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The past two decades have witnessed an increasing number of empirical analyses of the votes of judges in the lower federal courts (e.g., Richardson and Vines, 1970; Carp and Rowland, 1983; Atkins, 1972; Goldman, 1966; Goldman, 1975; Vines, 1964; Dolbeare, 1969; Johnson, 1979; Kritzer, 1978; Howard, 1981; Songer, 1982; Walker, 1972). Although great variety in the methods employed may be found in these empirical studies, virtually all of them share one approach common to Supreme Court studies: their analysis of judges' decisions and votes is restricted to data obtained from the published opinions of the courts.

While the focus of empirical analysis has been on the published opinions of courts, a large number of cases are decided without an accompanying published opinion. The phenomenon is most evident in the district courts where fewer than 10% of cases terminated by court action have published opinions (Vestal, 1970). A vast body of data on the outputs of the federal courts therefore remains largely unexplored by public law scholars. As Carp and Rowland suggest, "We know very little about the contents or impact of these many unreported opinions" (1983, p. 17). The present study attempts to shed some light on the similarities and differences between published and unpublished district judge decisions by analyzing the treatment of each on appeal.

The primary outlet for the publication of federal trial court opinions is the *Federal Supplement* compiled by West Publishing Company. The rates of opinion publication vary widely among judges. A study of opinion writing in 1968 uncovered one district judge who had 36 opinions published during the year, while at the other extreme 30 judges published four or fewer opinions (Vestal, 1970, pp. 676–77).

The criterion for publication decisions of federal judges was stated succinctly by the Judicial Conference in 1964: "The judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value." It is assumed that district and appeals court judges are called upon to decide many cases that require only the

clear extention of a prior rule of law. Such cases are assumed to have little or no precedential value, contribute little to the development of public policy, and to involve no significant exercise of discretion by federal judges (Fra, 1977). Proponents of limited publication plans argue that nonpublication of such trivial cases will make it easier for the judges to accomplish their important work. This argument for selective publication is based on three premises. The first assumption is that there is a clear distinction between "law making" opinions and "dispute-settling" opinions. Dispute-settling opinions do not deserve publication because they apply uncontroversial rules of law to ordinary cases and have no value to the public. The second premise for limited publication is that the cost of full publication is excessive. The third and most crucial premise of the argument is that judges can determine before writing an opinion whether it will be a "law making" opinion or simply a "dispute-settling" one (Reynolds and Richman, 1979, p. 808).

Most studies which are based on the analyses of lower court decisions (e.g., Richardson and Vines, 1970; Goldman, 1975; Songer, 1982) apparently assume that these criteria for nonpublication can be accepted at face value because they do not even bother to offer any justification for limiting their analyses to published opinions. Carp and Rowland, who offer one of the few thoughtful discussions of the limitations of reliance on published opinions, are nevertheless satisfied that their data derived from the *Federal Supplement* "represents the overwhelming majority of the more important, policymaking cases that came before the lower federal judiciary" (1983, p. 18).

One recent study of nonpublication in the Fifth Circuit appears to support this traditional reliance of scholars on published opinions. According to the author of the study, "The conclusion is reached that the judges of the Fifth Circuit were in fact able to discern which civil appeals could be summarily affirmed without great concern for the effect that the omission of those opinions would have on the development of case law." Moreover, they suggest that the instances of decisions not published which have precedential value, "are probably quite infrequent" (Shuchman and Gelfand, 1980, p. 202). No similar studies have examined unpublished district court decisions.

But not everyone shares these assessments. Reynolds and Richman maintain that "from the beginning there has been some skepticism concerning judges' ability to distinguish correctly between dispute-settling and lawmaking opinions." Their own subjective evaluation of 100 unpublished Fourth Circuit opinions led them to conclude that "several appear to merit publication" (1978, pp. 1192–93). Vestal concurs, noting that, "without a doubt, some written opinions which might contribute much to the corpus juris are not sent in by the writing judge and are not picked up by the publishing companies" (1966, pp. 188–89). This skepticism is further supported by Fra (1977), whose examination of 150 unpublished orders of the Seventh

Circuit uncovered twenty-four important cases in the areas of first amendment rights, criminal procedure and race discrimination which she concluded met the criteria for publication.

Research Design

A significant part of the justification for the nonpublication of opinions is that most decisions have little or no precedential value, contribute little to the development of public policy, and involve no significant exercise of discretion by federal judges. The literature reviewed above raises suspicions about the validity of these assumptions, but these suspicions have never been subjected to systematic empirical testing. Comprehensive examination of unpublished district decisions is difficult because the data are not readily available. Collection of even a random sample of such decisions would be quite expensive. Consequently, the present study proceeds to test the implications of the justification for nonpublication with data from published sources.

The principal set of data to be analyzed was derived from the published decisions of the United States Courts of Appeals. Substantial numbers of the decisions of the courts of appeals originate in cases in the district courts decided without published opinions.[1] The availability of these cases permits an indirect test of the assumptions about the characteristics of unpublished decisions of the district courts. The rationale typically provided for nonpublication leads to the prediction that all district court cases without published opinions should be what Goldman (1969) has labeled "consensual" cases.[2]

Goldman (1969) and Songer (1982) argue that such consensual cases in the courts of appeals are characterized by the unanimous affirmation of the decision of the district court. Therefore, the rationale provided for nonpublication leads to the prediction that district court decisions without published opinions which are appealed to the courts of appeals should be consensual cases which are unanimously affirmed by the courts of appeals. This expectation leads to several specific hypotheses.

First, it should be expected that the overwhelming majority of the decisions of the courts of appeals which result in either the reversal of the district court or in a divided vote among the appeals court brethren originated in cases accompanied by published opinions in the district court.

[1]In two recent years examined, 1976 and 1981, 81.3% of a random sample of decisions reported in the *Federal Reporter* were appeals from decisions of the district court without published opinions.

[2]The fact that such cases were appealed should not negate the assumption that they are consensual. In fact, Richardson and Vines (1970, pp. 118–19) argue that consensual appeals are the "bread and butter" of the caseload of the courts of appeal.

Second, it should be rare for a district decision without opinion to be reversed or to engender dissent in the courts of appeals. A minimum expectation is that the rates of reversal and dissent in cases appealed from unpublished district decisions should be low relative to the rates in decisions on appeals originating in district court decisions with published opinions.

Third, if district cases without published opinions are truly consensual, then even judges with different values and backgrounds should reach the same decision. Therefore it is hypothesized that there will be no significant differences in the votes of Republican and Democratic judges on the courts of appeals in cases without published district court opinions.

Fourth, cases decided with full opinion by the Supreme Court are assumed to have precedential value, policy significance, and (usually) to present the justices with a choice situation that permits substantial discretion in decision making. Consequently, it may be hypothesized that few cases originating in the district courts which are decided with full opinion by the Supreme Court will have come from district court decisions without opinions.

In order to test the first three hypotheses, a random sample of 150 criminal cases per calendar year was collected from the *Federal Reporter* for the years 1976 through 1984 (total N = 1650). Criminal cases were defined to include appeals of convictions, challenges to procedural rulings made by the district judge, and appeals of denials of petitions for a writ of habeas corpus. An examination of all published antitrust decisions of the courts of appeals during 1976 and 1977 and a random sample of 134 labor cases decided during the same years were used to supplement the main analysis of criminal decisions.

The appeals court data used to test these hypotheses were collected as part of a larger study on judicial impact. The types of cases and the years included in analysis were determined by the needs of that larger study. However, there are no obvious reasons to anticipate that data on district court decisions in any recent year are more or less likely to provide support for the hypotheses than in any other year. Moreover, when the criminal decisions were analyzed separately for each successive two-year period in the sample, no significant changes over time were evident.

The three case types chosen for analysis are not a representative sample of all district decisions.[3] Therefore, one cannot generalize with confidence the findings below to all opinion writing decisions by district judges. Each of the three case types is of more general political interest than many of the routine

[3]Most empirical analyses of the published decisions of district judges are also limited to a small number of non-random case types (e.g., Carp and Rowland, 1983; Richardson and Vines, 1970; Giles and Walker, 1975). In part this is due to the infeasibility of analyzing all case types and to the widespread perception among political scientists that many district court case types are not politically relevant.

TABLE 1

PROPORTION OF REVERSALS AND NONUNANIMOUS DECISIONS OF COURTS OF APPEALS WHICH WERE APPEALED FROM FEDERAL SUPPLEMENT DECISIONS

A. Reversals

Policy Area	Proportion from Federal Supplement	N
Criminal	8.2%	510
Antitrust	35.6%	45
Labor	25.0%	44

B. Nonunanimous Decisions

Policy Area	Proportion from Federal Supplement	N
Criminal	4.6%	174
Antitrust	45.0%	20
Labor	27.3%	11

decisions of district courts, and each has been the focus of previous empirical analyses of published federal court decisions.

The fourth hypothesis was tested by examining all the decisions announced with full opinion by the Supreme Court during its 1980 term. The year 1980 was randomly selected from among the years included in the analysis of *Federal Reporter* decisions. Each Supreme Court opinion was read to determine whether the case originated in the district court and if so to determine whether an opinion was published in either the *Federal Supplement* or the *Federal Rules Decisions*. *Shepard's United States Citations* were also consulted to determine whether the district decision was reported in a published opinion.

Findings

The first test of the prediction that the unpublished decisions of the district court should be consensual cases involved the examination of the origin of appeals court decisions which reversed the district court or which were decided with dissent. The rationale for nonpublication led to the hypothesis that an overwhelming proportion of such appeals court decisions would be appeals from district court decisions with opinions published in the *Federal Supplement*. However, the data in table 1 dramatically disconfirm these expectations.

The proportion of reversals in which the original district decision was published was less than 40% in all three policy areas examined. The findings are most striking for criminal appeals where only 8.2% of all district decisions reversed had been published. The smaller samples of labor and antitrust decisions confirm the findings derived from criminal appeals.

Similar results are obtained from the analysis of dissent in the courts of appeals. Only 4.6% of all criminal appeals with published dissent originated in the published decisions of the district courts. Larger proportions of the nonunanimous labor and antitrust decisions of the courts of appeals were derived from cases with published opinions below, but neither reached even 50%.

The second hypothesis derived from the traditional assumptions about the nature of cases resulting in nonpublication of opinions is that the reversal rates and the dissent rates in appeals from decisions published in the *Federal Supplements* should be significantly higher than the corresponding rates in appeals from unpublished decisions.

The data in table 2 provide very limited support for the hypothesis. For criminal cases, the 39.6% reversal rate in appeals from published decisions was significantly higher than the 22.3% rate noted in appeals from decisions without published opinions. However, even this lower reversal rate for appeals from unpublished decisions is substantially higher than would be expected from traditional assumptions about unpublished decisions. More-

TABLE 2

DIFFERENCES IN REVERSAL RATES AND DISSENT RATES IN APPEALS FROM DISTRICT COURT DECISIONS WITH AND WITHOUT PUBLISHED OPINIONS

A. Reversal Rate By Court of Appeals

Policy Area	District Decisions: No Opinion	(N)	In Federal Supplement	(N)	Z	Significance
Criminal	23.3%	(1554)	39.6%	(96)	2.13	$P < .02$
Antitrust	33.3%	(87)	34.0%	(47)	0.08	NS
Labor	34.7%	(95)	37.9%	(29)	0.03	NS

B. Proportion of Appeals Court Decisions With Dissent

Policy Area	District Decisions: No Opinion	(N)	In Federal Supplement	(N)	Z	Significance
Criminal	10.7%	(1554)	9.3%	(96)	−0.44	NS
Antitrust	12.6%	(87)	19.1%	(47)	1.41	NS
Labor	8.4%	(95)	10.3%	(29)	0.32	NS

TABLE 3

PARTY DIFFERENCES IN VOTES OF APPEALS COURT JUDGES IN APPEALS FROM DISTRICT DECISIONS WITHOUT OPINIONS

Policy Area	Party Differences—Proportion of Votes Supporting the Liberal Position					
	Democrats	(N)	Republican	(N)	Z	Significance
Criminal	23.6%	(2040)	14.2%	(2595)	8.55	$P < .001$
Antitrust	28.6%	(98)	19.0%	(163)	1.81	$P < .04$
Labor	38.6%	(101)	31.0%	(184)	1.30	NS

over, the differences between the reversal rates in published and unpublished decisions of the district courts in antitrust and labor cases are trivial and statistically insignificant. For both case types this absence of difference is due to the unexpectedly high rate of reversals of appeals from unpublished decisions. The findings for dissent rates offer even less support for the hypothesis. While the dissent rate in appeals from published decisions of antitrust and labor cases in the district courts is higher than the rate in appeals from unpublished decisions, it is lower in criminal cases. More importantly, none of the differences reach generally accepted standards for statistical significance. It might also be noted that in all three case types, the dissent rate on appeals from unpublished decisions is higher than the dissent rate of approximately 6% for all published opinions of the courts of appeals. Overall, it thus appears that the proportion of nonconsensual appeals from unpublished decisions of the district courts is roughly similar to the proportion from decisions with published opinions.

The third hypothesis is based on the assumption that in cases which are truly consensual, the background characteristics and attitudes of the judges should be unrelated to their decisions. The specific hypothesis tested was that there should be no party differences present in appeals court voting on cases lacking published opinions in the district courts.

The data do not support the hypothesis. Only in labor cases were the differences between the votes of Democratic and Republican judges statistically insignificant. And even in labor cases, the observed differences were in the direction which would be predicted if the judges perceived a sufficient choice situation to enable them to vote their policy preferences (i.e., Democrats were more pro-labor). On appeals from both the criminal and antitrust decisions of district judges which were not accompanied by a published opinion, the voting tendencies of Democratic and Republican appeals court judges were divergent to a significant degree. In both categories of cases the Democratic judges more frequently supported the liberal position (i.e. pro-defendant in criminal cases and pro-plaintiff in antitrust cases). These differences parallel earlier findings (Goldman, 1975) on the relationship of party to

the voting decisions of appeals court judges in nonconsensual cases. These data suggest that in a significant number of the district cases without published opinions the judges faced a choice situation which permitted them discretion to make decisions consistent with their personal values and policy preferences.

The final hypothesis to be tested was that almost all Supreme Court cases which originated in the district courts and which were settled with full opinions (either signed or per curiam) by the Supreme Court came from district decisions with published opinions. Analysis of all decisions of the Supreme Court during its 1980 term with opinions published in *United States Reports* fails to support this hypothesis. Of the 88 cases receiving full Supreme Court treatment which originated in the district court, district judges published opinions to explain and justify their original decision in only 44. That is to say, in exactly half of the district court cases which, at least in the opinion of Supreme Court justices, had the greatest precedential significance and importance for public policy, the district judge originally hearing the case failed to publish an opinion.

Conclusions

The indirect methods utilized above to analyze the nature of cases which resulted in decisions without published opinions by the district courts have some obvious limitation. The cases analyzed do not represent a random sample of all decisions without published opinions. All decisions which were not appealed and all appeals which were decided by the courts of appeals without published opinions were excluded from analysis. Such cases may possibly differ in significant and systematic ways from the cases examined in the present study. Nevertheless, the findings presented above clearly indicate that there are a substantial number of unpublished district court decisions which cannot be assumed to be trivial or consensual cases. A substantial number of such unpublished decisions appear to have presented the district judges with potential law making opportunities in which their values could shape the outcomes.

These findings further suggest that either district judges are unable to consistently make the distinction required in the official criteria for publication, different judges (e.g., appellate vs trial) have different perceptions of the law making potential of cases, or district judges deliberately refuse to write opinions in some cases which they perceive to be nontrivial. Judges might decide not to write an opinion for any one of a number of reasons including lack of time caused by heavy caseloads, a desire to evade a disliked precedent, a desire to prevent an intra-circuit conflict from being recognized, or as part of a strategy to avoid reversal.

The findings reported above suggest the need for a systematic study of the

unpublished decisions of federal courts. At a minimum we need to understand why judges publish opinions in some nonconsensual cases but not in others. If there are systematic reasons why certain types of nonconsensual cases do not result in published opinions, then some of the previous research based on published opinions may be fatally flawed. For example, it may be speculated that most judges who make a noncompliant decision will decline to publish in order to reduce the visibility of their defiance. If so, the conclusion of most studies of the impact of the Supreme Court on the lower federal courts may be seriously misleading. On the other hand, if the decision not to write an opinion is made in a haphazard, ad hoc fashion in response to caseload pressures, published opinions may still contain a representative sample of all nonconsensual cases.

Although the focus of the present study was district court decisions without published opinions, it is certainly reasonable in light of these findings to question the untested assumption that unpublished appeals court decisions represent trivial and consensual cases. Therefore, future research might also examine unpublished decisions of both the district and appeals courts to determine: (1) the relative frequency with which cases resulting in published and unpublished decisions presented judges with a choice situation permitting the judge's values to exert a decisive influence on the outcome; (2) whether there are systematic differences in the decisional trends among judges in published and unpublished decisions; (3) whether the frequency of publication and the nature of the decisions published varies with changing environmental factors (e.g., do judges publish fewer decisions in cases likely to evoke hostile public reaction); and (4) whether there is evidence that the decision to publish or not is related to strategic concern with the likelihood of reversal (e.g., do liberal judges write opinions to justify an increasing proportion of their liberal decisions as the court above becomes more conservative).

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