1976) with the text of the opinion in Westlaw’s CTA3 database and twelve unpublished cases with text from the Fifth Circuit (ranging in dates from 1973-1988) using the search CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS” UNPUBLISH!) & CO (C.A.3 C.A.5 C.A.11) & OP (F.2D F.3D F.R.D. B.R. T.C. B.T.A. VET.APP. U.S.C. U.S.C.A. C.F.R. FED.REG. U.S. S.CT. RULE) (search conducted Feb. 22, 2001).

59. CI, PR (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED OPINIONS”) & CO (C.A.3 C.A.5 C.A.11) (search conducted Feb. 25, 2001). In order to determine approximately how many of the opinions from these three circuits provide more than just a table opinion, I restricted the search to opinions that cite common legal authority; this restriction reduced the results to 1000 cases. I found that many of the opinions cited a local rule but did not provide any opinion text. I then excluded the local rule from the search (% “Local Rule”) and reduced the results to just 63 cases. Consequently, I determined that the vast majority of the unpublished opinions listed on Westlaw for these three circuits do not contain opinion text.

Westlaw and LEXIS federal court databases contain information about some of these table decisions that cannot be accessed in print sources. While there are approximately 334,795 unpublished table decisions in Westlaw⁶⁰ and many thousands on LEXIS, not all of these table decisions provide the legal reasoning behind the court's decision. However, thousands of the unpublished table decisions on Westlaw and LEXIS do provide more information about the courts' decisionmaking process than is available in the *Federal Reporter*.

One of the controversies raised by unpublished federal circuit court opinions is their availability on Westlaw and LEXIS even though they are not available in the *Federal Reporter*. This controversy has been framed as a fairness issue, in that some litigants (such as the government) can more likely afford to search Westlaw and LEXIS to find unpublished decisions that may help them prepare for litigation. However, to be of any use, an unpublished opinion must provide some legal reasoning, some explanation for the court's decision. While it is not possible to determine *exactly* how many unpublished cases on Westlaw and LEXIS provide legal reasoning that would not be found in the tables of the *Federal Reporter*, it is possible to conduct searches to roughly estimate how many such cases may exist.

Under the common law tradition, courts cite preceding legal authority for legal analysis and support when deciding legal issues. When interpreting statutes or regulations, courts cite these statutes and regulations during the interpretation process. As Judge Arnold points out, "Some unpublished opinions . . . are fairly elaborate. They go for as long as twenty pages. They contain citations and legal reasoning."⁶¹ Another commentator states that although some unpublished opinions are "extremely obtuse" and short, "just as often they resemble in every way the published opinions of the courts: facts are stated,

60. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH! TABLE) (search conducted Feb. 25, 2001).

61. Arnold, *supra* n. 36, at 224.

the parties' legal arguments are addressed, and authority is cited and explained."⁶²

To locate unpublished opinions containing reasoning, my strategy was to use search terms that would locate citations to federal legal authority in the text of the opinion. I constructed a search to retrieve unpublished opinions citing any of the most common publications containing primary federal sources of law. I found approximately 135,935 such opinions in Westlaw's CTA database.⁶³ Subtracting this figure (135,935) from the total number of unpublished opinions on Westlaw (335,100)⁶⁴ leaves about 199,165 unpublished opinions. Thus, there are approximately 199,165 unpublished opinions in which a court provides no legal reasoning for its decision.

III. WHO WINS AND WHO LOSES IN UNPUBLISHED OPINIONS OF THE UNITED STATES COURTS OF APPEALS?

In most published opinions of federal appeals (62 percent), the appellate court affirms the decision of the district court or administrative agency.⁶⁵ Significantly, in only 8 percent of

62. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940, 943 (1989).

63. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) & OP (F.2D F.3D F.R.D. B.R. T.C. B.T.A. VET.APP. U.S.C. U.S.C.A. C.F.R. FED. REG. U.S. S.CT. RULE) (search conducted Feb. 25, 2001). This search retrieved unpublished opinions which cited any of the following sources: *Federal Reporter 2d* or *3d*, *Federal Rules Decisions*, *Bankruptcy Reporter*, *Tax Court*, *Board of Tax Appeals*, *Veterans Appeals*, *United States Code*, *United States Code Annotated*, *Code of Federal Regulations*, *Federal Register*, *United States Reports*, *Supreme Court Reporter*, *Federal Rules of Civil Procedure*, and *Federal Rules of Criminal Procedure*. The term "Rule" also picks up other references to the word rule, but these situations are likely to encompass some form of legal reasoning. Approximately 135,634 of these opinions are table opinions. I tested this search against search results published in a previous article. See Dragich, *supra* n. 35. I estimate that for the year 1993 there were about 7,919 unpublished opinions that did not provide any reasoning for the court's decision. The other researcher estimated this number to be 6,248 for 1993. *Id.* at 802 n. 10. Westlaw estimates that there are approximately 145,091 unpublished federal circuit court opinions with text. E-mail from Kate MacEachern, Director, Cases Publishing Center of West Group (Jan. 16, 2001) (research done during January 2001).

64. See Tbl. 4, *supra*.

65. Kuersten & Songer, *supra* n. 5, at 40.

published opinions is the decision below reversed.⁶⁶ How well appellants do in unpublished opinions is much more speculative because “there is not much empirical research on the subject.”⁶⁷ But it is predicted that unpublished opinions “contain a much higher rate of loss for the appellants than those decisions that were announced with a published opinion.”⁶⁸ The following research is an attempt to determine various aspects of how appellants fare in unpublished opinions.

A. Unpublished Appeals in General

Statistics gathered from Westlaw searches indicate that in fact appellants do lose the vast majority of appeals in cases decided by unpublished opinions. For example, a search for unpublished opinions in which the court likely affirmed the decision below retrieved 265,171 cases.⁶⁹ In contrast, a search in the same database for unpublished opinions in which the court likely reversed, remanded or vacated the opinion retrieved only 72,593 cases.⁷⁰ If the searches are made more restrictive, so as to retrieve unpublished opinions that more likely represent totally affirmed decisions and not mixed decisions (such as affirmed in part, reversed in part or affirmed in part, vacated in part), the more restrictive search still retrieves 223,158 cases.⁷¹ A more

66. *Id.* (remaining cases were decided in “mixed decisions,” such as affirmed in part and reversed in part, by remand, or by certification to another court for further action).

67. *Id.*; but see Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 Am. J. Pol. Sci. 235, 249 (1992) (referring to an unpublished study that shows “that rates of reversal (i.e., appellant success) are substantially higher in published decisions than they are in unpublished decisions of the court”).

68. Kuersten & Songer, *supra* n. 5, at 41.

69. CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS UNPUBLISH!”) & OP (AFFIRMED “WE AFFIRM”) (search conducted Mar. 31, 2001) (when the search was changed to find all variations of the term “affirm” (AFFIR!), it retrieved 270,783 opinions).

70. CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS UNPUBLISH!”) & OP (REVER! REMAN! VACAT!) (search conducted Mar. 31, 2001) (overlaps exist between these results due to mixed decisions such as opinions in which the court affirmed in part and reversed in part).

71. CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS UNPUBLISH!”) & OP (AFFIRMED “WE AFFIRM” % REVER! REMANDED VACAT!) (search conducted Mar. 31, 2001).

restricted search for opinions more likely representing totally reversed decisions (not mixed) retrieved only 30,580 cases.⁷²

Some test searches were conducted to test the accuracy of these searches.⁷³ There are other dispositions besides just affirmed, reversed, remanded or vacated. However, these other dispositions also appear to usually rule against the appellant. These other types of dispositions are *dismissed* (apparently the appeal is dismissed), *denied* (motion denied), and *enforced* (these appear to be in cases in which the court enforces an agency's order). A search for dismissed or denied opinions retrieved 32,809 opinions.⁷⁴

B. Reversals in Unpublished Opinions

Despite the fact that far more affirmances than reversals are not published, the number of unpublished decisions in which the courts reversed the decision below is significant. Just the existence of a significant number of unpublished reversals indicates that unpublished opinions are not restricted to "easy" cases. As one commentator states, "[A]ccording to the criteria governing publication there should be essentially no reversals in unpublished decision."⁷⁵ Federal appellate court reversals nearly always involve questions of law, and a reversal indicates that the lower court mistakenly interpreted or applied the law in question.⁷⁶ "Therefore, a reversal should be taken as an objective indicator that at least for the district judge (and presumably for

72. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) & OP (REVER! REMAN! VACAT! % AFFIRMED "WE AFFIRM") (search conducted Mar. 31, 2001).

73. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) % OP (AFFIR! REVER! DISMISSED REMAN! VACAT! DENIED ENFORC!) (search conducted Mar. 31, 2001) This search retrieved only 6505 unpublished opinions; it excluded any case containing any of the terms listed in the OP Field. The majority of these cases (4,068) were from the Third, Fifth and Eleventh Circuits, and many of the cases from these three circuits appeared to be unpublished table cases without any explanation.

74. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) & OP (DISMIS! DENIED % AFFIRMED "WE AFFIRM" REVER! REMAN! VACAT!) (search conducted Mar. 31, 2001).

75. Songer, *supra* n. 13, at 311.

76. *Id.*

others) the law is in need of clarification.”⁷⁷ As a result, it could be argued that cases with some precedential value are being decided with unpublished opinions.⁷⁸ Other commentators believe that all reversals should be published unless the reversal was based on a standard or fact that was unknown to the lower tribunal when it decided the case.⁷⁹

In a study of unpublished opinions during 1978-79, the authors found that the rate of reversals (or other than affirmance) was about one in every seven unpublished opinions.⁸⁰ It is noteworthy that this study was done only about four years after the publication rules were created; the proportion has increased over time. By comparison, during the year 2000, about one in every 4.7 unpublished opinions was a nonaffirming opinion.⁸¹

1. Agencies

Unpublished table decisions are increasingly being used by federal circuit courts reviewing appeals from administrative agencies.⁸² It is difficult to construct accurate searches to identify various aspects of unpublished appeals of agency decisions in general. However, it is possible to conduct fairly accurate searches for a specific agency. For example, the National Labor Relations Board (“NLRB”) is a party to all appeals from its decisions.⁸³ Therefore, I constructed searches requiring the NLRB to be listed as a party. Searches conducted in Westlaw’s FLB-CTA database (federal labor and employment cases from the Courts of Appeals) indicate that the NLRB wins a very high number of these cases.

77. *Id.*

78. *Id.*

79. See Reynolds & Richman, *supra* n. 28, at 620.

80. *Id.* at 617. The study covered the reporting year from July 1, 1978 through June 30, 1979, finding 1018 unpublished “nonaffirming” opinions out of a total of 7,720 unpublished opinions.

81. I found 10,150 unpublished affirming opinions and 2,156 nonaffirming unpublished opinions, for a rate of about one in every 4.7 unpublished opinions. CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS” UNPUBLISH!) & OP (REVER! REMAN! VACAT! % AFFIRMED “WE AFFIRM”) & DA (2000) (search conducted Mar. 25, 2001) (searching for reversed, remanded or vacated unpublished opinions).

82. Schuck & Elliot, *supra* n. 52, at 1000.

83. Merritt & Brudney, *supra* n. 15, at 74.

The total number of unpublished opinions in this database, listing the NRLB as a party, is 5,707.⁸⁴ Of this number, approximately 4,594 are unpublished opinions in which the NRLB decision was affirmed or its orders were enforced.⁸⁵ I sampled these results by reviewing ten cases out of each group of one hundred, and in all of these sampled cases, the NRLB won the appeal either by an affirmance or by enforcement of its orders. Therefore, it appears that in the vast majority of these unpublished opinions, the NRLB wins on appeal. In sharp contrast, when I conducted a search for unpublished opinions in which an NRLB decision was reversed, remanded, or vacated, or enforcement was denied, I retrieved only 169 opinions.⁸⁶ Thus, it appears that the NRLB's win/loss record in unpublished opinions is approximately 4,594 to 169; or in other words, the NRLB is approximately 27 times more likely to prevail in unpublished opinions than is the opposing party.

In contrast, a search for published affirmances or enforcements issued after 1970 in which the NRLB is a party located 1,856 cases.⁸⁷ A search for reversed, remanded or vacated published opinions issued after 1970 in which the

84. CI, PR (UNPUBLISH! "TABLE OF DECISIONS WITHOUT REPORTED OPINIONS") & TI (N.L.R.B. "NATIONAL LABOR RELATIONS BOARD") (search conducted Mar. 27, 2001).

85. CI, PR (UNPUBLISH! "TABLE OF DECISIONS WITHOUT REPORTED OPINIONS") & TI (N.L.R.B. "NATIONAL LABOR RELATIONS BOARD") & LE (AFFIR! ENFORCED "ENFORCEMENT GRANTED" "ORDER ENFORCED" % REVER! REMAN! VACAT! "ENFORCEMENT DENIED") (search conducted Mar. 27, 2001). The lead field (LE) contains the "text of the lead opinion, including majority and plurality opinions." *Discovering Westlaw* 63 (Sheila Goeken et al., eds., 9th ed., West Group 2000).

86. CI, PR (UNPUBLISH! "TABLE OF DECISIONS WITHOUT REPORTED OPINIONS") & TI (N.L.R.B. "NATIONAL LABOR RELATIONS BOARD") & LE (REVER! REMAN! VACAT! "ENFORCEMENT DENIED" % AFFIR! ENFORCED "ENFORCEMENT GRANTED" "ORDER ENFORCED") (search conducted Mar. 27, 2001). A review of these cases indicates they were all nonaffirmances. Twenty-two of these opinions were from the Third, Fifth and Eleventh Circuits, so there was no need to exclude these circuits from any of the searches.

87. TI (N.L.R.B. "NATIONAL LABOR RELATIONS BOARD") & DA (AFT 1970) & LE (AFFIR! ENFORCED "ENFORCEMENT GRANTED" "ORDER ENFORCED" % REVER! REMAN! VACAT! "ENFORCEMENT DENIED") % CI, PR (UNPUBLISH! "TABLE OF DECISIONS WITHOUT REPORTED OPINIONS") (search conducted Mar. 27, 2001).

NLRB is a party retrieved 559 cases.⁸⁸ These search results indicate that in published opinions issued after 1970, cases involving the NLRB are affirmed or enforced only 3.3 times as often as they are reversed, remanded or vacated.

2. *Criminal Appeals*

There appears to be widespread agreement that many criminal and prisoner appeals are “frivolous.”⁸⁹ As one commentator states, “Since many criminal appeals appear to have very little legal merit, the government usually wins.”⁹⁰ The low rate of appellant success in criminal appeals “probably indicates that a fairly large portion” of criminal appeals are frivolous.⁹¹ Furthermore, since the Courts of Appeals do not have “docket control,” they “must rule on virtually all cases appealed to them”⁹² and this in turn inflates the winning percentages of repeat players such as the government.⁹³ It appears that some prisoners, since they have a lot of time on their hands, have taken advantage of the courts’ nondiscretionary dockets.⁹⁴

But criminal defendants and prisoners may be less likely to receive objective judicial scrutiny of their appeals.⁹⁵ In a much cited article, Marc Galanter divided up legal actors into those with “only occasional recourse to the courts (“one shotters” or “OS”) and repeat players (“RP”), who are engaged in many

88. TI (N.L.R.B. “NATIONAL LABOR RELATIONS BOARD”) & DA (AFT 1970) & LE (REVER! REMAN! VACAT! “ENFORCEMENT DENIED” % AFFIR! ENFORCED “ENFORCEMENT GRANTED” “ORDER ENFORCED”) % CI, PR (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED OPINIONS”) (search conducted Mar. 27, 2001).

89. A complaint “is frivolous where it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

90. Songer & Sheehan, *supra* n. 67, at 247.

91. *Id.* at 251.

92. *Id.* at 255-56.

93. *Id.* at 256.

94. *Green v. Camper*, 477 F. Supp. 758 (W.D. Mo. 1979) (listing “Inmate Green’s Previous Filings Totaling Over 500 Cases” and stating that these five-hundred-plus cases do not include “any of the uncounted hundreds of cases inmate Green has filed under the name of or ostensibly on behalf of other inmates. While he is enjoined from writ writing in the Western District of Missouri, he continues to engage in writ writing in other jurisdictions.”).

95. Reynolds & Richman, *supra* n. 28, at 621-626.

similar litigations over time.”⁹⁶ He specifically identified criminal defendants as one shotters and prosecutors as repeat players, among other actors.⁹⁷ The “RPs, having done it before, have advance intelligence; they are able to structure the next transaction and build a record.”⁹⁸

Because published opinions provide good archival records of what transpired in appeals, we know how well criminal appellants do in published federal appeals. In published opinions, criminal appeals are affirmed at higher rates than any other type of case.⁹⁹ One study found that the probability of appellant success “dropped from 45% for cases involving noncriminal issues to just 16.5% for published criminal decisions.”¹⁰⁰ A comprehensive study of the federal circuit courts for the years 1925-1996 found that 72 percent of criminal appeals are affirmed and that “outright reversal” occurs in just 6 percent of appeals and remand in 16 percent.¹⁰¹

The concern for the quality of review in criminal cases is heightened when the disposition of these appeals occurs in unpublished opinions. Some parallels have been drawn from Galanter’s article and applied to the debate about unpublished opinions. According to one critic, access to unpublished opinions in subject areas such as criminal appeals “pit[s] frequent litigants against . . . ‘one-shotters,’” remarking that “in these sorts of disputes it is unlikely that the same ability to monitor unpublished opinions exists on both sides.”¹⁰² Since criminal law involves serious issues in which the government may be depriving appellants of their property or their freedom, it is interesting to see how well “one shotters” fare in criminal appeals in unpublished opinions.

96. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Socy. Rev. 95, 97 (1974) (Galanter’s article is ranked thirteenth amongst the most cited law reviews of all time in Fred R. Shapiro, *The Most Cited Law Review Articles Revisited*, 71 Chi.-Kent L. Rev. 751, 766 (1996)).

97. *Id.*

98. Galanter, *supra* n. 96, at 98.

99. Kuersten & Songer, *supra* n. 5, at 41.

100. Songer & Sheehan, *supra* n. 67, at 251.

101. Kuersten & Songer, *supra* n. 5, at 41, 61 tbl. 2.9 (Note: this is the overall rate from 1925-1996).

102. Robel, *supra* n. 622, at 955.

While exact statistics cannot be found, searches can be conducted which give a general sense how criminal appellants fare in unpublished opinions. In the vast majority of criminal appeals it is the defendant and not the government who is appealing, because under the Fifth Amendment prohibition against double jeopardy, the government is prohibited from appealing most district court decisions favorable to the defendant.¹⁰³ As a result, in the majority of unpublished criminal appeals that affirm, the ruling has gone against the criminal defendant. Searches can be made more accurate by requiring that the United States be a party in the appeal, as the government is always one of the parties in a criminal appeal.¹⁰⁴ The following is a comparison of criminal appeals in published and unpublished opinions, all searches conducted in Westlaw's FCJ-CTA¹⁰⁵ database.

A search in the lead opinion for unpublished opinions affirming (not giving mixed dispositions) the lower court retrieved 14,720 opinions.¹⁰⁶ In comparison, a search for cases that were reversed, remanded or vacated (not mixed) in unpublished opinions retrieved only 1,697 opinions.¹⁰⁷ Thus unpublished criminal appeals are affirmed approximately 8.6 times as often as they are reversed, remanded or vacated.

In comparison, a search in the lead opinion for affirmed (not mixed) published opinions issued after 1970 retrieved 13,500 cases, and if the Third, Fifth and Eleventh Circuits are excluded, the number drops to 10,229.¹⁰⁸ A search for reversed,

103. Kuersten & Songer, *supra* n. 5, at 180 n. 2.

104. Robel, *supra* n. 62, at 956.

105. Federal Criminal Justice—Courts of Appeals Cases.

106. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) & LE (AFFIR! % REVER! REMAN! VACAT!) & TI ("UNITED STATES") (search conducted Mar. 26, 2001).

107. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) & LE (REVER! REMAN! VACAT! % AFFIR!) & TI ("UNITED STATES") (search conducted Mar. 26, 2001).

108. LE (AFFIR! % REVER! REMAN! VACAT!) & TI("UNITED STATES") & DA (AFT 1970) % CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) (search conducted Mar. 26, 2001) (as the Third, Fifth and Eleventh Circuits do not release their unpublished opinions, these three circuits were excluded to make the comparison more accurate).

remanded or vacated published opinions retrieved 4,688 cases.¹⁰⁹ As a result, published criminal appeals issued after 1970 are affirmed about 2.2 times as often as they are reversed, remanded or vacated.

C. Dissenting and Concurring Unpublished Opinions

Similar to the presence of unpublished reversals, the existence of dissenting opinions in unpublished opinions cuts against the premise that unpublished opinions are used only in “easy” cases. The major underpinning of the publication rules is that when a case involves legal issues that have already been so thoroughly analyzed and decided that the present case is merely redundant, it does not merit publication. In theory, unpublished opinions should represent cases that were easily decided by the court; thus there should be no dissension among the panel members. Various commentators have expressed this belief. One commentator opines that “virtually all of the unpublished decisions will be unanimous affirmances of the decision below.”¹¹⁰ In another article, the authors state that cases containing “dissents or concurrences are, by definition, controversial; the court disagrees either about the result to be reached or about the method used to reach it.”¹¹¹ Another author who has extensively studied the federal appellate courts believes that “a dissenting opinion provides concrete evidence that the outcome on appeal was not foreordained.”¹¹² This author also uses the presence of dissenting opinions as a proxy for unpredictability.¹¹³ He specifically included some unpublished opinions in one of his studies and found that “there are more

109. LE (REVER! REMAN! VACAT! % AFFIR!) & TI (“UNITED STATES”) & DA (AFT 1970) % CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS” UNPUBLISH!) (search conducted Mar. 31, 2001) (excluding Third, Fifth and Eleventh Circuits).

110. Songer, *supra* n. 13, at 309-10.

111. Reynolds & Richman, *supra* n. 28, at 612 (as a result, they believe that “few decisions with separate opinions should go unpublished”).

112. Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. Pitt. L. Rev. 1029, 1043 (1999).

113. *Id.* at 1044 (excluding concurring opinions from this study at 1048).

dissents in unpublished opinions than one might have expected.”¹¹⁴

Despite the philosophy behind the publication rules, unpublished opinions contain a significant number of dissenting or concurring opinions. As of March, 2001, there were approximately 1,715 unpublished opinions with dissents.¹¹⁵ It must be remembered that the Third, Fifth and Eleventh Circuit do not release their unpublished opinions to Westlaw or LEXIS, and even though unpublished table opinions from these three circuits are recorded on these databases, they do not register any dissenting or concurring opinions. To confirm this fact, I conducted a search for unpublished dissenting opinions from the Third, Fifth and Eleventh Circuits, but did not locate any cases.¹¹⁶ In contrast, since 1969 the Third, Fifth and Eleventh Circuits have published about 4,453 opinions with dissents.¹¹⁷ Therefore, it can be assumed that there are actually more dissenting opinions than the 1,715 mentioned above.

Reynolds & Richman's study from 1978-79 found that divided courts (those with separate dissenting or concurring opinions) “were more than 20 times more common in cases decided by published opinions than in those decided by unpublished opinions.”¹¹⁸ Their study was, at the time, “the first system-wide analysis of these publication plans and their effect on judicial productivity and responsibility.”¹¹⁹ The study found 512 published separate opinions and 38 unpublished separate opinions.¹²⁰ These figures mean that about one in every 13.5

114. *Id.* at 1047.

115. CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS” UNPUBLISH!) & “CIRCUIT JUDGE” “DISTRICT JUDGE” “CHIEF JUDGE” /S DISSEN! (search conducted Mar. 30, 2001). This search picked up cases in which it is mentioned that a judge dissents even though there is no actual dissenting opinion written.

116. CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS” UNPUBLISH!) & CO (C.A.3 C.A.5 C.A.11) & “CIRCUIT JUDGE” “DISTRICT JUDGE” “CHIEF JUDGE” /S DISSEN! (search conducted Mar. 24, 2001). Unpublished table opinions from the Third, Fifth and Eleventh Circuits are recorded on Westlaw, but no information about the opinions is available.

117. “CIRCUIT JUDGE” “DISTRICT JUDGE” “CHIEF JUDGE” /S DISSEN! & DA (AFT 1969) & CO (C.A.3 C.A.5 C.A.11) % CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS” UNPUBLISH!) (search conducted Mar. 30, 2001).

118. Reynolds & Richman, *supra* n. 28, at 613.

119. *Id.* at 574.

120. *Id.* at 614 tbl. 12.

separate opinions was unpublished. Meaningful comparisons cannot be made for the earlier years of unpublished opinions because many were not recorded on Westlaw or LEXIS.¹²¹ However, it appears that the rate of dissension or concurrence in unpublished opinions has increased measurably since 1978-79.

For example, not counting the Third, Fifth, and Eleventh Circuits, about 8,319 separate opinions in published opinions were issued from 1990 to the present.¹²² During this same period, there were about 2,007 separate opinions in unpublished opinions.¹²³ These figures indicate that one in every 4.1 separate opinions issued after 1989 was unpublished,¹²⁴ an increase of about 3.3 times over the 1978-79 rate. If only dissenting opinions are counted, the rate is also one in every 4.1 opinions.¹²⁵ In addition, the rate has increased slightly during the last six years (1995-2000), during which time about one in every 3.74 separate opinions was written for an unpublished case.¹²⁶

121. Only three unpublished opinions with dissents or concurrences from 1970 through 1979 are recorded in Westlaw's CTA database. It is not until 1985, when 36 such opinions are located, that any meaningful number of cases is found. However, the 1978-79 study listed about 39 such opinions. *See Reynolds & Richman, supra* n. 28, at 614 tbl. 12. Westlaw records 6,843 published cases with separate opinions for the same period. Excluding the 1,703 cases from the Third, Fourth and Eleventh Circuits leaves 5,140 cases.

122. "CIRCUIT JUDGE" "DISTRICT JUDGE" "CHIEF JUDGE" /S DISSEN! CONCU! & CO (C.A.3 C.A.5 C.A.11) & DA (AFT 1989) % CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) (search conducted Mar. 31, 2001). This search retrieved 2,307 opinions, and this number was subtracted from 10,626, which was the total number of published opinions with separate opinions issued since 1990.

123. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) & "CIRCUIT JUDGE" "DISTRICT JUDGE" "CHIEF JUDGE" /S DISSEN! CONCU! & DA (AFT 1989) (search conducted Mar. 31, 2001).

124. The majority of unpublished separate opinions (2,007) recorded on Westlaw's CTA database were issued from 1990 to the present.

125. CI, PR ("TABLE OF DECISIONS WITHOUT REPORTED OPINIONS" UNPUBLISH!) & "CIRCUIT JUDGE" "DISTRICT JUDGE" "CHIEF JUDGE" /S DISSEN! & DA (AFT 1989) (search conducted Mar. 24, 2001). In the unpublished dissenting opinions recorded on Westlaw, the dissenting judge would have reversed the decision below in 792 of the cases and affirmed in another 576.

126. I tested these searches against a 1993 study of the Ninth Circuit to determine their accuracy. *See Robel, supra* n. 62, at 948. In that study, the author found more than 50 dissents in unpublished Ninth Circuit opinions, in comparison to about 100 in published opinions. *Id.* In my test searches, I found 56 unpublished Ninth Circuit opinions with dissents during 1993 and 115 published opinions with dissents. I believe that my test validates the accuracy of these searches enough to draw inferences.

There has been a measurable increase in the proportion of cases deemed not to warrant publication despite the fact that they involved issues and decisions contentious enough to prompt at least one of the judges to dissent or concur.¹²⁷ In comparison, the percentage of published opinions with a dissenting or concurring judge has remained fairly constant since the federal circuit courts began to issue unpublished opinions. The overall percentages of published dissenting and concurring opinions, grouped roughly by decades, are: 1971-80 (9 percent dissenting, 5 percent concurring);¹²⁸ 1981-90 (10 percent dissenting, 5 percent concurring); and 1990-96 (9 percent dissenting, 4 percent concurring).¹²⁹

IV. CITATION OF UNPUBLISHED OPINIONS

Unpublished opinions have become an integral part of the behavior of federal circuit courts; therefore it is important to see to what extent unpublished federal appellate opinions are cited by other courts. Circuit court publication plans “are based on the central assumption that opinions that serve no lawmaking function should not be published.”¹³⁰ By definition, these opinions are designated as unpublished because they are redundant of the law expressed in previously published opinions. Thus, every legal issue raised and resolved in an unpublished opinion should have been raised and resolved in one or more previously published opinions.

Determining whether an equally on-point and published opinion already exists is a threshold matter in deciding whether to publish. In order to determine whether an opinion establishes new law, a court will look to existing published opinions. When a subsequent court finds both published and unpublished opinions of relevance, it should not cite the unpublished opinions; instead, it should cite the same published precedents

127. See *id.* at 948 (studying the Ninth Circuit, the author found that in immigration opinions, the published opinions contained one concurrence and one dissent while there were seven concurrences and seven dissents in unpublished opinions. The study covered an eleven-month period beginning October 1, 1986).

128. Kuersten & Songer, *supra* n. 5, at 166 tbl. 3.7.

129. *Id.* at 167 tbl. 3.7.

130. Robel, *supra* n. 62, at 941.

that persuaded the courts issuing unpublished opinions that there was no need to publish. The corpus juris of published opinions should serve both needs equally well. But for some reason this is not always true; courts do cite unpublished federal circuit opinions, indicating that these opinions do have informational value for the courts. Perhaps one reason is that an “opinion’s ultimate information value [is] hard to predict at the time when the publication decisions are usually made.”¹³¹ More importantly, if the courts themselves cite unpublished opinions, “[h]ow can the practicing attorney be sure that unpublished decisions are in fact insignificant and need not be researched? Why should the bar ‘trust the judges?’”¹³²

This section demonstrates how often unpublished federal circuit court opinions are cited by the United States Supreme Court, the federal courts of appeals, the federal district courts, and state courts. In addition, it explores citations to unpublished opinions by legal publications.

A. *United States Supreme Court*

The primary way for circuit court conflicts and inconsistencies to be resolved is through review by the United States Supreme Court.¹³³ The use of unpublished opinions has triggered concern that inconsistencies among the circuit courts would be hidden in unpublished opinions unlike published opinions that “facilitate the discovery of conflicts in the law of the circuit.”¹³⁴ It was thought that use of unpublished opinions along with the no-citation rules would “significantly diminish the possibility of review based upon a conflict among the

131. *Id.* at 954.

132. Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 28 (Federal Judicial Ctr. 1985) (citing testimony of Professor Charles Haworth, who, when asked about unpublished opinions building a body of law unknown to trial lawyers stated, “I think we have to trust the judges,” in *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase*, vol. 2, 939 (1975)).

133. Other methods, of course, involve the passage of new legislation and the overruling of precedent.

134. Dragich, *supra* n. 35, at 783; *but see* Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 Sup. Ct. Rev. 247, 266 (concluding that “unresolved intercircuit conflicts do not constitute a problem of serious magnitude in the federal judiciary today”).

circuits.”¹³⁵ Furthermore, “[t]he limited appellate capacity of the Supreme Court makes it extremely unlikely that it will review an unpublished opinion.”¹³⁶ These concerns were raised throughout the debates on the publication rules.¹³⁷ A federal appellate judge in a 1985 opinion also expressed these sentiments.¹³⁸

Others expressed concern about inconsistencies within a circuit itself. A 1976 work about appellate courts noted that the combination of unpublished opinions and no-citation rules in multi-panel appellate courts “may leave the law in a state of disarray that is hard to cure” because the no-citation rules prevent counsel from calling attention to the problem.¹³⁹ The authors pointed out inconsistencies in the Ninth Circuit which could “be perceived only by looking at the unpublished opinions, but because of the no-citation rule there is no way to bring this to the surface and present the conflict to the court for resolution.”¹⁴⁰ They believed that the no-citation rule undermines “one of the imperatives of an appellate system—that the system should promote uniform and coherent enunciation and application of the law.”¹⁴¹ They called for the abandonment of the no-citation rule and the non-publication policy.¹⁴² Given these concerns, it is somewhat ironic that during congressional debates about no-citation rules, some witnesses expressed worry that “judges would consult the opinions in an effort to avoid intra-circuit conflicts and keep abreast of the work of their courts,” and in doing so, would rely on unpublished opinions that were unavailable to attorneys.¹⁴³

135. Reynolds & Richman, *supra* n. 7, at 1203.

136. Reynolds & Richman, *supra* n. 57, at 283.

137. Stienstra, *supra* n. 132, at 35.

138. *National Classification Comm. v. U.S.*, 765 F.2d 164, 174 (D.C. Cir. 1985) (writing separately, Judge Wald criticized the overuse of unpublished opinions, stating that “the parties have little chance of prevailing on a suggestion for rehearing en banc in this court or a petition for certiorari in the Supreme Court when the court renders judgment with no opinion.”).

139. Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* 38 (West Publ. Co. 1976).

140. *Id.*

141. *Id.*

142. *Id.* at 39.

143. Stienstra, *supra* n. 132, at 946 (citing *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase*, 93d Cong., 1st Sess., vol. 1, 536 (1974)).

Because of these concerns, it is useful to explore how the nation's highest court has interacted with unpublished federal circuit court opinions. Apart from some references to a few unpublished opinions that have reached the Supreme Court, it does not appear that there has been any previous examination of how the Court interacts with unpublished opinions. This section will describe the Court's involvement with unpublished federal circuit court opinions. This description is limited to cases that can be identified in Westlaw's SCT database (Supreme Court). The searches used would not find unpublished cases that were denied certiorari unless the denial mentioned the publication status of the lower court decision.

It appears that the Court first encountered an unpublished opinion very near the time the nonpublication rules were enacted. This encounter occurred in 1974, when the Supreme Court reviewed an unpublished opinion from the D.C. Circuit Court.¹⁴⁴ Since that time, the United States Supreme Court has encountered unpublished federal circuit court opinions at least eighty-three times.¹⁴⁵ Of this number, the Court has either granted or denied writs of certiorari for seventy-one.¹⁴⁶ To briefly summarize the Court's dealing with unpublished

144. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (reversing and remanding an unpublished D.C. Circuit opinion). This is the first identifiable Supreme Court review of an unpublished opinion in Westlaw's SCT database.

145. This figure represents the approximate number of times that can be identified by searching Westlaw's SCT (Supreme Court cases) database, plus about four cases that have been discussed in law review articles. There may be many more unpublished opinions that were denied certiorari but which could not be identified, simply because no reference was made to their publication status in the denial. A search in Westlaw's CTA database for OP (F.2D F.3D CIR. +15 UNPUBLISHED +10 "CERT DENIED") located 294 opinions, most of which are probably references to unpublished opinions that were denied certiorari. The same search in the district court database (DCT) retrieved 106 cases. In addition, a search for TE (F.2D F.3D CIR. +15 UNPUBLISHED +10 "CERT DENIED") in the TP-ALL database (law reviews and other legal practice periodicals) found 216 documents. Many of these court cases and articles cited multiple unpublished opinions that were denied certiorari. However, there is no way of determining how many times these courts or articles were citing the same unpublished opinions.

146. Two searches were used to arrive at this figure: (1) OP (F.2D F.3D CIR. +15 UNPUBLISHED) and (2) UNPUBLISHED % OP(F.2D F.3D CIR. +15 UNPUBLISHED), both run in Westlaw's SCT database (search conducted Feb. 20, 2001). The second search was run to find cases that do not contain a Federal Reporter citation or the term Cir. in the citation. Four cases were found in law review articles. A search in LEXIS's GENFED; SUPCIR database for: COURT (supreme court) and OPINIONS (f.2d or f.3d pre/15 unpublished) retrieved 21 cases.

opinions and the number of times it has done so, we see that it has: (1) granted certiorari to review fifty-seven unpublished opinions (in twelve of these cases, granting certiorari because of circuit splits on legal issues); and (2) denied writs of certiorari to review fourteen unpublished opinions (in twelve of which the dissent would have granted certiorari, half because of a circuit split). Of the fifty-seven unpublished opinions granted certiorari, the Court reversed thirty-one cases, vacated and remanded nine cases, reversed in part and affirmed in part one case, and affirmed fourteen cases. In addition, the Court has cited an unpublished opinion during its analysis of legal issues in approximately four cases.¹⁴⁷

The Court's treatment of unpublished opinions varies considerably depending on the circumstances. In the few instances when the Court comments on the unpublished status of an opinion, the Court's view depends on whether or not it agrees with the lower court's reasoning and decision. If the Court agrees with the lower court ruling, the unpublished status of the opinion is of no concern. If the Court disagrees with the ruling from below, the Court may use the opinion's unpublished status as another form of criticism.

In some cases, the Court treats an unpublished opinion in a matter-of-fact-type appellate review, or it cites an unpublished opinion in the same manner as if it were dealing with a published opinion. In these situations, the Court may look favorably upon the opinion, and the only apparent distinction is a cursory reference to the fact that it is unpublished. For example, in one case the Court affirmed an unpublished per curiam opinion and explicitly agreed with the lower court's ruling.¹⁴⁸ The opinion's unpublished status was not a factor. In sharp contrast, the Court in another case expressed astonishment that the lower court held a federal statute unconstitutional in an unpublished opinion.¹⁴⁹ This particular case prompted the remark

147. Appendix A, *infra*, cites every Supreme Court case or denial of writ involving an unpublished circuit court opinion and briefly describes how the Court interacted with the unpublished opinion as identified on Westlaw's SCT (Supreme Court) database.

148. *Durst v. U.S.*, 434 U.S. 542, 544 (1978) (explicitly agreeing with *Sweetwine v. Warden*, 549 F.2d 799 (4th Cir. 1976) (per curiam)).

149. *U.S. v. Edge Broad. Co.*, 509 U.S. 418 (1993) (reversing an unpublished Fourth Circuit opinion). The Court stated. "We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as

that “[t]he Supreme Court can be quite caustic when it does review an unpublished opinion.”¹⁵⁰ The Court has also made it clear that a lower court decision cannot evade review just because it was unpublished and deemed to have no precedential effect.¹⁵¹

In a few other cases, the Court has indicated that the summary decision below did not provide an adequate record for review.¹⁵² But on several occasions the majority was comfortable with the abbreviated lower court record, and it is the dissent to an opinion or denial of certiorari that is displeased with the circuit court for summarily dealing with an issue in an unpublished memorandum-type opinion.¹⁵³ In these situations, the dissenting justice clearly thinks that the matter was not given enough attention.¹⁵⁴

applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion.” *Id.* at 425 n. 3.

150. Richman & Reynolds, *supra* n. 57, at 342 n. 51.

151. *Commr. v. McCoy*, 484 U.S. 3 (1987) (*per curiam*) (reversing unpublished Sixth Circuit opinion). The Court noted “the fact that the Court of Appeal’s order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.” *Id.* at 7.

152. *Lyle v. Household Mfr., Inc.*, 494 U.S. 545 (1990) (vacating and remanding an unpublished Fourth Circuit opinion). The Court stated that to apply its analysis from a prior opinion to the facts of this case “without the benefit of a full record or lower court determinations is not a sensible exercise of this Court’s discretion.” *Id.* at 552, n. 3. See also *Taylor v. U.S.*, 493 U.S. 906, 110 S. Ct. 265 (1989) (denying writ of certiorari to review an unpublished Fifth Circuit opinion). In discussing the denial, Justice Stevens stated that although there was an intra-circuit split within the Fifth Circuit, there was no inter-circuit conflict. He also stated that it was unfortunate that the Fifth Circuit’s summary disposition of the petitioner’s case and the Court’s denial of writ may require him to serve an 18-month prison term when the Guidelines specify a range between 9 and 15 months but that is “the kind of burden that the individual litigant must occasionally bear when efficient management is permitted to displace the careful administration of justice in each case.” 110 S. Ct. at 265-66.

153. *County of Los Angeles v. Kling*, 474 U.S. 936, 106 S. Ct. 300 (1986) (table) (reversing an unpublished Ninth Circuit opinion (later published)). The dissent criticized the Court of Appeals for not discussing the record in greater depth and deciding the opinion did not warrant publication, labeling the decision not to publish as “plainly wrong.” 106 S. Ct. at 301 (Marshall, J., dissenting), and referring to the practice of issuing unpublished opinions and no-citation rules as “secret law.” *Id.* n. 1.

154. *Vincent v. Louisiana*, 469 U.S. 1166, 105 S. Ct. 928 (1985) (table) (denying writ of certiorari to review unpublished Fifth Circuit opinion). Arguing that in a habeas corpus appeal, the Court must ensure that “lower courts do not improperly cut corners,” the dissent found that in this summary dismissal, the lower court proceedings fell “intolerably short of fulfilling this duty.” 105 S. Ct. at 928 (Brennan & Marshall, JJ., dissenting).

In another case, the roles were reversed, and it was the dissent that was critical of the majority for vacating an unpublished opinion because it did not contain an extended discussion of the issues.¹⁵⁵ Concerns about an inadequate record from the court below have been raised by critics of unpublished opinions, particularly unpublished summary affirmances: "A final difficulty with the one word decision is that it may leave the Supreme Court with an insufficient record on which to base a decision."¹⁵⁶

The Court's interaction with unpublished opinions has involved some significant cases. *Feist Publications, Inc. v. Rural Telephone Service Co.*¹⁵⁷ reversed an unpublished Tenth Circuit opinion and is one of the most important copyright decisions the Court has issued. *Connick v. Meyers*¹⁵⁸ reversed an unpublished Fifth Circuit opinion and is an important First Amendment case. In *Bob Jones University v. Simon*,¹⁵⁹ involving an organization claiming tax-exempt status, the Court approvingly cited an unpublished district court opinion that had been affirmed by an unpublished Ninth Circuit opinion.¹⁶⁰ In *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*,¹⁶¹ the Court reversed an unpublished Eleventh Circuit opinion. This is an important freedom of religion case involving a church's practice of the Santeria religion, in which one of the principal forms of devotion is ritual animal sacrifice. The Court ruled in favor of the church, in part because the ordinances regulating ritual animal sacrifice were not religiously neutral. Although not a

155. *Terrell v. Morris*, 493 U.S. 1 (1989) (vacating and remanding an unpublished Sixth Circuit per curiam opinion). The dissent stated that the majority was vacating a decision based on the "supposition that the court failed to give sufficient thought to its own holding, merely because we would prefer a more extended discussion." *Id.* at 4 (Rehnquist, C.J., White, O'Connor, & Scalia, JJ., dissenting). Furthermore, the dissent believed that it was an unwise use of the resources of Court and the court of appeals to vacate "unpublished lower court opinions without any suggestion of error or intervening change in the law." *Id.*

156. Kuersten & Songer, *supra* n. 5, at 1175.

157. 499 U.S. 340 (1991).

158. 461 U.S. 138 (1983).

159. 416 U.S. 725 (1974).

160. *Id.* at 733 n. 8 (citing *Liberty Amendment Comm. of U.S.A. v. U.S.*, Civ. No. 70-721 (C.D. Cal. June 19, 1970) (unpublished), *aff'd per curiam*, No. 26507 (9th Cir. July 7, 1972)).

161. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993) (reversing an unpublished Eleventh Circuit opinion in freedom of religion case).

well-known case, *Swann v. Taylor*,¹⁶² an unpublished death penalty case from the Fourth Circuit, had much at stake for the defendant. The Court denied a writ of certiorari to review the case. The defendant was eventually granted clemency, due to his severe mental impairment, four hours before he was to be executed.

The Court's review of at least twelve unpublished opinions because of a circuit split on a legal issue raises at least two inferences. First, it can be inferred that the unpublished opinion has some value to the Court. In the case of a circuit split, there should be published opinions from circuits on both sides of the split. Therefore, if the Court cites an unpublished opinion to illustrate a legal point, the unpublished opinion must have fulfilled an informational need of the Court, or presumably it would have cited to a published opinion instead. While the Court generally does not cite unpublished federal circuit court opinions to support legal reasoning, it appears that the Court places some value on these opinions in certain circumstances. On the other hand, if only an unpublished opinion is available from a particular circuit to illustrate a circuit court conflict, this is an opinion that should have been published.

B. United States Courts of Appeals

In the 1978-79 study by Reynolds and Richman, the authors had found only a few opinions in which the courts had cited an unpublished opinion, indicating "at least facial compliance with the noncitation rule."¹⁶³ However, such compliance is no longer true today. The United States courts of appeals cite unpublished federal circuit court opinions more often than does any other court system.

The circuit courts have cited at least one unpublished federal circuit court opinion in 4,580 cases.¹⁶⁴ However, not

162. *Swann v. Taylor*, 526 U.S. 1097 (1999) (table) (denying writ of certiorari to review unpublished Fourth Circuit opinion in death penalty case).

163. Reynolds & Richman, *supra* n. 28, at 582.

164. LE, CON, DIS (F.2D F.3D CIR. +15 UNPUBLISHED) (search conducted Feb. 19, 2001). This search located cases in which the lead or concurring or dissenting opinions cited unpublished federal circuit court cases. The search located references to Federal Reporter citations or the circuit court designation (CIR.) proceeding the term "unpublished" by up to fifteen terms. This search also finds citations to unpublished

every citation to an unpublished opinion is a citation for legal support. Oftentimes, the court simply reiterates the fact that one of the parties has cited an unpublished opinion or opinions to support a legal argument. In other situations, the court states that an appeal connected with the case was dealt with in another, unpublished opinion rendered by the court which is not, however, being cited for legal support.

The most important way a court uses an unpublished opinion is to cite it for legal support. To determine the approximate number of times courts cited such unpublished circuit opinions for legal support, I sampled the 4,580 cases citing unpublished opinions in the following manner: I read the first 25 cases of every group of 100 cases retrieved (1-25, 101-125, etc., through 4,501-4,580), examining the citation to an unpublished case to determine why the court was citing it. Out of each group of 25 cases, I kept track of every case (citing case) in which the court cited an unpublished opinion for legal support, while eliminating all other cases, and averaged the numbers as explained below.¹⁶⁵ As a result of this sampling, I estimate that there are 2,043 federal appellate opinions that cite unpublished opinions for legal support. This is a conservative estimate because I did not count citations to unpublished opinions that were related to the case at hand. In many of the uncounted cases, parties cited an unpublished opinion to support their legal arguments.

I also compared how often federal circuit courts cite unpublished federal circuit court cases in majority, concurring and dissenting opinions. This research reveals that unpublished federal circuit court opinions are cited far more often in majority opinions than in concurring or dissenting opinions. Using the same search method described above, but limiting the search to

federal opinions that do not have a federal reporter citation if the citation contains the term CIR., as it should. A comparison search on LEXIS (GENFED;USAPP) for OPINIONS (f.2d or f.3d or cir. pre/15 unpublished) retrieved 4,726 cases, which is comparable to the total number of cases retrieved on Westlaw. The LEXIS results were not sampled.

165. The total number of citing cases out of each group of 25 cases was 511. I divided 511 by 46 (the number of groups of 25 cases); this averaged 11.10, a figure which I multiplied by 4 (4 groups of 25 cases per 100 cases), thus averaging 44.43 for each group of 100 cases. I then multiplied 44.43 by 46 because there were 46 of groups of 100 (actually the last group only had 80), and this equals 2043.9. The last group of 25 cases had 12 citing cases, very close to the 11.10 average for each group of 25 even though there were only 80 cases in that group (4,501-4,580).

the majority opinion, I retrieved 4,449 cases.¹⁶⁶ This is a very large subset of the original search and is actually just 131 cases less than that the number of cases retrieved in that search. In contrast, unpublished federal opinions are cited for legal support in approximately 65 concurring opinions¹⁶⁷ and approximately 104 dissenting opinions.¹⁶⁸

Interestingly, approximately 2,189 unpublished federal circuit court opinions cite other unpublished federal circuit court opinions.¹⁶⁹ Of this number, approximately 692 cite other opinions for legal support.¹⁷⁰ In addition, when the search was restricted to lead (majority) opinions that more likely affirmed the lower court decision, it retrieved 802 opinions.¹⁷¹ A search restricted to lead opinions that more likely reversed, remanded, or vacated the decision below retrieved only 164 opinions.¹⁷²

166. LE (F.2D F.3D CIR. +15 UNPUBLISHED) (search conducted Feb. 23, 2001).

167. CON (F.2D F.3D CIR. +15 UNPUBLISHED) (search conducted Feb. 23, 2001). This search retrieved 75 cases, but only 65 actually cited unpublished opinions for legal support. The concurring field (CON) contains the “[t]ext of concurring opinions or opinions that concur in part and dissent in part.” *Discovering Westlaw*, *supra* n. 855 at 64. A comparison search on LEXIS for CONCUR (f.2d or f.3d or cir. pre/15 unpublished) located 44 cases. These cases were not sampled (search conducted Feb. 21, 2001).

168. DIS (F.2D F.3D CIR. +15 UNPUBLISHED) (search conducted Feb. 19, 2001). This search retrieved 145 cases, but only about 104 cases cited unpublished opinions for legal support. The dissenting field (DIS) contains the “[t]ext of dissenting opinions or opinions that concur in part and dissent in part.” *Discovering Westlaw*, *supra* n. 855 at 64. (Note: There is some overlap between concurring and dissenting opinions because both of these searches retrieve the same cases in which there is an opinion that concurred in part and dissented in part.) A comparison search in LEXIS’s GENFED;USAPP database for DISSENT (f.2d or f.3d or cir. pre/15 unpublished) retrieved 160 cases (search conducted Feb. 19, 2001).

169. CI, PR (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED OPINIONS”) & PR (“COURT OF APPEALS”) & LE, CON, DIS (F.2D F.3D CIR. +15 UNPUBLISHED) (search conducted Feb. 23, 2001). A comparison search in LEXIS’s (GENFED;USAPP) for OPINIONS (f.2d or f.3d or cir. pre/15 unpublished) and NOTICE (UNPUBLISH!) retrieved 1256 cases (search conducted Feb. 23, 2001). The cases on LEXIS were not sampled.

170. I used the same sampling method described in n. 165, *supra*. Each group of 25 cases averaged 7.86 citing cases, a figure I multiplied by 4 to get an average of 31.45 per group of 100 cases, which in turn I multiplied by 22 (22 groups of 100 cases), for a total of 691.9.

171. CI, PR (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED OPINIONS”) & LE (AFFIR! “WE AFFIRM”) & F.2D F.3D CIR. +15 UNPUBLISHED) % LE (REVER! REMAN! VACAT!) (search conducted Mar. 31, 2001).

172. CI, PR (UNPUBLISH! “TABLE OF DECISIONS WITHOUT REPORTED OPINIONS”) & LE (REVER! REMAN! VACAT! & F.2D F.3D CIR. +15 UNPUBLISHED) % LE (AFFIR! “WE AFFIRM”) (search conducted Mar. 31, 2001).

Thus, citations to unpublished opinions occur most often in the majority opinion and are much more likely to involve an affirmance of the lower court decision.

The federal circuit courts citing unpublished opinions often cited to more than one, often in a string citation. As a result, the actual number of unpublished opinions cited by other federal circuit courts is much higher than the above statistics reveal.

It appears that unpublished federal circuit court opinions play some meaningful role in judicial decision making in United States courts of appeals. It is logical to assume that cases cited for legal support have fulfilled a particular legal informational need of the courts, or the courts would have chosen to cite a published opinion that were equally on point. Indeed, the court in *Anastasoff* cited an unpublished opinion because it was the “only case directly on point.”¹⁷³

Unpublished opinions have been referred to as a “secret body” of law.¹⁷⁴ Perhaps, borrowing Winston Churchill’s 1939 description of the Soviet Union, we should call an unpublished opinion that cites other unpublished opinions “a riddle wrapped in mystery inside an enigma.”¹⁷⁵

As Table 6, *infra*, shows, federal circuit courts are certainly willing to cite their own unpublished opinions.¹⁷⁶ While these courts occasionally cite unpublished opinions from other circuits, the vast majority appear to be citations to opinions of their own. This is logical since these courts are much more likely to be aware of and have access to their own unpublished opinions. The courts often cite opinions related to the matters

173. 223 F.2d at 899.

174. See *County of Los Angeles v. Kling*, 474 U.S. 936, 106 S. Ct. 300, 301 n. 1 (1986) (Marshall, J., dissenting) (referring to the practice of issuing unpublished opinions and non-citation rules as “secret law”); Dragich, *supra* n. 35, at 788 (giving examples to show “the seriousness of the courts of appeals’ creation of a body of ‘secret law’ by failing to publish opinions in important cases”).

175. Churchill made this comment during his first wartime broadcast on October 1, 1939. He was responding to the news that two days earlier, the Soviet-German Boundary and Friendship Treaty was signed in Moscow. The full quote is: “I cannot forecast to you the action of Russia. It is a riddle wrapped in mystery inside an enigma.” An image of this document can be accessed at the Churchill College website, available at <http://www.chu.cam.ac.uk/archives/gallery/russia/CHAR_09_138_46.shtml> (accessed May 1, 2001).

176. A representative search in the CTA database for citations to unpublished Fourth Circuit opinions uses the query LE, CON, DIS (“4TH CIR.” +15 UNPUBLISHED) (search conducted Feb. 21, 2001).

they are deciding, some of which are unpublished. In addition, the parties often cite unpublished opinions from the reviewing circuits.¹⁷⁷

TABLE 6: SELF-CITATIONS TO UNPUBLISHED OPINIONS

<i>Circuit</i>	<i>Number of citations to its unpublished opinions</i>
1st	70
2d	106
3d	69
4th	907
5th	372
6th	1150
7th	317
8th	215
9th	455
10th	539
11th	104
Federal	69
D.C.	87

C. United States District Courts

More than 3,161 federal district court opinions cite unpublished federal circuit court opinions.¹⁷⁸ A sampling of these cases indicates that the district courts have cited unpublished opinions for legal support in approximately 1,967 cases.¹⁷⁹ This is a conservative estimate because I counted only cases in which the court explicitly cited the unpublished case for legal authority, and I eliminated references to unpublished opinions

177. Sixth Circuit unpublished opinions are cited more often than the unpublished opinions of other courts. Perhaps this is due in part to the Sixth Circuit rule on citation to unpublished opinions; while the Sixth Circuit generally disfavors such citations, “[i]f a party 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 decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court.” 6th Cir. R. 28(g).

178. OP (F.2D F.3D CIR. +15 UNPUBLISHED) (search conducted Mar. 27, 2001) (DCT database) (district court cases). A comparison search in LEXIS (GENFED;DIST) (U.S. district court cases) for OPINIONS (f.2d or f.3d or cir. pre/15 unpublished) retrieved 3,763 cases (search conducted Feb. 20, 2001).

179. I searched through the first ten cases of each group of 100 (1-10, 101-110, 201-210 etc. until 3001-3010). The average number of cases that cited an unpublished opinion for legal support was about 6.22 cases out of ten. I then multiplied this number by 10, which came to 62.25 (or 62.25 percent), and 62.25 percent of 3,161 is 1,967 cases.

related to the case at issue. I also eliminated references to unpublished opinions by one of the parties, unless the court also relied on the opinion. A significant number of these district court opinions cited more than one unpublished opinion; as a result, the actual number of cited unpublished opinions is higher than the number of citing cases.

I also found approximately 901 unpublished federal district court cases citing unpublished federal circuit court cases.¹⁸⁰ However, it appears that the vast majority of these unpublished district court opinions were counted in the search done in the district court database (DCT) described above. A search in DCT to eliminate unpublished opinions located only 393 opinions, indicating that perhaps as many as 2,768 out of the 3,161 federal district court opinions described above were unpublished opinions.¹⁸¹ I confirmed this estimate with a search in the DCT database for opinions that have only a Westlaw citation; I retrieved 2,769 opinions.¹⁸² Approximately 1,761 of these unpublished district court cases cited unpublished federal circuit cases for legal support.¹⁸³ As a result, it appears that the majority of district court cases citing such unpublished opinions for legal support were themselves unpublished.

In some instances, the district courts went to unpublished circuit court opinions because there were no published decisions on point.¹⁸⁴ Some courts seem to apologize for citing an

180. OP (F.2D F.3D CIR. +15 UNPUBLISHED) in Westlaw's DCTU database (unpublished district court opinions) (search conducted Mar. 28, 2001).

181. OP (F.2D F.3D CIR. +15 UNPUBLISHED) % CI (WL) (search conducted Mar. 28, 2001) (excluding cases with a Westlaw citation). 3,161 minus 393 = 2,768. The search was also tested in the DCTU database, but it did not retrieve any cases, indicating that it is an accurate search for eliminating unpublished district court opinions.

182. OP (F.2D F.3D CIR. +15 UNPUBLISHED) & CI (WL) (search conducted Mar. 28, 2001). I ran another test search to exclude cases with Westlaw or *Federal Supplement* citations: OP (F.2D F.3D CIR. +15 UNPUBLISHED) % CI (F.SUPP WL) (search conducted Mar. 28, 2001). This search retrieved only 22 cases, all of which were either *Federal Rules Decision* or *Bankruptcy Reporter* citations.

183. A search through groups of ten cases (1-10 etc. to 1001-1010) averaged 6.36 cases out of 10, or 1,761 cases.

184. *Amin v. Suthikant*, 1995 WL 781142 (W.D. Mo. Nov. 22, 1995). In determining whether an Illinois judgment was entitled to full faith and credit, the court stated,

The court recognizes that the Sixth Circuit disfavors citation to its unpublished decisions. The *Berke* case, however, represents the only case located that directly addresses whether a federal court has jurisdiction over a case seeking judgment on a state court judgment. Thus I take comfort that three circuit judges

unpublished opinion while at the same time being drawn to its persuasiveness.¹⁸⁵ One court decided that the no-citation rules did not apply to the court itself.¹⁸⁶

Table 7, *infra*, shows the approximate number of times that unpublished opinions from each circuit court have been cited in district court cases. Interestingly, unpublished opinions from the Third, Fifth and Eleventh Circuits are cited in district court cases despite the fact that these circuits do not disseminate their unpublished opinions.

TABLE 7: CITATIONS OF UNPUBLISHED CIRCUIT COURT OF APPEALS OPINIONS BY DISTRICT COURTS.¹⁸⁷

<i>Circuit</i>	<i>Number of Citations</i>
1st Circuit	97
2d Circuit	194
3d Circuit	103
4th Circuit	624
5th Circuit	227

have also determined that the federal courts have jurisdiction over such an action.

Id. at *2 n. 4 (citing *Berke v. Northcutt*, No. 84-5228, 1986 WL 17153 (6th Cir. June 17, 1986) (per curiam).

185. See *U.S. v. Williamson*, 1999 WL 232918 (D. Kan. Mar. 4, 1999):

The court recognizes that unpublished opinions remain unfavorable but concludes that the Tenth Circuit Court of Appeals' decision in *United States v. Hutchinson*, 141 F.3d 1186, 1998 WL 94600 (10th Cir. 1998) (unpublished opinion) has persuasive value on a material issue presented here—that is, whether a certificate of appealability may be granted”

Id. at *1. A few lines later, citing *United States v. Lacey*, 162 F.3d 1175, 1998 WL 777067 (10th Cir. Oct. 27, 1998), the district court wrote,

The court again recognizes that citation of unpublished opinions is disfavored. However, the court concludes that the Court of Appeals' opinion in *Lacey* is extremely persuasive here because the defendant in *Lacey* moved the court to apply the doctrine of equitable tolling

Id.; see also *Riggs v. Boeing Co.*, 1999 WL 233285, at *1 (D. Kan. Mar. 4, 1999) (“While the court recognizes that citation to unpublished opinions remains disfavored, it concludes that the Circuit’s decision in *Suazo* is extremely persuasive because the Circuit specifically addressed the very issue presented here.”) (citing *Suazo v. Regents of U. of Cal.*, 1998 WL 339714 (10th Cir. June 24, 1998)).

186. *U.S. v. Gatto*, 1995 WL 564813, at *1 n. 3 (E.D. Pa. Sept. 20, 1995) (“In the Eighth Circuit, unpublished opinions may not be cited by a ‘party’ but there is no proscription on their consideration by a court for their persuasive value. In any event, the proposition for which these cases are referenced is evident.”).

187. OP (“6TH CIR.” +15 UNPUBLISHED) in DCT database (search conducted Feb. 28, 2001) (example of a search for citations to unpublished Sixth Circuit opinions).

<i>Circuit</i>	<i>Number of Citations</i>
6th Circuit	459
7th Circuit	270
8th Circuit	92
9th Circuit	274
10th Circuit	342
11th Circuit	73
Federal Circuit	51
D.C. Circuit	65

D. State Courts

State courts cite unpublished federal circuit court opinions much less frequently. There appear to be 54 state cases that have cited unpublished federal circuit court opinions for legal support.¹⁸⁸ Thus, it can be inferred that unpublished federal circuit court opinions are not a significant part of state court decisionmaking.

E. Law Reviews and Legal Practice Material

Apparently unpublished federal circuit court opinions have some importance for legal scholarship and secondary sources. A search in Westlaw's JLR database (full-text journal and law reviews) indicates that unpublished federal circuit court opinions have been cited in more than 3,700 full-text law reviews, journal articles and legal practice materials.¹⁸⁹

V. PER CURIAM OPINIONS

A correlation can be seen between the increased use of unpublished opinions and the increased use of per curiam

188. OP (F.2D F.3D +15 UNPUBLISHED % MANUAL MANUSCRIPT WORK) in Westlaw's ALLSTATES database retrieved 93 cases, of which 54 cited an unpublished federal circuit court opinion for legal support (search conducted Apr. 2, 2001).

189. TE (F.2D F.3D CIR. +15 UNPUBLISHED). This query searched the Text (TE) field of the articles for citations to unpublished federal circuit court opinions (search conducted Feb. 20, 2001). However, it is not known how many of these citations refer to the same unpublished opinion nor how important the case is to the legal issues being discussed. A comparison search on LEXIS retrieved 2,477 articles, using the following search: f.2d or f.3d or cir. /15 unpublished in LAWREV; ALLREV. (Note: The LEXIS search was conducted in a combined law review file, which does not contain other material, and this is probably why the number is lower).

opinions¹⁹⁰ by federal circuit courts. The total number of per curiam opinions (published and unpublished) is approximately 121,840 for the period 1945 to the present.¹⁹¹ A search restricted to find all per curiam opinions issued from 1945 to 1969 (a few years before courts started to issue unpublished opinions) retrieved 22,275 cases.¹⁹² A search for per curiam opinions (published and unpublished) from 1970 to the present retrieved 99,565 cases.¹⁹³ Thus, the large majority of per curiam opinions have been issued from 1970 to the present. However, 60,606 of these per curiam opinions issued since 1970 are unpublished.¹⁹⁴ In other words, close to two-thirds of the per curiam opinions issued by the federal circuit courts of appeals after 1970 have been unpublished opinions. Furthermore, the vast majority of these unpublished per curiam opinions were issued from 1985 to the present, as Table 8, *infra*, indicates.¹⁹⁵

TABLE 8: UNPUBLISHED PER CURIAM OPINIONS
ON WESTLAW AND LEXIS

Year	Westlaw ¹⁹⁶	LEXIS ¹⁹⁷
2000	4,492	3,466
1999	4,798	3,189
1998	5,037	3,909

190. A per curiam opinion is an “opinion handed down by an appellate court without identifying the individual judge who wrote the opinion.” *Black’s Law Dictionary* 1119 (7th ed. West Group 1999).

191. PR (“COURT OF APPEALS”) & JU (“PER CURIAM”) (search conducted Feb. 20, 2001).

192. PR (“COURT OF APPEALS”) & JU (“PER CURIAM”) & DA (BEF 1/1/1970) (search conducted Feb. 20, 2001).

193. PR (“COURT OF APPEALS”) & JU (“PER CURIAM”) & DA (AFT 12/31/1969). The total number of unpublished per curiam opinions reported on LEXIS is 47,693. NOTICE (unpublish!) and allcaps (per cur**m) GENFED;USAPP (search conducted Feb. 20, 2001).

194. CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS” UNPUBLISH!) & PR (“COURT OF APPEALS”) & JU (“PER CUR**M”) (search conducted Feb. 20, 2001). This number differs from the total number when the individual circuit totals are added together from Table 8, *infra*. That total comes to 59,963.

195. Westlaw’s CTA database & LEXIS’s GENFED;USAPP.

196. CI, PR (“TABLE OF DECISIONS WITHOUT REPORTED OPINIONS” UNPUBLISH!) & JU (“PER CUR**M”) & DA(AFT 12/31/1999 & BEF 1/1/2001) (search conducted Feb. 20, 2001) (example of search for the year 2000).

197. NOTICE (unpublish!) and allcaps (per cur**m) AND date aft 12/31/1990 and date bef 01/01/1992 (search conducted Feb. 20, 2001) (example of search for the year 1991).

<i>Year</i>	<i>Westlaw</i>	<i>LEXIS</i>
1997	4,512	3,578
1996	5,137	4,044
1995	5,214	3,896
1994	4,856	6,021
1993	4,553	6,056
1992	4,244	5,130
1991	3,512	4,212
1990	3,689	2,490
1989	2,673	51
1988	2,793	87
1987	2,532	122
1986	1,286	161
1985	524	14
1984	9	12
1983	8	3
1982	12	2
1981	8	1
1980	2	3
1979	2	1
1978	7	2
1977	5	6
1976	16	207
1975	14	366
1974	9	122
1973	14	16
1972	5	11
1971	0	5
1970	0	0
Pre 1970	0	0

VI. CONCLUSION

For more than a century, the United States courts of appeals have been “pivotal players in the creation and application of legal policy,” and yet they “are virtually invisible to most Americans.”¹⁹⁸ The most visible action of these courts is deciding cases appealed to them. Since the mid-1970s, however, this most visible action has been increasingly hidden because many of these decisions are issued in unpublished opinions. The rise of unpublished opinions is one of the most important changes occurring in the courts of appeals in the last quarter century. This article has documented the use of Westlaw and LEXIS, the two main electronic legal research services, to gain some visibility about unpublished opinions. While it is just a

198. Kuersten & Songer, *supra* n. 5, at 1.

rough sketch, it does shed some light upon various aspects of unpublished opinions. As a result, it may help to make the work of these important courts a little more visible.

APPENDIX A: SUPREME COURT CASES REVIEWING UNPUBLISHED OPINIONS

This appendix cites, in reverse chronological order, each Supreme Court case or denial of writ involving an unpublished circuit court opinion, and briefly describes how the Court interacted with the unpublished opinion. This is not a complete list and only includes those opinions that can be identified on Westlaw's SCT database.

Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000) (affirming unpublished Fourth Circuit per curiam opinion, having granted certiorari "in light of disagreement among the Circuits" and explicitly citing the unpublished opinion to illustrate conflict).

Carter v. U.S., 530 U.S. 255 (2000) (affirming unpublished Third Circuit opinion, having granted certiorari to resolve conflict among the circuits.)

Johnson v. U.S., 529 U.S. 694 (2000) (granting certiorari to resolve conflict in statutory interpretation among circuits, citing unpublished First Circuit opinion to show this conflict).

Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) (affirming unpublished Tenth Circuit opinion).

Swann v. Taylor, 526 U.S. 1097 (1999) (table) (denying writ of certiorari to review unpublished Fourth Circuit opinion in death penalty case). About four hours before his scheduled execution, defendant was granted clemency by Governor of Virginia, and sentence was commuted to life imprisonment due to severe mental impairment.

Hetzel v. Prince William County, 523 U.S. 208 (1998) (reversing unpublished Fourth Circuit opinion).

Lachance v. Erickson, 522 U.S. 262 (1998) (reversing unpublished Federal Circuit court opinion).

Lynce v. Mathis, 519 U.S. 433 (1997) (concurring opinion points out that Court granted certiorari because of circuit court conflict, comparing Tenth Circuit opinion and unpublished order from Eleventh Circuit to illustrate conflict).

Old Chief v. U.S., 519 U.S. 172 (1997) (reversing and remanding unpublished Ninth Circuit opinion, having granted certiorari because courts of appeals were divided sharply on the issue).

Behrens v. Pelletier, 516 U.S. 299 (1996) (reversing and remanding unpublished Ninth Circuit opinion).

Things Remembered, Inc., v. Petrarca, 516 U.S. 124 (1995) (affirming unpublished Sixth Circuit opinion).

Thompson v. Keohane, 516 U.S. 99 (1995) (vacating and remanding unpublished Ninth Circuit opinion, having granted certiorari because of conflict among circuits).

Sandin v. Conner, 515 U.S. 472 (1995) (citing unpublished Ninth Circuit opinion for legal support).

MCI Telecomm. Corp. v. American Tel. & Telegraph Co., 512 U.S. 218 (1994) (affirming unpublished per curiam order from D.C. Circuit.)

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994) (reversing and remanding unpublished Ninth Circuit opinion).

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (reversing and remanding unpublished Sixth Circuit per curiam opinion, having granted certiorari because of conflict among circuits).

U.S. v. Edge Broad. Co., 509 U.S. 418 (1993) (reversing unpublished Fourth Circuit opinion). The Court stated, "We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion." *Id.* at 425 n. 3.

Shalala v. Schaefer, 509 U.S. 292 (1993) (affirming unpublished Eighth Circuit opinion).

Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520 (1993) (reversing an unpublished Eleventh Circuit opinion in freedom of religion case).

Spectrum Sports, Inc., v. McQuillan, 506 U.S. 447 (1993) (reversing and remanding unpublished Ninth Circuit opinion, pointing out that this unpublished opinion and a line of cases it relies on conflict with every other circuit, thus granting certiorari to resolve the conflict).

Langston v. U.S., 506 U.S. 930 (1992) (table) (denying writ of certiorari). Dissent cites several circuit court opinions, including unpublished opinion, to illustrate that “this issue arises with some frequency, and in light of the conflict in the Circuits,” certiorari should be granted. *Id.* at 932 (White & Thomas, JJ., dissenting).

Costa v. U.S., 506 U.S. 929 (1992) (table) (denying writ of certiorari). Dissent would grant certiorari to resolve circuit court split, citing unpublished opinions from the Ninth Circuit and Sixth Circuit to show split. *Id.* at 929 (White & O’Connor, JJ., dissenting).

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) (pointing out that Fifth Circuit granted rehearing en banc because published opinion by one of its panels conflicted with previous unpublished opinion in same circuit). Dissent cites same unpublished opinion and refers to unpublished Ninth Circuit opinion when giving history of interpretation of statute, explaining that these two unpublished opinions followed the reasoning of first court to interpret particular term of statute and that no other courts had examined first court’s ruling before statute was amended. *Id.* at 488 (Blackmun, Stevens, & O’Connor, dissenting).

Waller v. U.S., 504 U.S. 962 (1992) (table) (denying writ of certiorari to review unpublished Ninth Circuit opinion). Dissent points out that this unpublished opinion, along with opinions from the Fourth, Fifth, Sixth and Eleventh Circuits, conflict with the First Circuit and so certiorari should be granted to resolve the conflict. *Id.* at 964 (White & O’Connor, JJ., dissenting).

Ankenbrandt v. Richards, 504 U.S. 689 (1992) (reversing and remanding unpublished Fifth Circuit opinion).

Smith v. U.S., 502 U.S. 1017 (1991) (table) (denying writ of certiorari to review unpublished Fourth Circuit opinion). Dissent would vacate judgment, arguing irrelevance of unpublished status: “Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.” *Id.* at 1020 n. * (Blackmun, O’Connor, & Souter, JJ., dissenting).

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) (vacating and remanding unpublished First Circuit opinion).

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 354 (1991) (reversing unpublished Ninth Circuit opinion, having granted certiorari to address “this important issue” because of divergence of opinion among the circuits).

Stevens v. Dept. of Treasury, 500 U.S. 1, 4 (1991) (reversing and remanding unpublished Fifth Circuit per curiam opinion, having granted certiorari because there was a “clear misreading by the lower courts of the applicable and important federal statute”).

Feist Publications, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (reversing unpublished Tenth Circuit opinion).

Portland Golf Club v. Commr., 497 U.S. 154 (1990) (affirming unpublished Ninth Circuit opinion).

Lytle v. Household Mfg., Inc., 494 U.S. 545, 552 n. 3 (1990) (vacating and remanding unpublished Fourth Circuit opinion, remarking that to apply Court’s analysis from a prior opinion to facts of this case “without the benefit of a full record or lower court determinations is not a sensible exercise of this Court’s discretion”).

Taylor v. U.S., 493 U.S. 906, 110 S. Ct. 265 (1989) (table) (denying writ of certiorari to review unpublished Fifth Circuit opinion, because despite intra-circuit split within the Fifth Circuit, there was no inter-circuit conflict). Justice Stevens, in an opinion respecting the denial of certiorari, observed that it was “unfortunate” that the Fifth Circuit’s summary disposition of the case and the Court’s denial of writ may require petitioner to serve an 18-month prison

term when the Guidelines specify a range between 9 and 15 months, remarking, “That, however, is the kind of burden that the individual litigant must occasionally bear when efficient management is permitted to displace the careful administration of justice in each case.” 110 S. Ct. at 265-66.

Terrell v. Morris, 493 U.S. 1 (1989) (vacating and remanding per curiam unpublished Sixth Circuit opinion). Dissent states that majority is vacating decision based on “supposition that the court failed to give sufficient thought to its own holding, merely because we would prefer a more extended discussion,” and further believes it an unwise use of judicial resources to vacate “unpublished lower court opinions without *any* suggestion of error or intervening change in the law.” *Id.* at 4 (Rehnquist, C.J., White, O’Connor, & Scalia, JJ., dissenting).

Hardin v. Straub, 490 U.S. 536 (1989) (reversing and remanding unpublished Sixth Circuit opinion).

City of Canton v. Harris, 489 U.S. 378 (1989) (vacating and remanding unpublished Sixth Circuit opinion).

Rhodes v. Stewart, 488 U.S. 1 (1988) (reversing unpublished per curiam Sixth Circuit opinion).

Reed v. Collyer, 487 U.S. 1225 (1988) (table) (denying, with dissent, writ of certiorari to review unpublished Sixth Circuit opinion).

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) (affirming unpublished Ninth Circuit opinion).

Houston v. Lack, 487 U.S. 266 (1988) (reversing unpublished Sixth Circuit opinion).

Doe v. U.S., 487 U.S. 201 (1988) (affirming decision in unpublished Fifth Circuit per curiam opinion and noting that unpublished opinion and opinions from the Second and Eleventh Circuits conflict).

Liljeberg v. Health Services Acq. Corp., 486 U.S. 847 (1988) (examining dissent in unpublished opinion that was part of underlying litigation in case).

Chaser Shipping Corp. v. U.S., 484 U.S. 1004 (1987) (table) (denying writ of certiorari to review unpublished Second Circuit opinion).

St. Louis S.W. Ry. Co. v. Bhd. of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, 484 U.S. 907, 108 S. Ct. 250 (1987) (table) (denying writ of certiorari to review unpublished Fifth Circuit opinion). Dissent would grant certiorari based on split between Fifth and Fourth Circuits to “resolve the conflict in the Courts of Appeals over this important question of federal law.” 108 S. Ct. at 250 (White & Brennan, JJ., dissenting).

Commr. v. McCoy, 484 U.S. 3, 7 (1987) (per curiam) (reversing unpublished Sixth Circuit opinion and noting “the fact that the Court of Appeal’s order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.”).

Burlington N. R.R. Co., v. Okla. Tax Commn., 481 U.S. 454 (1987) (granting certiorari and reversing unpublished Tenth Circuit opinion because unpublished opinion conflicted with the Eighth Circuit).

Rose v. Clark, 478 U.S. 570 (1986) (vacating and remanding unpublished Sixth Circuit opinion).

County of Los Angeles v. Kling, 474 U.S. 936, 106 S. Ct. 300 (1986) (table) (reversing unpublished Ninth Circuit opinion (which was later published)). The dissent criticized the court of appeals for not discussing the record in greater depth and deciding the opinion did not warrant publication. The decision not to publish the opinion was “plainly wrong.” 106 S. Ct. at 301 (Marshall, J., dissenting). Justice Marshall referred to the practice of issuing unpublished opinions and no-citation rules as “secret law” and cited several sources that have discussed this issue. *Id.* n. 1.

Kentucky v. Graham, 473 U.S. 159 (1985) (reversing unpublished Sixth Circuit opinion).

Vincent v. Louisiana, 469 U.S. 1166, 105 S. Ct. 928 (1985) (table) (denying writ to review unpublished Fifth Circuit opinion). Dissent argued that in habeas corpus appeal, Court must review lower court proceedings with great care to ensure that “lower courts do not improperly cut corners,” 105 S. Ct. at 928 (Brennan & Marshall, JJ., dissenting), that in this summary dismissal lower court

proceedings “have fallen intolerably short of fulfilling this duty,” *id.*, and that “[n]one of the justifications proffered by the court or the State can excuse the court’s summary dismissal of Vincent’s petition,” *id.* at 931.

Merrill Lynch, Pierce, Fenner & Smith, Inc., v. McCollum, 469 U.S. 1127 (1985) (table) (denying writ of certiorari). Dissent would grant certiorari to resolve this important issue, citing unpublished Tenth Circuit opinion to illustrate circuit court conflict. *Id.* at 1129 (White & Blackmun, JJ., dissenting).

Borchardt v. U.S., 469 U.S. 937 (1984) (table) (denying writ to review two unpublished Fifth Circuit cases). Dissent would grant certiorari because cases present important constitutional issue whether multiple punishments may be obtained through multiple prosecutions of the same offense, believing government violated Double Jeopardy Clause. *Id.* at 937-38 (Brennan & Marshall, JJ., dissenting).

Sanson v. U.S., 467 U.S. 1264 (1984) (table) (denying writ of certiorari to review unpublished Seventh Circuit opinion). Dissent would grant certiorari, comparing this unpublished Seventh Circuit opinion to other circuits to illustrate circuit split. *Id.* at 1265 (White, J., dissenting).

McDonald v. City of West Branch, 466 U.S. 284 (1984) (reversing and remanding unpublished Sixth Circuit opinion).

Blum v. Stenson, 465 U.S. 886 (1984) (affirming in part and reversing in part unpublished Second Circuit opinion).

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984) (reversing unpublished Eleventh Circuit opinion). Dissent believes that majority’s insistence upon a fuller record is misplaced because court of appeals was deciding an interlocutory appeal. *Id.* at 161-62 (Stevens, Brennan & Marshall, JJ., dissenting).

U.S. v. Hasting, 461 U.S. 499 (1983) (reversing and remanding unpublished Seventh Circuit per curiam opinion).

Hensley v. Eckerhart, 461 U.S. 424 (1983) (vacating and remanding unpublished Eighth Circuit opinion). Dissent notes that Eighth Circuit’s *published* opinions are consistent with other circuits, so Court should not have

“devoted our scarce time to hearing this case,” yet once writ was granted, unpublished opinion should have been affirmed. *Id.* at 457 (Brennan, Marshall, Blackmun & Stevens, JJ., concurring in part and dissenting in part).

Connick v. Myers, 461 U.S. 138 (1983) (reversing unpublished Fifth Circuit opinion).

Kime v. U.S., 459 U.S. 949 (1982) (table) (denying writ of certiorari to review unpublished Fourth Circuit opinion).

Summit Valley Indus., Inc., v. Local 112, United Bhd. of Carpenters & Joiners of Am., 456 U.S. 717 (1982) (affirming unpublished Ninth Circuit per curiam opinion).

Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981) (affirming three Second Circuit cases, including two unpublished opinions.)

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled by Daniels v. Williams*, 474 U.S. 327 (1986) (in concurring opinion, citing unpublished Sixth Circuit opinion).

Hughes v. Rowe, 449 U.S. 5 (1980) (affirming in part, reversing in part and remanding unpublished Seventh Circuit opinion).

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) (reversing unpublished Fourth Circuit opinion).

Hyman v. Rickman, 446 U.S. 989 (1980) (table) (denying writ of certiorari to review an unpublished Seventh Circuit opinion). Petitioner was an inmate who filed pro se civil rights action under 42 U.S.C. § 1983 alleging violation of constitutional right to appropriate medical treatment for glaucoma. Dissent would grant certiorari.

Branti v. Finkel, 445 U.S. 507 (1980) (affirming unpublished Second Circuit opinion).

Brown v. Felsen, 442 U.S. 127 (1979) (reversing unpublished Tenth Circuit opinion, after having granted certiorari because this opinion conflicted with every other court of appeals that had considered the question).

Durst v. U.S., 434 U.S. 542 (1978) (affirming unpublished Fourth Circuit opinion, while expressly agreeing with reasoning in the unpublished opinion).

Brown Transport Corp., v. Atcon, Inc., 439 U.S. 1014 (1978) (table) (denying writ of certiorari). Dissent would grant certiorari but points out that this case is no more deserving of review than many other cases which were denied certiorari, citing several unpublished opinions as examples. *Id.* at 1017-22 (White & Blackmun, JJ., dissenting).

Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257 (1978) (reversing unpublished Seventh Circuit opinion, but not addressing challenge to Seventh Circuit's no-citation rule).

Moore v. Illinois, 434 U.S. 220, 228 (1977) (reversing and remanding unpublished Seventh Circuit opinion, ruling that court of appeals erred in admitting victim's testimony that she had identified defendant in an uncounseled pretrial confrontation, even if defendant's rights had been violated, because there was an "independent source" for victim's identification).

Batterton v. Francis, 432 U.S. 416 (1977) (reversing unpublished Fourth Circuit per curiam opinion).

U.S. v. Janis, 428 U.S. 433 (1976) (reversing and remanding unpublished Ninth Circuit opinion).

Do-Right Auto Sales v. U.S. Ct. App. for Seventh Cir., 429 U.S. 917 (1976) (involving constitutional challenges to the Seventh Circuit's no-citation rule; denying motion for leave to file petition for writ of mandamus and prohibition).

Scott v. Kentucky Parole Bd., 429 U.S. 60 (1976) (table) (vacating unpublished Sixth Circuit opinion and remanding it to court of appeals for consideration of question of mootness). Dissent points out that the conflict in the circuits over whether any constitutionally mandated procedural safeguards apply to parole release hearings is "more than evident" and compared this unpublished opinion with other circuits to show conflict. *Id.* at 343 n. 1 (Stevens, Brennan & Powell, JJ., dissenting).

Moore v. U.S., 429 U.S. 20 (1976) (vacating and remanding unpublished Fifth Circuit opinion).

Goldberg v. U.S., 425 U.S. 94 (1976) (vacating and remanding unpublished Ninth Circuit opinion to district court).

Rose v. Hodges, 423 U.S. 19 (1976) (citing two unpublished Sixth Circuit opinions as examples of correct rulings and stating that the cited cases are identical to the one at issue). Dissent disagrees with majority's reading of both the record below and the unpublished opinions it cited; dissent also points out that the Sixth Circuit rules prohibit citation to unpublished opinions and asks, "Am I to understand that this Court is not called upon to respect that prohibition?" *Id.* at 23 n. 2 (Brennan & Marshall, JJ., dissenting).

Transamerican Freight Lines, Inc., v. Brada Miller Freight Sys., Inc., 423 U.S. 28 (1975) (reversing and remanding an unpublished Seventh Circuit opinion).

Administrator, FAA, v. Robertson, 422 U.S. 255 (1975) (finding statute at issue to be unclear, citing several circuit court cases, including an unpublished Fifth Circuit opinion, to show conflicting interpretations of statute).

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (reversing and remanding unpublished D.C. Circuit opinion).

Bob Jones U. v. Simon, 416 U.S. 725 (1974) (citing unpublished Ninth Circuit opinion for legal support).