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NONPUBLICATION IN THE ELEVENTH CIRCUIT: AN EMPIRICAL ANALYSIS

DONALD R. SONGER,* DANNA SMITH,** AND REGINALD S. SHEEHAN***

This Article examines the criteria used by the Eleventh Circuit Court of Appeals in determining whether or not a judicial opinion should be published. Through an empirical study and analysis, the authors conclude that the written rule governing publication offers little guidance to the judges and is often applied inconsistently within the circuit.

JUDICIAL opinions are of great significance in the practice of law. First, they not only serve to clarify and interpret existing rules of law, but they also “contribute to the evolution of a consistent, comprehensive body of legal doctrine.”¹ By requiring judges to explain their reasoning behind a particular decision, judges help the parties involved to understand the law, and thus, the outcome of a case. In addition, opinions enable us to hold judges accountable for their decisions, as the opinions require the judges to publicly justify their rulings.

To save both time and money, the appellate courts have adopted a limited publication policy to cut back the number of cases published in the *Federal Reporter*.² Given the importance of judicial opinions, limited publication has become a controversial legal issue,³ leaving unanswered these questions: Should judges publish more or fewer of their opinions? Are there a significant number of frivolous cases being published resulting in a mass of unnecessary text? Do unpublished opin-

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1. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981).

2. D. STENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS (Fed. Jud. Center 1986).

3. See *id.* at 2.

ions have greater importance than judges would like us to believe? Are there serious consequences to limiting publication or are the consequences greater if publication is not restricted? Such questions have been debated by many, with little hope of ever reaching consensus on either an answer to the questions or a solution to the problem.

This study focuses on the criteria the Eleventh Circuit Court of Appeals uses in determining whether or not to publish a judicial opinion.⁴ This Article does not attempt to offer alternative criteria or pass judgment on the existing criteria. Rather, it analyzes the methods used to determine whether or not they are consistent with the written rules. First, a brief history of how the courts selected the criteria for publishing or not publishing an opinion offers insight to some of the inherent problems with restricted publication.

I. A BRIEF HISTORY OF NONPUBLICATION

The debate on curtailing publication stemmed from a legitimate concern over maintaining a manageable body of law.⁵ The exponential growth of published opinions has forced the federal appellate courts to adopt procedural guidelines for dealing with such large numbers of cases.⁶ The Judicial Conference of the United States expressed its concern with the problem in 1964 when it took note of "the rapidly growing number of published opinions . . . and the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities."⁷ In response to its immediate concern on the matter, the Judicial Conference circulated a resolution among the appellate and district courts recommending that judges limit the publication of opinions to those "which are of general precedential value."⁸

The courts recognized the problems which accompany an overloaded legal system and focused their efforts on limiting publication. The recommendation given by the Judicial Conference, however, was not precise enough to ensure consistency among the circuits. Noting that much was left to the discretion of both the judges and the courts, a Federal Judicial Center Report in 1971 stated that no agreement existed on ways to limit publication, even though there was "widespread

4. The criteria for publication varies from circuit to circuit. *See generally id.* at 28-38. An analysis of the criteria used by circuits other than the Eleventh Circuit is beyond the scope of this Article.

5. *See generally id.* at 5-8.

6. *Id.* at 1. In 1977, 19,118 cases were filed in the 12 circuit courts of appeals. 1978 ANN. REP. DIRECTOR ADMIN. OFF. U.S. CTS. 156. By 1987, the number had increased to 35,176. 1987 ANN. REP. DIRECTOR ADMIN. OFF. U.S. CTS. 1-2.

7. REP. PROCEEDINGS JUD. CONF. U.S. 11 (1964).

8. *Id.*

consensus that too many opinions are being printed and published.”⁹

By 1972 the Judicial Center recommended to the Judicial Conference that each circuit review its own guidelines for publication and focus on limiting publication further by modifying its existing rules.¹⁰ The Judicial Conference agreed to circulate the Judicial Center’s report to all circuits.

The Advisory Council on Appellate Justice, which consists of lawyers, judges, and law professors organized by the Judicial Center in 1971, also worked on the publication problems of the appellate courts. In its report, published in 1973, the Advisory Council proposed standards for publication and recommended that nonpublished opinions not be cited as precedent.¹¹ This report recognized a major problem of limiting publication—the problem of access. If a larger number of cases were unpublished, access to those opinions would be unequal because only those law firms with extra time and financial resources could afford to research both the unpublished and published opinions. As a result, the Advisory Council recommended restricting the citation of unpublished opinions.¹²

By the mid-1970’s, each of the circuits had submitted its modified rules for publication to the Judicial Conference. Upon receipt of these plans, the Judicial Conference immediately noticed the variation which existed between the circuits. Nonetheless it approved all of the plans, stating only that it hoped time eventually would help all circuits reach a consensus on the methods adopted towards restricting publication.¹³

As concern over the problem continued, hearings were held in ten cities during 1974 and 1975 by the Commission on Revision of the Federal Court Appellate System.¹⁴ Various judges, attorneys, and legal scholars testified at these hearings, expressing their views on limited publication and on the citation of unpublished opinions. A majority agreed that all decisions did not require publication.¹⁵ Some believed that restricting publication would reduce the time pressure on judges and reduce the costs incurred by attorneys in researching “an ever-increasing body of law.”¹⁶ Others, however, were wary of the abuses which might accompany an overly restrictive nonpublication policy.¹⁷

9. 1971 FED. JUD. CENTER ANN. REP. 7-8.

10. D. STIENSTRA, *supra* note 2, at 6.

11. *Id.* at 7.

12. *Id.*

13. *Id.* at 8-9.

14. *Id.* at 9. The Commission was created by Pub. L. No. 92-489, 86 Stat. 807 (1972), as amended by Pub. L. No. 93-420, 88 Stat. 1153 (1974).

15. D. STIENSTRA, *supra* note 2, at 9.

16. *Id.* at 9-10.

17. *Id.*

A major concern was how a circuit might enforce rules restricting the citation of unpublished opinions.¹⁸

By 1978 the Judicial Conference had received enough information on the subject to formulate a conclusion. This conclusion was not, however, accompanied by a solution. In its report the Judicial Conference stated, "At this time we are unable to say that one opinion publication plan is preferable to another, nor is there a sufficient consensus on either legal or policy matters, to enable us to recommend a model rule. We believe that continued experimentation under a variety of plans is desirable."¹⁹

As a result of these studies, the Eleventh Circuit adopted Rule 36-1, which states:

Rule 36-1 Affirmance Without Opinion.

When the court determines that any of the following circumstances exist:

- (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
- (b) the evidence in support of a jury verdict is sufficient;
- (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
- (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
- (e) judgment has been entered without an error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.²⁰

The policy of the Eleventh Circuit regarding the publication of opinions is set forth in its procedures for internal operations:

3. Publication of Opinions—The policy of the court is: The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency to reduce the volume of published opinions. Judges of this court will exercise appropriate

18. *Id.* at 10-12.

19. *Id.* at 13. See Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1172 (1978) ("A majority of the Commission recommended selective publication and the adoption of citation rules. Ultimately, however, the Commission reserved judgment on those issues and left the problem with the Judicial Conference.") (footnote omitted).

20. 11TH CIR. R. 36-1.

discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.

Opinions that the panel believes to have no precedential value are not published. All non-published opinions and affirmances without opinion under 11th Cir. R. 36-1 are printed in table form in the Federal Reporter. (See for example 791 F.2d 170). Although unpublished opinions may be cited as precedent, this is looked upon with disfavor by the Court. If cited, a copy should be attached to or incorporated within the motion, brief or petition in which such citation is made.²¹

The problems with the criteria used here are evident: they are broad, vague, and do little to give uniform direction. Further, they rely on the ability of a court to predict early in the judicial process that its opinion will not make law.²² Consequentially, if the criteria are followed, unpublished opinions must be so trivial that knowledge of them would be of little consequence to anyone.²³

Most empirical studies of the decisions of the lower federal courts apparently assume that the published opinions represent the majority of policy-making decisions since these studies offer no explanation why their analyses focus solely on published opinions.²⁴ One study conducted by Robert Carp and C.K. Rowland suggests that conclusions drawn from published material regarding courts are reliable.²⁵ Their research led them to conclude that the published opinions represented "the overwhelming majority of the more important, policymaking cases that [came] before the lower federal judiciary."²⁶

Several studies have expressed concern over the strong reliance on data received solely from published opinions.²⁷ William Reynolds and William Richman used as their data base 100 unpublished opinions in the Fourth Circuit.²⁸ Their conclusions illustrate the difficulty judges are having in deciding whether or not a case will in fact make precedent. They found that several unpublished opinions "appear to merit

21. INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT [FRAP 36], reprinted in Fed. Local Ct. R. (Callaghan) (11th Cir.) 14-15 (1987).

22. Reynolds & Richman, *supra* note 19, at 1191-92.

23. *But see id.* at 1192. "From the beginning there has been some skepticism concerning judges' ability to distinguish correctly between dispute settling and law making opinions."

24. Songer, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206, 206-07 (1988).

25. R. CARP & C. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS (1983).

26. *Id.* at 18.

27. *See, e.g.*, Reynolds & Richman, *supra* note 19, at 1191-94; Vestal, *Reported Federal District Court Opinions: Fiscal 1962*, 4 Hous. L. REV. 185, 188-89 (1966).

28. Reynolds & Richman, *supra* note 19.

publication."²⁹ Just a year earlier, another commentator concluded after an examination of 150 unpublished orders in the Seventh Circuit that twenty-four cases met the circuit's own criteria for publication.³⁰

In another study, Reynolds and Richman introduced evidence that judges are having a difficult time following the criteria. They noted a Fourth Circuit case in which a "challenge to Virginia's voter registration laws was disposed of in a one-paragraph unpublished opinion."³¹ The authors uncovered a number of such examples, leading them to conclude that many policymaking decisions are, in fact, going unpublished.³²

Others have conducted research which has resulted in similar findings. David W. Neubaer, for example, was skeptical of the assumption that judges can successfully pull the most important cases for publication.³³ Although his study was based on research of the Louisiana Supreme Court, his concern was on the criteria used for the publication of judicial opinions, which consequently focuses on a case's precedential value. He acknowledged that "[t]he overall impact of differential publication rates is not clear."³⁴ However, "[o]ne potential consequence of discretionary decisions to affirm summarily some cases without providing reasons is that the cases resulting in written opinions may not be representative of the universe of criminal appeals."³⁵

Allan D. Vestal also notes that "[w]ithout 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."³⁶ He further suggested that the appellate courts are not following the criteria given them, pointing out that "[s]ome judges make available for publication a great number of opinions, many of which seem to be worthless because they add nothing to the law."³⁷

A fair interpretation of the above studies indicates that reliance solely on unpublished opinions is misplaced. On the other hand, an earlier article focusing on nonpublication in the Fifth Circuit supported the heavy reliance on the use of data derived from published

29. *Id.* at 1192-93.

30. Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 315-40 (1977).

31. *Id.* at 1192. The case was *Justice v. Mahan*, No. 77-1616 (4th Cir. May 9, 1977).

32. Reynolds & Richman, *supra* note 19, at 1192-93 & nn. 130-34.

33. Neubaer, *Published Opinions Versus Summary Affirmations: Criminal Appeals in Louisiana*, 10 JUST. SYS. J. 173 (1985).

34. *Id.* at 189.

35. *Id.*

36. Vestal, *supra* note 27, at 188-89.

37. *Id.* at 188.

opinions.³⁸ The focus of the study centered around the use of Local Rule 21, which permits the court to affirm without written opinion "non-meritorious appeals of rulings and verdicts in civil cases."³⁹ The study concluded that the judges of the Fifth Circuit were, in fact, able to differentiate between those cases which "could be summarily affirmed without great concern for the effect [of] the omission . . . on the development of case law" and those that clearly affect the law.⁴⁰ The authors further suggested that the significance of unpublished opinions which may be of general precedential value is minimal.⁴¹ Finally, they admitted that some cases with potential precedential value do go unpublished. However, they stress that their research led them to believe that these cases were "quite infrequent."⁴²

These studies, when viewed as a whole, are inconclusive. No consensus emerges on whether or not the appellate courts are correctly following their guidelines for publication. The debate, however, does not end here. Many of the authors of these studies are concerned with the large numbers of cases which do not reach the *Federal Reporter*,⁴³ while others are concerned with an overload of published opinions.⁴⁴

The issues revolving around unpublished opinions are important given the large percentages of unpublished cases that exist. The significant percentages of these cases for the Eleventh Circuit exemplify the reasons for concern. Of the 1,663 cases filed in 1986, 1001 were unpublished. This results in an astonishing figure—60.2% of all cases filed in the Eleventh Circuit during 1986 went unpublished. Given such a high percentage, the questions and issues arising out of a need to restrict publication become significant, and thus worthy of concern.

This study explores the practical significance of the Eleventh Circuit's rules for nonpublication. The analysis proceeds in two stages. First, it will assume that the formal criteria specified in the circuit rules are the sole determinants of whether or not a decision is explained in a published opinion and that all judges who participate in the circuit's deliberations apply the criteria in a uniform and consistent manner. Based on this assumption, predictions will be made about the expected characteristics of published opinions and unpublished dispositions.

38. Shuchman & Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L.J. 195 (1980).

39. *Id.* at 195.

40. *Id.* at 224.

41. *Id.*

42. *Id.*

43. See, e.g., Reynolds & Richman, *supra* note 19.

44. See generally Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791 (1975).

These predictions will then be empirically tested with an analysis of all of the 1986 decisions of the court. The second stage of analysis focuses on whether the criteria employed in practice by the judges results in any significant differences in the parties, issues, or outcomes observable in the published versus the unpublished decisions of the court.

As indicated above, a number of previous studies questioned the manner in which criteria for publication were applied by the federal courts of appeals. Several studies suggested that a number of unpublished opinions have precedential value and thus deserved publication had the circuit's rules been correctly applied, but there is no consensus to support this judgment. The present study, while also arguing that a number of unpublished decisions are not the trivial appeals which the circuit rules would seem to suggest, differs from previous studies in several crucial respects. Most previous studies of nonpublication were based on small samples of unpublished decisions not necessarily chosen in any systematic fashion. In contrast, the present analysis is based on all of the cases terminated by judicial action after oral argument or submission on briefs during calendar year 1986.

In addition, prior studies largely depended on the subjective evaluations of individual investigators. In contrast, in the present study a number of specific objective characteristics of each decision were coded according to precise guidelines. Two hundred of the cases were independently coded by two of the authors to ensure that reliability of the coding was objectively specified.

Finally, instead of attempting to directly determine on a case-by-case basis whether the formal criteria were correctly applied, the present study involved testing with empirical data the logical behavioral consequences which should follow if the criteria did in fact govern the decisions of the judges. This approach allowed the use of statistical tests which objectively indicate the probability that the observed behavior by the judges might have occurred by chance if the judges were faithfully following the formal criteria.

II. RESEARCH METHODS

Several hypotheses may be derived from the formal criteria for publication discussed above. First, one should expect that virtually all of the unpublished decisions will be unanimous affirmances of the decision below. If the case involves, as the criteria suggests, the straightforward application of clear and well-settled precedent which is not in need of any published explanation by the courts of appeals, then the correct decision and the correct basis of decision should be obvious to any person who is well trained in the law. Since federal district court judges are highly trained professionals, they should be expected to

reach the correct decision in such cases and thus to have their decisions affirmed.

A number of earlier studies⁴⁵ have demonstrated quite conclusively that in a significant minority of cases which received explanation in published opinions of the courts of appeals, the votes of judges reflect differences in the political values of the different judges. Appellate court judges affiliated with the Democratic Party (Democratic judges) were shown to be significantly more likely to support unions in disputes with management and to support injured individuals in tort cases than were their Republican brethren (Republican judges).⁴⁶ Similarly, appellate court judges appointed by former President Carter have been more likely than appointees of former President Reagan to support the positions of criminal defendants⁴⁷ and those raising civil liberties claims.⁴⁸ All of these studies were based on the assumption that in a small, but not trivial number of cases, the legal and factual issues presented to the judge admitted of no clear consensual solution.⁴⁹ Either the relevant case law was conflicting or there was no case law directly on point and unambiguously controlling. In such cases, students of the courts generally have assumed that the judges perceive themselves as having a significant degree of discretion, and assume that this discretion, when present, will facilitate the influence of judicial values on the decision. Interviews with a number of judges from the courts of appeals generally have confirmed this interpretation.⁵⁰

But the conditions which facilitate value-based decisions by appellate court judges should not be present in the unpublished decisions of the court. The studies discussed above assumed that even in the published opinions, judges were sufficiently free from the constraints of clear precedent to decide only a minority of the cases before them according to their value preferences. Since the rules governing the publication of opinions imply that judges will have substantially less discretion, then the value preferences of judges should have essentially no impact on their decisions. Consequently, characteristics of judges which are as-

45. J. HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* (1981); Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975); Songer, *Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals*, 26 AM. J. POL. SCI. 225 (1982).

46. See generally Goldman, *supra* note 45.

47. Rowland, Songer & Carp, *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 LAW & SOC. REV. 191, 192, 195-200 (1988).

48. Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 51 (1986).

49. See Goldman, *Backgrounds, Attitudes and the Voting Behavior of Judges: A Comment on Joel Grossman's Social Backgrounds and Judicial Decisions*, 31 J. POL. 214, 215 (1969).

50. See J. HOWARD, *supra* note 45.

sumed to be indicators of differences in the political values of groups of judges such as political party affiliation and the appointing president, which have been found to be related to the voting tendencies of judges in studies of published opinions, should not be related to the voting tendencies of judges in unpublished opinions. Therefore, the assumption that the formal rules accurately describe the criteria used in practice for publication leads to the hypothesis that no significant differences in the voting tendencies of Democratic and Republican judges or in the voting patterns of judges appointed by different presidents should emerge.

The third hypothesis derived from the implications of the formal rules governing publication relates to the participation rates by different judges in published and unpublished decisions. According to the rules of the Eleventh Circuit, judges are assigned to panels on a purely random basis.⁵¹ After the composition of the panels is determined, cases are assigned such that each panel hears a variety of case types.⁵² Therefore, over time the nature of the cases heard by each judge will be essentially the same as those heard by every other judge. Any differences among judges in the types of cases heard will be small and the magnitude of the differences may be statistically predicted. This means that every judge will have essentially the same number of cases in which, according to the rules governing publication, the potential precedential value will objectively merit publication. The rules governing publication thus lead to the hypothesis that there will be no statistically significant differences among judges in the number of times they participate in a panel that publishes an opinion in cases they decide.

If the three hypotheses described above are not supported by the data, the presumption that all unpublished decisions of the court have little or no precedential value will be suspect. If precedential value is not in fact the criteria, or at least not the only criteria which distin-

51. The Internal Operating Procedures of the Eleventh Circuit provide:

To insure complete objectivity in the assignment of judges and the calendaring of cases, the two functions of judge assignment to panels and calendaring of cases are intentionally separated. The circuit executive and the scheduling committee take into account a fixed number of weeks for each active judge and the available sittings from the court's senior judges, and visiting circuit or senior district judges. After this determination, names of the active judges for the sessions of the court are drawn by lot from a matrix for the entire court year.

INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT [FRAP 34] 1(a), *reprinted in* Fed. Local Ct. R. (Callahan) (11th Cir.) 10 (1987).

52. "The clerk attempts to balance the calendars by dividing the cases evenly among the panels by case type so that each panel for a particular month has an equitable number of different types of litigation for consideration." *Id.* 1(b)(2), *reprinted in* Fed. Local Ct. R. (Callahan) (11th Cir.) 10 (1987).

guishes published from unpublished decisions, then to obtain an accurate understanding of the role and functioning of the courts of appeals it will be necessary to investigate in more detail the similarities and differences between the types of cases which result in published opinions and those relegated to an unpublished status. This study will explore those differences.

The investigation of the differences between published opinions and unpublished decisions focuses on three concerns. The first concern is whether there are differences among types of appellants in the frequency with which their appeals are decided in published opinions. Such differences may indicate that judges have subtle biases about the importance of different classes of litigants. That is, do judges feel that the concerns and the legal issues raised by some classes of litigants are inherently more interesting or more important than the legal concerns of other groups? The second concern is whether some types of issues more consistently result in published opinions than do other issue types. The final concern is whether there are differences among judges in their tendencies to publish opinions for different types of decisions.

The data to test the three hypotheses and the three related concerns described above were obtained by coding all of the published opinions ($N = 662$) and all of the unpublished decisions ($N = 1001$) of the judges of the United States Court of Appeals for the Eleventh Circuit in calendar year 1986, for all cases which were terminated by judicial action after oral argument or submission of briefs. Thus a total of 1,663 cases were coded. For each case the names and votes of each judge participating on the panel, the decision, the nature of the issue, the nature of the litigants, the presence or absence of dissents, and the treatment of the decision below were coded.⁵³

Each of the cases was coded by one of the authors. To assess the reliability of the coding, 200 of the cases were independently coded by two of the authors. Based on these dual coded cases, two measures of inter-coder reliability were computed. The results are displayed in Table 1.

53. A copy of the codebook can be obtained from the authors.

TABLE 1
INTER-CODER RELIABILITY

<u>VARIABLE</u>	<u>AGREEMENT RATE</u>	<u>PI*</u>
Treatment (affirm/reverse)	99.5%	.99
Appellant**	87.0	.83
Respondent	84.0	.82
Decision-directionality	92.5	.89
# Dissents	99.5	.92
Issue ***	84.0	.82
Votes of Judges		
Anderson	99.0	.97
Clark	97.5	.93
Edmondson	98.5	.91
Fay	98.5	.96
Godbold	99.5	.99
Hatchett	99.0	.97
Henderson	100.0	1.00
Hill	98.5	.96
Johnson	97.5	.94
Kravitch	98.5	.96
Morgan	98.5	.86
Roney	98.5	.95
Tjoflat	98.5	.96
Vance	99.0	.98
Designated judges	96.5	.94

*The statistic pi is designed to provide a measure of reliability which is not dependent on the marginal frequencies of the variables. The simple percentage agreement rate will be artificially high for variables in which almost all of the responses fall into a single category. If, for example, 90% of all responses fall into category 1, then two independent coders who randomly assigned 90% of all responses into category 1 (without regard for the "true" value) would be expected to agree on 81% ($.9 \times .9$) of their coding assignments. To correct for this possible bias, the statistic pi is computed according to the formula:

$$pi = P(o) - P(e)/1 - P(e)$$

where $P(o)$ is the actual observed rate of agreement between coders; and $P(e)$ is the rate of agreement between the two coders which could be expected to occur by chance. The value of pi thus has a maximum value of 1.0 for perfect agreement among coders and a minimum value of -1.0 . The value of pi may be interpreted as the extent to which the observed agreement is in excess of the probability of agreement hypothetically expected under the assumption of random assignment given the marginal distributions of the variable. Landis and Koch, *infra* note 55, at 165, suggest that a value of pi above .80 should be considered "almost perfect," a value from .61 to .80 "substantial," and a value between .41 and .60 "moderate."

**The nature of the appellants and respondents was coded as being one of seven general categories (natural person, private business, non-profit organization, federal government, state government, substate government, or other) and one of 220 detailed categories. The agreement rates listed in the table are for agreements in coding using the detailed categories. If the data are collapsed into the seven general categories, the agreement rate increases to 95.5% for appellants and 93.5% for respondents.

***Each case was coded as dealing with one of 35 issue categories. A copy of the codebook and a listing of issue categories can be obtained from the authors.

The first measure displayed in Table 1 is simply the percentage of times that both coders recorded the identical code for a given variable. Overall, the level of agreement recorded in this double coding was high with a median of 94% agreement. The lowest rate of agreement on any variable was 84%, but that result reflected a variable (the detailed nature of the respondent) in which there were 220 possible categories from which to choose.

The second, more widely accepted measure of reliability⁵⁴ is π_i . This measure varies from -1.00 for perfect disagreement to a maximum value of 1.00 for perfect agreement. This statistic indicates the percentage by which the actual agreement between the independent coders exceeded the agreement rate which would be expected by chance. One study argues that values of π_i above 0.81 should be regarded as very high reliability and values between 0.61 and 0.80 should be regarded as "substantial."⁵⁵ As can be seen from Table 1, all of the values of π_i for data in the present study are above 0.81 with a median of π_i equal to 0.95. This statistic indicates that the data used for the analysis presented below are highly reliable.

III. ANALYSIS OF HYPOTHESES

The findings of this study suggest that the criteria for publication are in fact not being followed in the Eleventh Circuit Court of Appeals. Statistical analyses of the data allow us to reject all three of the main hypotheses proposed in this study and lend credibility to the assertion that publication of opinions in the Eleventh Circuit is much more subjective than the circuit courts would have us believe.

Since unpublished opinions supposedly are of a trivial nature and have no precedential value, one might expect that all unpublished decisions would be unanimous affirmances of the decisions of the lower courts. This hypothesis was tested by examining the number of cases that ended in a reversal of the lower court decision. The results of the analysis indicated a rate of reversal in the unpublished opinions of 12%. Upon first appearance this may not seem to be a significant number of reversals, but according to the rules of publication and non-publication there should be essentially no reversals in unpublished opinions. Furthermore, the significance of the finding is enhanced by examination of the raw

54. K. KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (1980); Johnson, *Content-Analytical Techniques and Judicial Research*, 15 AM. POL. Q. 169 (1987); Scott, *Reliability of Content Analysis: The Case of Nominal Scale Coding*, 19 PUB. OPINION Q. 321 (1955).

55. Landis & Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977).

data revealing a total of 121 reversals in the unpublished opinions in one year. If the entire output of the circuit is examined (published and unpublished opinions combined), only 333 cases were reversed. Thus, more than a third of all of the reversals (36.3%) of the entire court for the year were unpublished. If the rules and criteria for publication are being followed strictly and consistently by the appellate court judges, the significant number of reversals found in the unpublished opinions becomes difficult to explain.

This finding suggests that the criteria are not being applied in all instances and as a result many controversial cases are ending up in unpublished opinions. When a reversal occurs in a case, inevitably it involves a question of law, with the court addressing a legal mistake from below. It would seem that in any case where the appellate courts find it necessary to overturn a decision from below, one might assume that existing law was unclear. Otherwise, the district judge would not have reached an erroneous decision. Therefore the circuit rules on publication imply that an opinion from the court of appeals would be necessary to clarify existing law even if the judges felt they were not making new law. Reversals may be an objective indicator that, at least for the district judge (and therefore presumably for others, as well), the law is in need of clarification. Reversals by a court suggest that a controversy over precedent has occurred and a decision of this type would establish a new precedent. Accordingly, this finding supports the claim that non-trivial cases and cases of precedential value are ending up in unpublished opinions.

Relying on the criteria for publication, one would expect that the unpublished opinions contain no value-based decisions, since unpublished decisions are presumed to be straightforward, allowing for no discretion on the part of the judges. Supposedly the cases that are unpublished are of such a trivial nature they would not warrant the intrusion of values in the decision process. Cases that are not published according to the criteria are of such a nature that a clear precedent will govern the decision, thus removing any opportunity for discretion on the part of the judges. Therefore, in the unpublished opinions no difference should emerge between the voting tendencies of Democratic and Republican judges or judges appointed by different Presidents.

Testing this hypothesis required an analysis of the ideological nature of the decisions that are unpublished and a comparison of these decisions to the ideological structure of the panel of judges. Panels in the courts of appeals consist of three judges that are selected randomly. In the unpublished opinions it should not matter if two of the three judges on the panel were members of the same political party since, as hypothesized, ideology should not be a relevant factor in these decisions. Table 2 presents the results of a cross-tabulation in which the percentage of "liberal"

decisions⁵⁶ is examined when a majority of Democratic judges are on the panel, as opposed to when the majority are Republican judges.

TABLE 2
VOTING OF JUDGES IN UNPUBLISHED OPINIONS
BY PARTY AND IDEOLOGY

	<u>% LIBERAL</u>	<u>N</u>
Democrat Majority	28.7	442
Republican Majority	8.7	105

Z-score = 4.35, $p < .001$.

The difference between Republican dominated panels and Democratic dominated panels, with respect to the ideology of the decision, should be insignificant. But contrary to this expectation, panels dominated by Democratic judges were liberal in 28.7% of their decisions, while Republican-dominated panels were liberal in only 8.7% of their decisions. The difference between these two percentages was significant at the .001 level.⁵⁷ Obviously, Democratic judges are taking "liberal" positions in more cases than Republican judges. Contrary to what the criteria for publication would suggest, ideology is a factor in at least 20% of the decisions that result in the unpublished opinions. The magnitude of these differences is particularly striking because in earlier studies essentially the same magnitude of difference between Democratic and Republican judges was found for non-consensual published decisions. If ideology is a factor in this many cases, then the suggestion arises that there is an absence of a controlling precedent in these cases and the judges are using broad discretion in their decisions. It would seem implausible to argue that an objective, highly trained judge would allow subjectivity to enter into the decision-making process in cases that were of no importance to case law and in which there was a clear governing precedent. Therefore, the only reasonable conclusion is that some unpublished cases are signifi-

56. Following the practice of Goldman, *supra* note 45, we adopted the definitions of liberal and conservative most widely used in empirical analyses of the courts. Under this conceptualization, decisions are coded as liberal if: (1) they support the interest of the defendant in a criminal case; (2) the plaintiff asserts a civil rights claim; (3) the government is involved in a tax or economic regulation case; or (5) the government is underdog in other economic cases. *Id.* at 491-92. Cases involving economic issues which pitted one individual against another or one corporation against another were excluded from analysis.

57. A test of significance, such as the difference of proportions test (with test statistic Z) used in the present study, indicates the probability that the observed relationship could have occurred by chance. In the present example, to say that the difference was significant at the .001 level means that there is less than one chance in a thousand that the difference in the proportion of liberal decisions between Democratic and Republican panels found in the sample could have occurred by chance unless Democratic panels are really more likely than Republican panels to make liberal decisions.

cant and raise questions that are of importance, at least in the minds of many of the judges.

Recent research⁵⁸ demonstrates that Carter-appointed judges are more likely to vote "liberal" in judicial decisions than even their fellow Democratic judges appointed by former President Johnson. Other studies suggest that Carter-appointed judges are significantly more "liberal" than Reagan-appointed judges.⁵⁹ In this study, a comparison of judges appointed by Carter and Reagan could not be performed because there is only one Reagan-appointed judge sitting in the Eleventh Circuit. But this does not prevent examination of the ideological voting of Carter-appointed judges in decisions that are not published, which will allow further testing of the hypothesis that ideology should not be a factor in unpublished decisions. In the unpublished opinions it should not matter if two of the three judges on the panel were appointed by Carter. But, if contrary to the expectations derived from the criteria for publication, judges do have discretion to decide cases in accordance with their values even in unpublished decisions, then panels with a Carter majority should make the most liberal decisions. Table 3 presents the results of a cross-tabulation in which the percentage of liberal decisions is examined when a majority of Carter judges are on the panel, as opposed to when a minority are Carter judges.

TABLE 3
VOTING OF CARTER JUDGES IN UNPUBLISHED
OPINIONS BY IDEOLOGY

	<u>% LIBERAL</u>	<u>N</u>
Carter Minority 0-1	17.8	202
Carter Majority 2-3	29.7	347

Z-score = 3.13, $p < .01$

The percentages, 17.8% for minority and 29.7% for majority, demonstrate that in fact more liberal decisions are made when a panel is composed of a Carter majority. The difference between these percentages was significant at the .01 level. This finding provides further evidence that ideology is indeed a factor in unpublished decisions.

The above results indicate that our second hypothesis must be rejected, since ideology appears to be a relevant factor in unpublished opinions. Furthermore, many of the cases that are decided with unpublished opin-

58. Davis, *President Carter's Selection Reforms and Judicial Policymaking: A Voting Analysis of the United States Courts of Appeals*, 14 AM. POL. Q. 328 (1986).

59. See *supra* notes 45-48 and accompanying text.

ions do have precedential value and therefore we must question the presumption of the formal rules of publication that these cases are trivial in nature.

The Eleventh Circuit rules for selecting panel judges states that the judges are selected at random.⁶⁰ If this is the case and the appeals that come before the court are random, then the participation rate of individual judges in published and unpublished cases should be approximately the same. If the criteria of publication are being followed stringently, then a particular judge should not be involved in published opinions to a greater degree than any other judge. Based on random distributions, the percentage of trivial cases as opposed to non-trivial cases coming before each judge should be close to the same as the percentage for any other judge. Therefore, a significant discrepancy between the percentage of participation rates in published and unpublished opinions would suggest that a strict criterion is not being followed consistently by all the judges. In Table 4, the results of frequencies of participation by judges demonstrates that in two situations there are significant discrepancies.

TABLE 4
JUDGE PARTICIPATION RATES

JUDGE	PUBLISHED (N = 662)	UNPUBLISHED (N = 1001)
Anderson	20.5%	21.8%
Clark	19.3%	20.3%
Edmondson	4.1%	12.1%
Fay	10.8%	14.9%
Godbold	24.8%	21.4%
Hatchett	21.6%	18.5%
Henderson	14.7%	13.4%
Hill	25.5%	19.9%
Johnson	22.8%	25.3%
Kravitch	22.4%	25.3%
Morgan	5.1%	2.9%
Roney	16.6%	19.9%
Tjoflat	11.9%	22.7%*
Vance	17.4%	29.5%*
Other Judge	67.0%	23.0%*

* $p < .001$

Judge Tjoflat has a participation rate of 11.9% in published opinions as opposed to 22.7% in unpublished opinions. In the case of Judge Vance, the participation rates were 17.4% for published and 29.5% for unpublished. The difference in the percentages for published and unpublished opinions was significant at the .001 level. This statistic suggests that these two judges are not as likely to publish opinions as their colleagues. Surprisingly, the analysis of participation rates of designated

60. *Supra* note 51.

judges produced a significant discrepancy between published and unpublished decisions. Panels in which designated judges are involved publish 67% of the time as opposed to not publishing 23% of the time. The percentages reported suggest that these judges have a strong propensity to publish more than the sitting judges in the circuit. According to the rules, designated or substitute judges are selected at random and should have no greater chance of reviewing more important appeals than any other judge. The difference in the percentages for these judges was significant at the .001 level.

Although only two sitting judges have significant differences in their participation rates this result still indicates that the rules of publication are being interpreted differently by some judges. No judges should be publishing a significantly larger number of opinions in comparison to other judges. Such a finding suggests that in some instances certain judges prefer to publish more than other judges, without revealing whether this is the result of value judgments on the significance of the case or personal desires to be in publication. Research that focused more on interviewing individual judges would be required to determine personal motivations in these situations. But for purposes of this study, these findings clearly indicate that the criteria for publication are not being followed strictly and consistently by all the judges.

IV. IMPLICIT BIASES IN PUBLICATION DECISIONS

The second stage of this study focuses on differences between unpublished and published opinions as a result of the criteria judges use in practice. The preceding analysis suggests that the strict criteria for determining whether or not to publish is being interpreted differently in many instances. Therefore, it becomes prudent to determine if there are significant differences in the characteristics of decisions that are published as opposed to those that are unpublished.

The first concern in this study was to determine if there were differences among the types of appellants in the frequencies with which their appeals are decided with published opinions. To perform this analysis the appellants had to be classified into categories. For purposes of this study, the researchers chose to use a classification previously used at the Supreme Court level to determine differences among appellants in the frequencies with which they were granted writs of certiorari.⁶¹ The classification consist of two groups of litigants, "upperdogs" and "underdogs." The upperdogs are those with presumed higher status (govern-

61. Ulmer, *Selecting Cases for Supreme Court Review: An Underdog Model*, 72 AM. POL. SCI. REV. 902 (1978).

ment and corporations), while the underdogs include labor unions, individuals, minorities, aliens, and convicted criminals. An examination of the rates of publication for upperdogs as opposed to underdogs provides an insight into biases that are held by the judges and the legal system.

The results in Table 5 reveal a significant difference between publication rates for appeals by upperdogs and underdogs. Decisions in which the appellant is an upperdog are published 58.3% of the time, in contrast to a 33.5% rate of publication for decisions in which the appellant is an underdog. The difference in these percentages was significant at the .001 level. This finding suggests the presence of subtle biases in the judicial decisionmaking processes in that certain litigants and their concerns are considered more important than other litigants.

TABLE 5
COMPARISON OF PUBLICATION RATES FOR DIFFERENT
CLASSES OF APPELLANTS

<u>APPELLANT</u>	<u>NON- PUBLISHED</u>	<u>PUBLISHED</u>	<u>N</u>	<u>% PUBLISHED</u>
Upperdogs	55	77	132	58.3%
Underdogs	788	397	1185	39.5%

Z-score = 14.5, $p < .001$

We can further analyze this relationship between the different classes of litigants by focusing on particular issues that are raised by each class. Some issues when raised by upperdogs may be considered inherently more important than when they are raised by underdogs. Table 6 presents the results of analyses performed on four different groups of issues that come before the court on a regular basis.

TABLE 6
COMPARISON OF PUBLICATION RATES FOR DIFFERENT
CLASSES OF APPELLANTS BY ISSUE

<u>ISSUE/ APPELLANT</u>	<u>NON- PUBLISHED</u>	<u>PUBLISHED</u>	<u>N</u>	<u>% PUBLISHED</u>
Procedural				
Upperdogs	22	44	66	66%
Underdogs	131	70	201	35%
Criminal				
Upperdogs	4	19	23	83%
Underdogs	221	161	382	42%
Civil Rights				
Upperdogs	5	20	25	80%
Underdogs	38	37	75	49%
Economic				
Upperdogs	19	70	89	79%
Underdogs	25	30	55	54%

Z-scores for differences of proportions:

Procedural = 4.42, $p < .001$.

Criminal = 3.73, $p < .001$.

Civil Rights = 2.82, $p < .003$

Economics = 3.57, $p < .001$.

The results demonstrate quite conclusively that when upperdogs are the appellants, they are more likely to have their appeal decided in a published opinion in all four of these issue areas. The important point to be grasped from this analysis is the small rate of publication in the areas where underdogs bring the majority of their cases. In civil rights, of the 75 cases in which an underdog appealed, only 37 (49%) of those decisions were published. Contrast that with 25 civil rights cases in which upperdogs appealed resulting in 20 (80%) published opinions. In procedural and criminal cases where underdogs were the appellants, publication rates were 35% and 42%, respectively. When the upperdogs bring cases in these areas they are published 66% of the time in the procedural cases and 83% of the time in the criminal cases. These statistics suggest a strong tendency to publish cases appealed by upperdogs in issue areas that are generally considered the realm of the underdog.

The finding that upperdogs are published more in the economic cases is not so surprising, since that is the area where the majority of their cases would most likely originate. The difference of proportions for the data above were all significant at the .001 level, except for civil rights which was significant at the .003 level.

These results indicate that biases exist within the membership of the court in terms of which litigants have their appeals decided with published opinions. Furthermore, even in issue areas where lower class litigants bring the majority of their cases, the upperdogs are favored for publication by the court. This finding suggests the possibility that the judges implicitly apply another criteria in determining what decisions to publish. Perhaps judges are inclined to publish cases they believe are "important" and that importance is a very subjective criterion which may be subtly affected by unarticulated attitudes regarding the status of the parties before them.

The second concern examined by this study was whether some types of issues merit published opinions more often than others. Table 7 presents the results for a comparison of rates of publication for individual issues.

TABLE 7
COMPARISON OF PUBLICATION RATES
FOR DIFFERENT TYPES OF ISSUES

<u>ISSUE</u>	<u>PUBLISHED</u>	<u>UNPUBLISHED</u>	<u>N</u>
Criminal	44.2%	55.8%	407
Civil Rights	58.3%	41.7%	103
Labor	73.5%	26.5%	34
Prisoner Petition	35.0%	65.0%	40
Antitrust	85.7%	14.3%	7
Individual Benefit	43.3%	56.7%	67
First Amendment	84.6%	15.4%	13
Diversity	69.5%	30.5%	82

** $p < .005$.

* $p < .05$.

The results demonstrate that significant differences exist in the rates of publication for different types of issues. Issue areas that are within the arena of upperdog appeals generally have a higher percentage of published decisions. Labor and antitrust cases are published significantly more often than criminal, prisoner petition, and individual benefit cases. Considering the findings in Table 6, this result is not surprising since in most labor and antitrust cases at least one of the litigants will be a corporation.

The findings presented lend credibility to the concern of this study that biases exist regarding the types of issues being published. This bias could be a result of the nature of the issue or it could be the result of prejudicial tendencies in the judicial decisionmaking process. Cases that deal with criminal convictions and prisoner petitions could be more likely to address trivial points of law that can be settled with the application of precedents. Once convicted, a criminal generally will try several strategies of appeal that have become routine in criminal cases before the court. Because of the commonality of these types of appeals and the availability of relevant precedent, they are often disposed of quickly, and consequently do not merit publication. In contrast to this argument it could be posited that judges have genuine biases in deciding what cases are important enough to warrant publication.

The final analysis in this study focused on differences among judges in their tendencies to publish opinions for different types of cases. Table 8 presents the results of a comparison of publication rates of liberal decisions for Democratic majority panels as opposed to Republican majority panels.

TABLE 8

TENDENCY OF PANELS WITH DEMOCRATIC AND REPUBLICAN MAJORITIES
TO PUBLISH OPINIONS WHEN MAKING LIBERAL DECISIONS

	<u>% PUBLISHED</u>	<u>N</u>
Democratic Majority	57	297
Republican Majority	80	62

Z-score = 3.29, $p < .01$

The results demonstrate that panels with a Republican majority publish 80% of their liberal decisions. In contrast, panels with a Democratic majority publish only 57% of their liberal decisions. The difference between these proportions was significant at the .01 level.

It is beyond the scope of this analysis to determine specifically why Republican judges would be more likely to publish cases that result in liberal decisions. One possibility is that Republican judges feel obligated to clarify their reasoning in a decision that is not reflective of their ideological background. The importance of the finding is that it supports the

claim that differences exist among judges in the types of cases that are published.

V. CONCLUSIONS

The analysis of all of the 1986 decisions of the Eleventh Circuit presented above casts serious doubt on whether the official criteria for publication of opinions provide a meaningful guide to the judges. The findings suggest that at least a significant number of the decisions currently not published are not the routine, trivial appeals with no significance for the explication of precedent that the rules implicate. Instead, many appear to be cases in which the judges perceived themselves as having significant discretion in making their decision, and as a result were free to decide the case in a manner consistent with their values. The data suggest that a number of the unpublished cases may have been decided differently if heard by a different panel of judges.

The Eleventh Circuit rule governing the publication of opinions is stated in very broad, general language. No precise, objective guidelines are included. Judges are admonished only to avoid publishing decisions if their opinion would have "no precedential value."⁶² Interpretation of such a rule is inevitably quite subjective. As a result, it is not surprising that different judges applied the rule inconsistently. In effect, a different set of implicit rules potentially exists for publication for each different combination of judges that sit together. Determination of what those actual implicit criteria are is beyond the scope of the present study, but perhaps these criteria are largely unarticulated assumptions that shape the perceptions of judges about the importance of various cases without being conscientiously applied by the judges in any systematic manner. Such speculation is supported by the findings of systematic differences in the rates of publication for different types of issues and for appeals brought by different categories of parties.

The purpose of this study was not to add another point of view to the debate over whether the criteria for publication are appropriate or whether any cases currently not published deserve published opinions. However, the findings that many of the unpublished decisions involve discretionary decisionmaking by the judges and that those judges use different criteria for publication should be relevant to that debate.

62. *Supra* note 21 and accompanying text.