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PARTIAL PUBLICATION: A PROPOSAL FOR A CHANGE IN THE "PACKAGING" OF CALIFORNIA COURT OF APPEAL OPINIONS TO PROVIDE MORE USEFUL INFORMATION FOR THE CONSUMER

Eva S. Goodwin*

INTRODUCTION

There are a large number of appellate decisions about which the public, the ultimate consumer, will never know, and which attorneys, the immediate consumers, will never have the benefit of using. These are the opinions that do not appear in the official reports as they did not meet the existing California criteria for selective publication. The rationale for limiting the number of published opinions is to save the legal profession the time and expense of purchasing, storing and researching the huge number of opinions of no precedential value that are written each year.¹

Unfortunately, the impact of selective publication is more far-reaching. This article will explore the problems that led to the adoption of selective publication, the criteria most commonly used to implement selective publication, and the shortcomings of the criteria. The article will then examine California’s system of selective publication and finally, offer a new approach—partial publication.

SELECTIVE PUBLICATION

In 1962, it was estimated that the total number of printed

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With the increase in both the number of filings and the number of complex cases that has accelerated the workload of both state and federal appellate courts, several other jurisdictions have adopted selective publication rules. See, e.g., 9th Cir. R. 21, note 7 infra, discussed in notes 8-10 infra.
American judicial decisions exceeded 2,250,000;\textsuperscript{2} ten years later, that the total number was approaching 3,000,000.\textsuperscript{3} The three million mark has undoubtedly been long passed. As the number of opinions continued to grow, it became clear that there are financial and spatial limitations on the capacity of the system to absorb, store and digest the growth. One author has estimated that the cost of maintaining and keeping a library current could exceed $30,000 a year, and that the cost of acquiring an "adequate working library" could well run beyond the $100,000 mark.\textsuperscript{4}

The jurisdictions which have come to grips with the problems created by the gigantic growth in the number and complexity of reported cases have uniformly adopted some variant of selective publication.\textsuperscript{5} Basically, under this approach the courts or the legislature establish standards for publication.\textsuperscript{6} The criteria vary among jurisdictions.\textsuperscript{7} If a case fits within one of the standards or meets one of the stated criteria, it is published; otherwise, the case remains unreported. Among the more common criteria are:

1) \textit{The decision establishes, alters, modifies or clarifies a rule of law.}\textsuperscript{8} This standard would not authorize the publication of a case applying settled law to a novel fact pattern. The standard, however, encompasses the initial interpretation of a new statute, the new construction of an old statute, and the creation of judge-made law.

2) \textit{The decision criticizes existing law.}\textsuperscript{9} This standard recognizes that there is an important court function in informing the legislature that existing law needs to be changed. In some jurisdictions this criterion may encompass the publication of a dissenting opinion.\textsuperscript{10}

\textsuperscript{2} Prince, \textit{supra} note 1, at 134.
\textsuperscript{3} Joiner, \textit{Limiting Publication of Judicial Opinions}, 56 JUDICATURE 195 (1972).
\textsuperscript{4} Prince, \textit{supra} note 1, at 135.
\textsuperscript{5} See N.Y. JUD. LAW § 431 (McKinney 1968); CONN. GEN. STAT. §§ 51-21 (West 1958); OHIO REV. CODE ANN. § 2503.20 (Anderson 1954); CAL. R. CT. 976; 9TH CIR. R. 21.
\textsuperscript{6} Joiner, \textit{supra} note 3, at 197-98. The author discusses possible criteria for selective publication.
\textsuperscript{7} Compare CAL. R. CT. 976 \textit{with} 9TH CIR. R. 21.
\textsuperscript{8} In the Ninth Circuit the court is authorized to publish a decision which applies settled law to a novel fact pattern. In California this is prohibited. Note 7 \textit{supra}.
\textsuperscript{9} Publication of a decision criticizing existing law is authorized in both the Ninth Circuit and the California courts of appeal. Note 7 \textit{supra}.
\textsuperscript{10} The Ninth Circuit authorizes the publication of a written opinion if it is accompanied by a separate concurring or dissenting opinion if the author of the separate expression requests publication. 9TH CIR. R. 21.
3) The decision involves a legal issue of continuing public interest. This standard permits the publication of a decision that does not establish new law if the issue resolved is one of continuing public interest. For example, this standard does not include public interest in a sensational murder case because the public interest is not "continuing."

4) The decision relies on the published decision of a court of record. Where there is a published opinion of a case, some record of the final disposition on appeal should be preserved in the published records.

The success of selective publication ultimately depends on the criteria adopted to determine if a case is publishable. If the criteria are specific and properly applied, the number of cases reported will be significantly reduced. On the other hand, if the criteria for publication are general, the number of cases will not be significantly reduced, and the aim of selective publication will not be achieved.

THE CALIFORNIA APPROACH

With the California Supreme Court's adoption of Califor-
nia Rules of Court, Rule 976 in 1964,\textsuperscript{15} California commenced

Such opinions of the Supreme Court, of the courts of appeal, and of the appellate departments of the superior courts as the Supreme Court may deem expedient shall be published in the official reports. The reports shall be published under the general supervision of the Supreme Court.

\textit{Id.} § 68903 states:

The official reports shall be published under a contract to be entered into on behalf of the state by the Chief Justice of California, the Secretary of State, The Attorney General, the President of the State Bar, and the Reporter of Decisions, who shall serve as secretary.

\textit{Id.} § 68904 states:

The contract shall be entered into with the person who agrees to publish and sell the official reports, for a period of five years on the terms most advantageous to the state and to the public. Prior to the letting of such a contract, the Reporter of Decisions shall advertise for proposals for the publication of the reports pursuant to Section 6961 of this code in a daily paper in Sacramento, one in Los Angeles, and one in San Francisco. The Reporter of Decisions shall have no pecuniary interest in the volumes of reports.

\textit{Id.} § 68905 states:

The contract shall require the publisher:

(a) To print and publish each volume in the style stipulated in the contract within 60 days after the manuscript is delivered by the reporter.

(b) To sell copies to the state for official use only at the price fixed in the contract.

(c) To keep on hand and for sale at the price stipulated in the contract a sufficient number of each volume to supply all demand for six years after the publication.

(d) To give bonds in the sum of ten thousand dollars ($10,000) for the fulfillment of the terms of the contract.

15. \textit{Cal. R. Ct. 976 (Publication of Appellate Opinions)} states:

(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

(b) [Standard for opinions of other courts] No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule,\textsuperscript{1} (2) involves a legal issue of continuing public interest,\textsuperscript{2} or (3) criticizes existing law.\textsuperscript{3}

(c) [Courts of Appeal and appellate departments] Unless otherwise directed by the Supreme Court, an opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports if a majority of the court rendering the opinion certifies prior to the decision becoming final in that court that it meets the standard for publication specified in subdivision (b). An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect.

(d) [Superseded opinions] Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial action shall be published in the Official Reports.

(e) [Editing] Written opinions of the Supreme Court, Courts of Appeal and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified
the practice of publishing only some of the opinions decided by
the state courts of appeal. This rule requires that all supreme
court decisions be published in the official reports and sets
standards for publication of lower court opinions.\textsuperscript{16}

As originally adopted the rule favored publication by pro-
ducing that each court of appeal opinion was to be published
\textit{unless} a majority of the court rendering the opinion certified
that it did not meet any of the criteria for publication.\textsuperscript{17} Effec-

\begin{itemize}
  \item[	extsuperscript{1}] This criterion calls for publication of the relatively few opinions
    that establish new rules of law, including a new construction of a statute,
    or that change existing rules. This criterion does not justify publication
    of a fact case of first impression, where a legal rule or principle is applied
    to a substantially new factual situation.
  \item[	extsuperscript{2}] This criterion requires that the legal issue, rather than the case or
    controversy, be of public interest and that the interest be of a continuing
    nature and not merely transitory. Public interest must be distinguished
    from public curiosity. The requirement of public interest may be satisfied
    if the legal issue is of continuing interest to a substantial group of the
    public such as public officers, agencies, or entities, members of an economic
    class, or a business or professional group. An opinion which clari-
    fies a controlling rule of law that is not well established or clearly stated
    in prior reported opinions, which reconciles conflicting lines of authority,
    or which tests the present validity of a settled principle in the light of
    modern authorities elsewhere may be published under this criterion if it
    satisfies the requirement that the legal issue be of continuing public
    interest.
  \item[	extsuperscript{3}] This criterion would justify publication of the rare intermediate
    appellate opinion which finds fault with existing common law or statu-
    tory principles and doctrines and which recommends changes by a higher
    court or by the Legislature.
\end{itemize}

\textsuperscript{16} \textit{Id.}
\textsuperscript{17} CAL. R. CT. 976(c) (effective Jan. 1, 1964):
\begin{enumerate}
  \item[(a)] [Supreme Court] All opinions of the Supreme Court shall be
    published in the Official Reports.
  \item[(b)] [Standard for opinions of other courts] An opinion of a District
    Court of Appeal or of an appellate department of the superior court shall
    be published in the Official Reports if it involves a new and important
    issue of law, a change in an established principle of law, or a matter of
    general public interest.
  \item[(c)] [District Courts of Appeal] Every opinion of a District Court of
    Appeal shall be deemed to meet the standard for publication specified
    in subdivision (b) and shall be published in the Official Reports unless
    \begin{enumerate}
      \item[(1)] a majority of the court rendering the opinion certifies that it does not
        meet the standard for publication and specifies it for nonpublication and
      \item[(2)] either no petition for hearing in the Supreme Court is filed in the
    \end{enumerate}
tive January 1, 1972, Rule 976 was revised to its present more restrictive form to reflect a bias against publication. An opinion is presently published if a majority of the panel rendering the opinion certifies it for publication. Even then, the California Supreme Court may "depublish" the opinion. All of the California courts of appeal sit in three-judge panels. Thus, the decision to publish or not to publish is made by the panel assigned to the case. In practice, the initial recommendation for or against publication is made by the author of the opinion; however, the concurrence of at least one other member of the panel is required to satisfy the rule.

cause or the petition is denied by the Supreme Court without ordering publication of the District Court of Appeal opinion.

(d) [Appellate departments] Unless otherwise directed by the Supreme Court, an opinion of an appellate department shall be published in the Official Reports if two of the judges joining in the opinion certify that it meets the standard for publication specified in subdivision (b). (Emphasis added).

18. The history of the present rule is discussed, in Comment, Publish or Perish, supra note 1, at 757-61.

19. Cal. R. Ct. 976(c). Although a court of appeal division or panel has certified an opinion for publication, and the opinion is published in the advance sheets, the state supreme court, on denial of a petition for a hearing, has the authority to "depublish" a court of appeal opinion. "Unless otherwise directed by the Supreme Court, an opinion of a Court of Appeal shall be published in the Official Reports." Cal. R. Ct. 976(c). An opinion not so certified shall nevertheless be published in the official reports upon order of the supreme court to that effect. Where a petition for a hearing is granted, the court of appeal opinion is superseded and cannot be published. Cal. R. Ct. 976(d).

Decertification is, understandably, puzzling, confusing, frustrating and no doubt has engendered some of the most strident criticism of the selective publication and no citation rules, as about 90 "depublished" opinions were extant as of August 1977. Lascher, Lascher at Large, 52 Cal. St. B.J. 335, 342-43 (1977) [hereinafter cited as Lascher].

In the opinion of this writer, some of the criticism of the selective publication rule spills over and focuses on two other recent practices, namely the use by most of the California courts of appeal of a central staff to prepare shorter memorandum opinions, and "depublication." The purpose and use of central staffs and "by the court" memorandum opinions has been fully discussed elsewhere. See Thompson, One Judge and No Judge Appellate Decisions, 50 Cal. St. B.J. 476 (1975). See also Witkin, supra note 13, at 259; P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 44-55 (1976). There is also the view that any opinion that meets the present stringent criteria for publication, however brief, should be signed by a single author rather than "by the court," to ensure quality control and accountability. Thompson, supra. See Cameron, The Central Staff: A New Solution to an Old Problem, 23 U.C.L.A. L. Rev. 465, 477-78 (1976).

Witkin characterizes depublication as "a remedy of overkill not warranted by the circumstances," and suggests the practical solution of a return to the prior practice of the California Supreme Court, namely the statement of a reason or reasons on the denial of a rehearing, or some other brief and precise indication as to which portion of the opinion is disapproved. Witkin, supra note 13, 35-36 n.6.
Collegiality, perhaps in some instances, demands a trade-off—a concurrence in the result in return for non-publication. On the other hand, the criteria may be less rigidly applied, for example, if the author is a temporarily assigned judge or has greater expertise and experience in the particular field of law than his colleagues. In borderline situations, collegiality may also extend to the court below and lead to non-publication to prevent the embarrassment of a trial judge and former colleague.

If selective publication in California is judged solely by the reduction in the number of opinions published, it has been a success. The appellate reports are increasing by between ten and fifteen volumes each year. Without selective publication

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20. The following table indicates the percentage of majority opinions of courts of appeal certified for publication during 1976-77. Despite some variations among the districts and divisions, the percentages for the state as a whole are not significantly different from the percentages published in 1974-75. However, in 1976, the workload of the courts of appeal had increased 3 percent over the previous year. Between fiscal 1966-1967 and 1976-1977 the number of majority opinions filed annually by the California courts of appeal increased from 2,444 to 6,003, an increase of 146 percent.

21. The proponents of the selective publication rule were pleased with the significant reduction in the number of volumes of the California Appellate Reports, currently estimated at about 15-20 volumes per year instead of 65-70 volumes, according to Robert S. Formichi, California's present Reporter of Decision.
it is estimated that forty-two volumes would be added each year. In 1977, an official from the Judicial Council estimated that only 900, or about 15 per cent, of the over 6000 court of appeal decisions are certified for publication annually. Before and after the adoption of the selective publication rule, petitions for a hearing in the California Supreme Court have been sought in about 4 per cent of all cases decided by the courts of appeal.

Not only are very few of the appellate decisions reported today, but Rule 977 also prohibits the citation of an unpublished opinion. The result of selective publication, Rule 976, and the prohibition on citing unpublished opinions, Rule 977, is to remove the vast majority of appellate decisions from the available case law.

22. Id.


24. Detailed statistics have been kept since the Administrative Director of the Courts was added to the staff of the Judicial Council. CAL. GOV'T CODE § 68500.5 (1976). Over the years, despite the increase in volume, there has been a remarkable consistency in the statistics. Petitions for a hearing are filed in about 4 percent of all cases decided by the courts of appeal; of this 4 percent, about 1/10 are granted annually. In a typical current year, petitions for a hearing will be sought in about 2,500 of the approximate total of 6,000 court of appeal opinions (1,000 published; 5,000 unpublished); filed and granted in about 200.

25. CAL. R. CT. 977 provides:

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent. This rule shall not apply to an opinion certified for publication prior to its actual publication.

26. Rule 977 was a clear departure from the prior law, which was explained in a case decided in 1937, when all court of appeal opinions were published. In re Little's Estate, 23 Cal. App. 2d 40, 43, 72 P.2d 213, 215 (1937) states:

It is to be noted that this case has never been overruled and is therefore binding upon this court. The fact that this case was not ordered reported in the official report of the Supreme Court does not detract from its binding force.

It is not clear whether the rule of In re Little's Estate applies to the propriety of the use as precedent as distinguished from citation of an unpublished court of appeal decision decided after the adoption of the selective publication rule, but before the January 4, 1974 effective date of the no-citation rule. See Gray v. Key, 47 Cal. App. 3d 562, 568 & n.3, 120 Cal. Rptr. 915, 918 & n.3 (1973). Rule 977 is a pragmatic necessity that works in concert with the selective publication rule to prevent chaos.
A decision can become part of the case law only if a majority of the court panel hearing the case certifies that the opinion meets one of the following three criteria:

(1) The opinion establishes a new rule of law or alters or modifies an existing rule.  

(2) The opinion involves a legal issue of continuing public interest.  

(3) The opinion criticizes existing law.  

The first criterion authorizes publication of the few opinions that establish new law. A footnote to this first criterion specifically points out that publication of an opinion that applies established law to a new fact situation is not authorized.

The second criterion is satisfied if "the legal issue is of continuing interest to a substantial group of the public..." An opinion which clarifies a controlling rule of law that is not well established, or which reconciles conflicting lines of authority, or which tests the present validity of a settled principle in light of modern authorities may be published under this criterion if it is of continuing public interest.

The third criterion authorizes publication of an opinion which criticizes the existing case or statutory law, if the criticisms are aimed at persuading a higher court or the legislature to change the law.

In 1975, a rule was adopted to expressly set forth the procedure for requesting publication. Any request must state why the opinion meets one or more of the criteria for publication.

27. Cal. R. Ct. 976(b)(1).
28. Id. 976(b)(2).
29. Id. 976(b)(3).
30. Id. n.1.
31. Id. n.2.
32. Id. n.3. This criterion provides an easy formula to assure publication, but is rarely used.
33. Cal. R. Ct. 978 provides:
   (a) [Request procedure; action by court rendering opinion] A request by any person for publication in the Official Reports of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by letter, with a copy to each party to the action or proceeding not joining therein, stating concisely why the opinion meets one or more of the criteria for publication in Rule 976. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court may, and at the instance of the person requesting publication shall, transmit the request and a copy of the opinion to the Supreme Court with its recommendation for appropriate disposition and a brief statement of its reasons therefor.
   (b) [Action by Supreme Court] When a request for publication is received by the Supreme Court from the court that rendered the opinion
There are four basic problems created by the adoption of selective publication. The first concerns the subtle way the law ebbs and flows. Unpublished opinions prevent commentators from making a contribution. In addition, the public and the legal community are deprived of the knowledge of the direction in which the law is shifting. As new approaches and interests often emerge in a series of cases, no single one may be unusual or significant in and of itself, but may subsequently appear so as part of an entire pattern. The visibility of only the published part of an iceberg may inhibit the recognition and solution of societal problems by the California Supreme Court, or other parts of the body politic. As has been suggested, the sheer quantity of appellate court opinions on specific issues has significance.

This problem also encompasses the advantages enjoyed by experienced and specialized appellate litigators, who have greater access to unpublished opinions and therefore better knowledge of the parameters of particular arguments and issues that have been rejected or accepted by a panel of a court of appeal. Although somewhat obviated by the no-citation rule, the argument still applies with particular force to governmental law offices that increasingly are parties in emerging pat-
terns of appellate litigation, and who may be able to bury some of their losses. The Attorney General recently stated that "if the people have lost a case but the opinion is unpublished, for a variety of reasons, including the fact of non-publication, they may choose to forego a petition for hearing."38 An ethical objection can also be raised when the no-citation rule prevents an experienced litigator from citing and distinguishing an adverse but relevant unpublished case of which he has direct knowledge. 39

This first criticism of selective publication is endemic to the concept. Publishing only some of the case law disguises the subtle changes taking place; however, the standards for publication can accentuate or mitigate this problem. The second criticism of selective publication deals with the standards employed. Specifically, California's criteria do not authorize the publication of a decision applying settled law to a novel fact situation.40 This particular standard has been severely criticized.41 As Witkin points out, "the profession has long been used to the opposite. Lawyers, judges and publishers are constantly on the lookout for applications of old doctrines to new situations."42 He adds, "[m]oreover, the difference between an old rule applied to a new set of facts, and a new rule devised

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38. 8 CAL. DEFENDER, No. 8, at 7 (Aug. 1977). People v. Agee, 67 Cal. App. 2d Adv. Sh. 148 (1970), distinguishing California v. Green, 399 U.S. 149 (1970), held that CAL. EVID. CODE § 1235 was an unconstitutional violation of due process, insofar as the statute permitted as substantive evidence of the defendant's guilt a witness' unsworn prior inconsistent statement. After the opinion was decertified and duly depublished by the supreme court on denial of the petition for a hearing, pursuant to CAL. R. CT. 976, the defense bar wrote letters requesting publication of the opinion. The Attorney General's response to these letters included the sentence quoted in text.

39. Lascher, supra note 19, at 342. In theory, under appropriate standards, unpublished cases make no new law and should not present any ethical dilemmas. If in fact such a dilemma arises, it indicates that the case should have been published. Pursuant to Rule 978, publication may be sought even after an unpublished opinion is final, and the court has lost jurisdiction. Straughter v. California, Civ. No. 36754 (Ct. App. Cal. Mar. 3, 1976) (order published Feb. 2, 1979).

40. The Ninth Circuit authorizes the publication of a decision applying settled law to a novel fact situation. See note 8 supra. A recent study of the unreported decisions of the federal circuits concludes that the Ninth Circuit rule is preferable to that of the other circuits. Note, 63 CORNELL L. REV. 128 (1977).

41. See, e.g., WITKIN, supra note 13, at 30.

42. Id.
for such a set of facts is one of degree," and he notes that courts may not always be sufficiently aware of the distinction.43

Even if the criteria selected are proper, the problem of consistent or uniform application remains.44 Jurisdictions disagree on the best method for guaranteeing consistency. In some, the judges participating in the decision determine whether the case meets the standards for publication.45 These jurisdictions believe that the judge who decides the case and authors the opinion is most familiar with that case and therefore is in the best position to determine if it meets the standards for publication.46 In other jurisdictions, the publication decision is made by a special committee.47 These jurisdictions fear that the author of the opinion may not be objective in determining whether the criteria for publication are met. The proponents of an independent panel point out that it is free from the influence of the pride of authorship and the routine acquiescence of the concurring judges in the author's recommendation.48

This approach presents its own difficulties. Additional time and expense is required to maintain an independent staff; such a staff is another invisible and perhaps unaccountable bureaucracy. Also, in the interest of judicial economy, the author of the opinion should know beforehand whether the decision will be published.49 Accordingly, the more common approach is the California one of allowing the panel of judges deciding a case also to make the decision on publication.50

The California rule on selective publication has been subjected to vigorous criticism by those lawyers who assert that there is lack of uniformity in the application of the standards.51 In 1976, the State Bar Board of Governors and Delegates expressed concern that Rule 976 was not being applied uniformly, and that some significant opinions were not being certified for publication. As a result, the Judicial Council asked the West-

43. Id.
44. Kanner, supra note 36, at 442. The article discusses several inconsistencies between prior published and later unpublished opinions.
45. See, e.g., Cal. R. Ct. 976(c).
46. Witkin, supra note 13, at 32.
47. In New Jersey and New York the decision to publish is not made by the judges deciding the case, but by an independent panel. Joiner, supra note 3, at 197.
49. Id. at 33-34.
50. Cal. R. Ct. 976(c).
51. See Seligson & Warnlof, The Use of Unreported Cases in California, 24 Hastings L.J. 37 (1972); Kanner, supra note 35.
ern Regional Center of the National Center for State Courts to undertake the study that was completed in December, 1976.\textsuperscript{52} The study recommended no innovative approaches, but noted that currently eighty percent of court of appeal opinions were unpublished, and concluded that since only about one percent of the unpublished opinions studied warranted publication, no legal "gems" had been lost.\textsuperscript{53} The appropriate solution suggested by the study was a more careful and independent con-

\textsuperscript{52} National Center for State Courts, Western Regional Office, Report on Unpublished Opinions of the California Courts of Appeal (1976) [hereinafter cited as Unpublished Opinions]. The scope of the study was limited to a review of over 1,023 unpublished opinions filed in October, November, and December, 1975, and an additional 43 unpublished opinions identified or submitted by attorneys who believed they met the criteria for publication. The study implied that the 1,023 opinions comprised almost all of the unpublished opinions for the three months. Because only annual statistics are kept, and no organized, systematic record or index of unpublished opinions exists, the persons who conducted the 1976 study could not be certain whether the 1,023 opinions examined constituted, in fact, all of the unpublished opinions filed by all California Courts of Appeal in the period of time covered by the survey. Apparently the funds and staff were not sufficient to allow a review of the daily minutes of each district. Accordingly, the 1976 study had no way of ascertaining the precise number of unpublished opinions rendered during October, November, and December, 1975. This casts a cloud over the 1976 study.

The first group comprised 409 civil and 614 criminal appeals. The study concluded that a total of 14 (10 civil, 4 criminal) met the criteria for publication. As to the second group of 43, the 1976 study concluded that 10 satisfied the criteria and should have been published. No comparison was attempted between the 1,023 unpublished opinions and the opinions published in October, November, and December, 1975 (at least this figure is known)—and how many of the published opinions, in fact, met the criteria for publication. No evaluation of the application of the selective publication criteria is possible on the basis of only the unpublished opinions.

The fact that petitions for hearing are granted in cases with unpublished opinions (that then result in a published opinion of the California Supreme Court) strongly suggests that some "gems" or errors indeed may be buried despite the study's contrary conclusion. Or these cases may simply be a healthy index of the quality and frequency of elastic modifications and updating required of the California Supreme Court if the law is to keep pace with the changes in a state that continues to be one of the harbingers of legal and social reform in the U.S. See, e.g., Serrano v. Priest, 20 Cal. 3d 25, 557 P.2d 929, 135 Cal. Rptr. 345 (1977). As the late Robert M. Hutchins, former President of the University of Chicago, remarked about a year before his death, "I'm sorry to have to tell you that it is only a slight exaggeration to say that everything I studied in law school, and what is worse, everything I taught there, has now been overruled or repealed." Extemporaneous remarks by R. M. Hutchins, dedication of the Graduate Studies and Research Center of California State University, Long Beach, Cal., reprinted in Hutchins, All Our Institutions Are in Disarray, Center Rep. 20, Dec., 1974.

\textsuperscript{53} One member of the 1976 Study Committee recently expressed some of his reservations. Lascher, supra note 19, at 342-43. The State Bar apparently was also dissatisfied with the 1976 study. The Board of Governors has "authorized the creation of a State Bar Committee to review unpublished appellate opinions upon request and, when thought appropriate, to seek publication of these opinions." State Bar of California, Reports, 5 (Sept. 1977).
consideration by each of the non-authors of the opinion as to whether the criteria for publication were met. 54

Finally, and most fundamentally, accountability of all governmental institutions is essential in a democratic society. All citizens are entitled to read and to know the law, and should have access to court decisions and be able to understand them. Selective publication may be used to bury an embarrassing result or judicial error. But this consideration is not as important as the loss of significant precedent.

SUGGESTED ALTERNATIVE: PARTIAL PUBLICATION

Partial publication, although yet untried, is a preferable alternative—a middle ground that meets some of the objections to the selective publication and no citation rules, yet provides a way to limit the number of volumes added each year. 55 Under this approach a court would decide a case and then analyze each of the issues involved independently. While the parties would continue to receive a copy of the entire opinion, only that portion of the opinion which meets one of the criteria for publication would appear in the published reports. 56 An appropriate caption would be included in the opinion indicating that the remainder is proscribed by the selective publication and no-citation rules. For purposes of further appellate review a partially published opinion would be considered as a whole, having the same status as any other court of appeal opinion. The better approach is for the partially published opinion to identify or summarize the issues that the court deemed did not meet the criteria for publication.

In 1973, partial publication was approved and recommended by the Federal Advisory Council on Appellate Justice 54. Thus, the study simply confirmed the view expressed two years earlier that once the author of the opinion has determined that it merits publication, it is "a touchy matter for his two colleagues to decide" that the opinion does not meet the criteria of the rules. Gustafson, Some Observations about California Courts of Appeal, 19 U.C.I.A. L. Rev. 204 n.127 (1974).

55. The two elder statesmen of this country's appellate scholars, B.E. Witkin and R.A. Leflar, have endorsed partial publication as a feasible solution. Witkin, supra note 13, at 37-38; R. LEFLAR, APPELLATE JUDICIAL OPINIONS 318 (1974). The 1976 annual workshop of California Court of Appeal Judges also did so, and four of the state's five appellate districts have published opinions lamenting the absence of a partial publication rule. Generally, the mechanics or details of how to write an opinion for partial publication and, more importantly, the fear of a potentially adverse effect on the quality and completeness of opinions have served as inhibiting factors.

56. The author would prefer to see all appellate opinions published. However, given the current and increasing volume, a return to total publication may have to await the putting in place of the appropriate technologies with public accessability.
in its report on the use of appellate court energies.57 The Council made the following recommendation:

The Committee recognizes that in many cases an opinion prepared mainly for the benefit of the parties may involve several matters that do not meet the standards for publication, and at the same time may involve one or more matters meeting the standards. In such cases, partial publication should be ordered for so much of the opinion as meets the publication standards; the remainder should be left unpublished. When a tentative decision to publish is made before the opinion is prepared the opinion writer can prepare the opinion with partial publication in mind. . . . Deletions should be clearly indicated in the published opinion so that anyone interested may know what is available in the records of the court. All unpublished opinions and parts of opinions are components of the public records of the court and available to anyone to examine.

There should be no problem in implementing this proposal so long as the writer of the opinion knows at the outset that the decision is to publish only partially.58

Solving Shortcomings of Selective Publication

Partial publication if applied properly can solve two of the most serious criticisms leveled against selective publication.59 Since partial publication would significantly reduce the length of published opinions, the standards set under California's selective publication rules could be broadened without increasing the number of pages printed in the appellate reports each year. For instance, a change in the criteria for publication to include that part of the opinion applying settled law to a novel fact situation will alleviate the tendency of the present selective publication and no-citation rules to disguise the subtle shifts taking place in the law.60 Partial publication would also permit the publication of more cases, and thereby increase access and accountability.


58. STANDARDS, supra note 12, at 13-14.

59. See text accompanying notes 34-35 supra for a discussion of the criticisms of selective publication.

60. See text accompanying note 44 supra, which discusses consistency.
Examples of Partial Publication

*People v. Moore,*" decided by Division Two of the Second

61. *People v. Moore,* 15 Cal. App. 3d 851, 93 Cal. Rptr. 447 (1971), slipped by the reporter of decision prior to any articulation of the policy prohibiting partial publication which had been an unwritten corollary of *Cal. R. Ct.* 976 since its adoption in 1964. The full text of Justice Fleming's opinion is as follows:

Appear from a judgment of conviction for second degree murder and grand theft. The facts and appellant's arguments, except the one discussed below, are covered in an appendix which we have certified for nonpublication.

(1) Appellant's remaining argument is that the trial court committed prejudicial error by failing to admonish the jury at the time of a 10-minute mid-morning recess not to discuss the case or form any opinion on it. This argument is based on the provisions of Penal Code section 1122: "The Jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them." (Italics added.) Appellant in effect argues that at each break in the proceedings, no matter how abbreviated or for what cause, the admonition must be given.

We do not agree. Rather we construe the word *adjournment* in the section to mean a continuance of the proceedings to another day. Any break in the proceedings for a lesser period than a day is properly termed a recess; it does not amount to an adjournment within the meaning of the section and does not require the admonition of the jury in the manner specified in section 1122.

(2) The word *adjournment* traces back through Medieval English to Old French for day (journee), to Late Latin adiurnare [ad(to)diurnus (daily)], to Latin for day (dies). The idea of day remains paramount throughout these various antecedents, and we find it made explicit in a maxim of the Justinian Code, which declares that "an adjournment is to appoint a day or give a day." (4 Inst. 27, quoted in Black's Law Dictionary (4th ed.) p. 62.) Thus to adjourn is to continue proceedings to another day or to continue them without specification of the day (sine die). Webster's New International Dictionary, second edition, defines *adjourn* as: "To put off or defer to another day or place, or indefinitely; to postpone; to close or suspend for the day." Clearly, the term *adjournment* connotes a substantial break in the proceedings. In contrast is the term *recess,* which is generally used to describe a suspension of proceedings for a period of time less than a day. Black's Law Dictionary defines *recess* as "a short interval or period of time during which the court suspends business, but without adjourning." We construe section 1122 as having no application to a recess, i.e., a temporary suspension of proceedings for a period less than a day. (*People v. Colmere,* 23 Cal. 631; *People v. Burwell,* 44 Cal.2d 16, 33 [279 P.2d 744].) Since at bench the court did not continue the proceedings to another day, the temporary break in the proceedings amounted to no more than a recess, and the statutory admonition was not required.

The judgment is affirmed.

Roth, P. J., and Herndon, J., concurred.
District in March, 1971, is the only partially published court of appeal opinion in California. In Moore, the appellant was convicted of grand theft and second degree murder, but the published opinion did not discuss any of the facts surrounding the killing. These were all placed neatly in an appendix to the case which was certified for nonpublication. Instead, the opinion states that the trial judge failed to admonish the jury, before a ten minute mid-morning recess, not to discuss the case or form any opinion about it. The court noted that the jury must be so admonished at each adjournment and went on to discuss the meaning of adjournment, concluding that it means continuance until another day. All this was done in a little more than one page of text. None of the other issues raised on appeal were mentioned or discussed as they did not meet the criteria for publication. This case indicates that partial publication is a workable approach that could be used to reduce the number of volumes added to the reports each year without loss of clarity.

Although a case in partial context might tear an issue from its total matrix, the appellate process by its very nature focuses on limited issues and facts, the frozen record, and law. In many instances, only a single portion of an opinion is likely to be of value and of practical significance to a future litigant. Usually that portion opens up new avenues by changing or modifying an existing rule. In addition, a significant number of presently published opinions concern both the application of new statutes, or emerging new doctrines of law, and routine evidentiary or procedural matters. For purposes of partial publication, these latter areas easily lend themselves to separation. Frequently, most of the facts relate to the sufficiency of the evidence and therefore are not significant for that segment which is to be partially published.62

In 1975, Justice Friedman, of the Third District Court of Appeal in People v. Collins63 severely criticized the absence of

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1. We note that even in the case of a true adjournment failure to give the admonition would not require reversal unless the defendant directed the court's attention to the omission at the time of adjournment or was able to show that prejudice resulted from the omission. (People v. Fairchild, 254 Cal.App.2d 831, 839 [62 Cal.Rptr. 535], cert. den. 391 U.S. 955 [20 L.Ed.2d 870, 88 S.Ct. 1861].)

62. See People v. Moore, id.; People v. Collins, 44 Cal. App. 3d 617, 118 Cal. Rptr. 864 (1975). If one of the errors is prejudicial, a consideration of the entire record may be required. See also People v. Beyea, 38 Cal. App. 3d 176, 118 Cal. Rptr. 254 (1974). Even in such an instance, partial publication is feasible. In Beyea, only the impeachement issue would appear in a partially published opinion.

a rule permitting partial publication. Collins involved an appeal from a conviction of robbery. In connection with the offense the jury found that the defendant had intentionally inflicted great bodily injury. Pursuant to the then applicable statute, Penal Code section 213, such a finding increased the minimum punishment. The trial court had instructed the jury that an accomplice may be found to have inflicted great bodily injury, even though another participant in the robbery actually inflicted the harm. The case discussed the instruction and concluded that it was proper. This part of the opinion took approximately three and one-half pages. The Justice then turned to the other issues in the case, prefacing his remarks by saying:

At this point we have completed the only portion of this opinion which meets the criteria for publication in the official reports fixed by rule 976, subdivision (b), California Rules of Court. Although important to the prosecution and the defendant, the remainder of this opinion has no precedential value. Unfortunately, the Rules of Court do not provide for partial publication of appellate opinions. To swell the torrent of published reports by judicial lucubrations adding nothing to the law is regrettable but unavoidable.64 (Footnote quoting Rule omitted.)

The court then discussed the sufficiency of the evidence presented at trial. This discussion by itself would not meet any of the California criteria for publication.65

Recently, Division Two of the Fourth District in People v. Superior Court66 made a plea for partial publication. The case was before the court of appeal on an alternative writ of mandate. The state sought a reversal of the trial court's order suppressing certain evidence. The initial question discussed in the opinion was one of first impression. After the suppression hearing and the filing of the alternative writ of mandate, the defendant was found incompetent to stand trial. This finding raised the question of the appellate court's jurisdiction to decide this matter, since Penal Code section 1368 appeared to require all proceedings in a criminal prosecution to be suspended when the defendant is found incompetent.67 The court finally determined that it had jurisdiction. Before resolving the other issues, the court stated:

64. Id. at 623, 118 Cal. Rptr. at 868.
65. The discussion of the sufficiency of the evidence does not establish new law, concern a legal issue of continuing public interest, or criticize existing law. See Cal. R. Ct. 976(b).
From this point on, this opinion lacks precedential value. The following issues are a matter of interest only to the parties to this litigation. They present no issues worthy of publication under rule 976, California Rules of Court. Nevertheless, since we are denied the luxury of partial publication of an opinion, we proceed with a full discussion of those issues. 68

In the remaining five pages the court discussed the evidence presented at the hearing to determine if the police officers had probable cause for the issuance of a search warrant. The court concluded that sufficient evidence was presented and issued a writ of mandate directing the superior court to vacate its order granting the motion to suppress and to enter an order denying the motion to suppress in part.

In June 1978, Presiding Justice Gardner of the same court tried another method of partial publication in People v. Johnson. 69 After devoting five pages to a discussion of Penal Code section 2900.5, the opinion continued:

Defendant's other contentions do not deserve discussion in a published opinion and were we afforded the luxury of partial publication, we would simply dispose of them by written memoranda to counsel. However, since partial publication is not available to us, we dispose of these issues in summary form.

The court then disposed of the remaining six issues in two pages. 70

In July 1978, Justice Scott of the First District indicated that partial publication was equally useful in a civil case, Golden Gate Bridge & Highway Transportation District v. 71

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68. 74 Cal. App. 3d 407, 414-15, 141 Cal. Rptr. 497, 500-01 (1977). The court added the following footnote to the above quoted language at 415:

This observation is based upon the fact that on several occasions the authors of opinions in the Courts of Appeal have attempted partial publication only to have the case decertified by the Supreme Court. However, a ray of hope exists. In People v. James, 19 Cal.3d 99 [137 Cal. Rptr. 447, 561 P.2d 1135], the Supreme Court said, "Defendant's additional contentions were fully addressed by the Court of Appeal when the case was before that court. With one exception, we agree with the Court of Appeal's resolution of the issues there presented and therefore reject the contentions as without merit." Since that opinion of the Court of Appeal exists only in the offices of that Court of Appeal and of the parties to that case, and in West's California Reporter but not in the Official California Reports, it would appear that the Supreme Court has, in James, adopted a modified version of partial publication of an opinion.

The California Supreme Court subsequently denied a petition for hearing.
70. Id. at 189, 147 Cal. Rptr. at 61.
71. Id. at 189-90, 147 Cal. Rptr. at 61.
After a three and a half page discussion of three issues pertaining to the condemnation authority of the district, the opinion stated that there was no merit in the appellants’ remaining contentions which did not warrant publication: “Preferably, there would be a partial publication rule for these circumstances. Absent such a rule, the balance of the opinion will be placed in a footnote.” The footnote discussing three evidentiary issues occupied three pages.

These recent cases demonstrate that partial publication would better reflect the dual aspects of the work of appellate courts, reviewing for correctness and developing and declaring law in the areas entrusted to the courts.

The recent cases also indicate that a range of techniques for partial publication is readily evolved to accommodate the needs of different fact patterns and legal issues. A partial publication rule would result in fewer published pages with more precedentially useful “meat” on each page than the present “all or nothing” rule. This conclusion is based on the commensurate reduction in the space required for the reporter’s summary and headnotes and the fact that certain cases may require a final paragraph to indicate that on a review of the entire record the errors below were harmless under the applicable constitutional standard.

Partial publication would accommodate readily the relatively few appellate opinions that involve concurring or dissenting opinions. The 1976 study commented:

There were very few concurring and dissenting opinions among the sample cases. It appears that the system would not be overburdened if publication were required when such opinions are filed. However, there is no indication

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73. Id. at 714, 148 Cal. Rptr. at 204.
74. Id. 714-17, 148 Cal. Rptr. at 204.
75. The major question is whether a partial summary of the unpublished issues as in People v. Johnson, 82 Cal. App. 3d 183, 147 Cal. Rptr. 55 (1978), or permitting the unpublished issues to remain unidentified, as in People v. Moore, 15 Cal. App. 3d 851, 93 Cal. Rptr. 447 (1977), is more useful. This author prefers the former.
76. In People v. Mack, 66 Cal. App. 3d 839, 846 n.1, 136 Cal. Rptr. 283; 289 n.1 (1977), after a 2 page discussion, Justice Puglia said:

The discussion just concluded furnishes the sole justification for publication of this opinion. The remaining questions with which we must treat in disposing of this appeal are neither new nor novel, but remain an unavoidable appendage to this opinion by force of the “all or nothing” character of the rules governing publication of appellate opinions.

The rest of the opinion then continued for over 16 pages in the reports.
that the filing of a concurring or dissenting opinion necessarily reflects discussion of new legal issues.\textsuperscript{77}

Under partial publication, decisions with concurring and dissenting opinions are publishable if the concurrence or dissent meets the criteria for publication.

Many practitioners have suggested that at least all court of appeal reversals should be published. In response to this suggestion, the 1976 study concluded:

The vast majority of trial court decisions reviewed in criminal appeals were affirmed. Approximately 25 percent of the civil appeals resulted in reversals. There is no justification for the suggestion of mandatory publication of opinions which reverse trial court decisions because the likelihood of significant issues worthy of publication does not appear to be greater than in opinions involving affirmances. Supporting this conclusion is the fact that no opinions reversing decisions in criminal appeals warranted publication.\textsuperscript{78}

A policy permitting partial publication could also help to ameliorate the fear that under the present "all or nothing" approach some "meat" from potentially useful reversals is lost.

In addition, the adoption by California of the practice of some of the federal circuits of publishing an index\textsuperscript{79} in the reports listing the date, parties, and docket numbers of unpublished opinions and matters decided without opinion would provide the necessary access to all public documents for interested citizens to review.\textsuperscript{80} An index would be useful inasmuch as unpublished opinions are technically a part of the public record, and there is no practical way for any persons except the parties and counsel to examine them, unless the name and date of the case and the location of the court of appeal district and panel responsible for the decision are known.\textsuperscript{81} Although in fact

\textsuperscript{77} Unpublished Opinions, supra note 52, at 14.
\textsuperscript{78} Id.
\textsuperscript{79} The District of Columbia Circuit, like the Ninth Circuit, published a list of decisions rendered without opinions. See, e.g. 543 F.2d 1389 (9th Cir. 1977), 529 F.2d 521 (D.C. Cir. 1976).
\textsuperscript{80} In 1977, as in 1975, measures providing for citable indexed opinions and non-citable non-indexed opinions died in committee or were dropped. L.A. Daily J., Apr. 20, 1977, at 1.11; author's telephone interview with Sen. Roberti's office (Apr. 24, 1978).
\textsuperscript{81} Lack of access to unpublished opinions works a hardship on appellate attorneys and lessens the quality and usefulness of written and oral arguments presented to a court of appeal. Effective appellate advocacy requires knowledge of the views of the member judges, as expressed in their written opinions. On appeal, counsel should
very few persons may make use of such an index, the justification is not one of utility but the right of the public as the ultimate consumer of justice to easy access to all public records.

CONCLUSION

The immense growth in case law throughout all of the appellate jurisdictions in the country is straining the legal system's ability to assimilate the law. Most commentators agree that some way must be found to reduce the volumes added to the case law each year. California has responded to this problem by enacting two court rules. The first authorizes the publication of a decision only if it establishes new law, involves an issue of continuing public interest or criticizes existing law. The second prohibits the citation of unpublished opinions. As a result, unpublished decisions are not and cannot become precedents for future cases unless the parties seek and are granted relief pursuant to the procedures prescribed.

The California system has been very successful in stemming the tidal wave of appellate reports threatening to engulf the legal community. However the selective publication of appellate decisions has severe shortcomings for a legal system that purports to apply the law openly and consistently. Even if California applies its criteria for selective publication consistently, the standards need fine tuning and broadening. Further, the failure to publish fact cases of first impression masks the subtle shifts taking place in an area of law. An indexing system would provide a mechanism for access and accountability.

not have to argue an issue without knowing whether the panel hearing the argument has already decided the matter in an unpublished opinion. The counties that comprise each of the state's five court of appeal districts are set forth in CAL. GOV'T CODE § 69100 (West 1976). The four divisions or panels of the First District, in Los Angeles (id. § 69102); the single division of the Third District, in Sacramento (id. § 69103); and the single division of the Fifth District, in Fresno (id. § 69105). As to the Fourth District, id. § 69104 provides:

The Court of Appeal for the Fourth Appellate District consists of two divisions. One division shall hold its regular sessions at San Diego and shall have four judges and the other shall hold its regular sessions at San Bernadino and shall have five judges.

82. Joiner, supra note 3.
83. See, e.g., id.; Prince, supra note 1. Contra, Silverman, supra note 35.
84. CAL. R. CT. 976(b).
85. Id. 977.
86. Id. 978.
87. See note 23 supra.
88. See text accompanying note 33 supra.
Partial publication is an intermediate, workable alternative and a foreseeable ameliorative step to the accountability of courts of appeal, in light of budgetary stringencies, and other theoretical and practical considerations and limitations. Partial publication would have a deceleration effect on the number of volumes of court of appeal reports published annually. The present inflexible rule tends to discourage publication in borderline situations; partial publication on the other hand, would tend to favor publication of the "meat" and thus enhance legal advocacy. Partial publication of only that portion of a court of appeal opinion that met the criteria for publication would increase the utility, if not the quality, of everything published.89

89. By invitation, preliminary draft of this article and suggestions for the implementation of partial publication were presented to the California Chief Justice's newly created Advisory Committee for an effective publication rule, at a public hearing in San Francisco on November 2, 1978.