Independent Panels to Choose Publishable Opinions: A Solution to the Problems of California's Selective Publication System

Robert P. Andreani
Whitman & Ransom, Los Angeles, California

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Since 1964, California Courts of Appeal have operated under a system of selective publication, whereby only those opinions meeting specified criteria are published in the official reports. Although much criticism has been leveled at the system, no one has yet devised an alternative to selective publication which would effectively control an otherwise overwhelming flood of written judicial opinions.

This article will discuss the events which led to the adoption of the selective publication rules, examine the various problems and failings of the system, and review some proposed modifications for its improvement. Finally, it will advocate a new solution—the use of panels independent of the appellate judiciary to select publishable opinions.

**HISTORICAL CONTEXT: THE NIGHTMARE OF UNRESTRICTED PUBLICATION**

The requirement of written judicial opinions in California dates back to an 1850 statute ordering the supreme court to publish all its opin-
ions. This command was applied to the appellate courts following their creation in 1904. By the 1960's, however, the rapidly expanding bulk of reported decisions drew scathing criticism from those who maintained that the duty of the courts was to settle private disputes and not to develop the law. The central theme permeating the critics' arguments was that the excessive volume of written decisions placed onerous economic burdens on the court by the increased costs of publishing and editing, and by the added time and effort required to produce opinions of publishable quality. Practitioners also were burdened by the costs of purchasing the volumes and the expense of added hours of needless research on cases which merely expounded already settled law. Indeed, the roots of these objections date back to 18th century England.

Currently, some judges believe that as much as 85 percent of their cases present no issue of precedential value, and that publication of those opinions would merely create tons of useless print. Even under the present selective publication scheme, the flood of opinions is mind-boggling: about 35 volumes of advance sheets are printed each year. With unrestricted publication, it is estimated that 50 to 60 volumes of California Appellate Reports would be added to the shelves per annum. Members of the bar have cited the growing size of California's population, with its attendant complexities and frictions, as a major reason for this steadily growing swarm of judicial business. Additionally, the judicially-wrought revolution in criminal law has encouraged a veritable flood of appeals by convicted defendants.

The American Bar Association seems to agree that "[r]outine publi-
cation of all opinions involves substantial expense . . . much of which goes to publish memoranda of little interest or use to anyone other than the immediate parties. . . ." Moreover, say some critics, total publication would make legal research a nightmare. Imagine having to cite, distinguish, explain, and otherwise weed through 3000 search and seizure cases each year. In such circumstances, the chances of a truly insightful or authoritative case being lost in the shuffle would become extremely high. Thus, in the words of Justice Gardner, total publication would "turn the appellate system into a judicial Tower of Babel."

Three basic methods have in the past been repeatedly urged for controlling this flood: codification, shortening of opinions, and selective publication. Codification, according to Judge Story, means "reducing to a text the exact principles of the law . . . [to] pave the way to a general code which will present . . . the most material rules to guide the lawyer, the statesman, and the private citizen." California, like many other jurisdictions, is of course a "code state"—statutes are codified into "codes", such as the Civil Code, Commercial Code, etc., with publishers' annotations after each code section. Codification, however, falls within a different context here: the judicial opinions themselves would be eliminated entirely, replaced by a more detailed statutory scheme—a codification of all past cases and existing statutes which would serve as the only form of written law. This type of codification, however, seems so contrary to our common law tradition of development of the law through cases and precedent that modern writers have abandoned it as a viable solution. Moreover, other more practical problems make codification unrealistic. Among these problems are added costs of codifying, time delays, the questions of who should codify and by what standards, and the inevitable countless judicial opinions needed to construe such codifications.

Similarly, shortening of opinions may seem admirable in theory, but since it leaves implementation totally within the discretion of the opinion writers themselves, it too must fail. In addition, some opinions,
such as in major antitrust cases, by the very nature of their subject matter would require more space to discuss the facts and issues than would others, thus making objective length limitations impractical.

Thus, selective publication seemed the most promising remedy to the problems of unrestricted reporting. Accordingly, the California Supreme Court in 1964, pursuant to state constitutional authority, adopted Court Rule 976, which forbids the publication of any intermediate appellate court opinion which does not meet one or more of three stated standards, namely: (1) it establishes a new rule of law, or modifies an existing rule; (2) it involves a legal issue of continuing public interest; or (3) it criticizes existing law.

The first standard only allows publication of the few opinions that create "new law." Opinions that merely apply established law to a novel fact situation are expressly not authorized. Under the second criterion, an opinion that reconciles conflicting authority, clarifies a controlling rule of law that is not well-established, or tests the present value of a heretofore settled principle in light of modern authorities...
may be published if it is for "continuing public interest." The third standard permits publication of opinions that criticize the existing authorities, but only if aimed at persuading the legislature or a higher court to change the law.

Following the adoption of Rule 976, the next step was taken in 1974 with the adoption of Rule 977, which prohibits the citation of unpublished opinions except when "relevant" under the doctrines of law of the case, res judicata, or collateral estoppel. Finally, in 1975, Rule 978 was enacted to set forth a procedure whereby any person may file a written request with the Supreme Court asking for publication of an opinion which was not certified for publication by the Court of Appeal.

A CRITICAL ANALYSIS OF CALIFORNIA'S PRESENT SYSTEM OF SELECTIVE PUBLICATION

California's selective publication scheme has been attacked by numerous attorneys and commentators, as well as some members of the bench, with the objections falling under three broad categories: (1) the justices have too much discretion in deciding what to publish, discretion which is often abused; (2) anything less than total publication is a threat to our common law system of precedent and stare decisis; and (3) unpublished opinions are in effect a denial of the public's right to free and ready access to the records of the judiciary. In addition, this writer's own experiences as a judicial extern on the California Court of Appeal have suggested still another perhaps more dangerous flaw: that

20. CAL. R. CT. 976, n.2.
21. CAL. R. CT. 976, n.3.
22. California Rules of Court, Rule 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 respondent.
23. California Rules of Court, Rule 978 provides:
(a) 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) When a request for publication is received by the Supreme Court from the court that rendered the opinion the Supreme Court shall either order the opinion published or deny the request.
(c) An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or any of the law set forth in the opinion.
the choice regarding publication has the potential for affecting the actual outcome of the appeal itself.

A. Abuse of Judicial Discretion

Statistics compiled during 1970-71 by the Judicial Council of California show a marked disparity between the publication percentages among different divisions of the Court of Appeal.\textsuperscript{24} Notwithstanding slight statistical variances which might be the result of different numbers or types of cases decided in each division, the discrepancies in percentages are so large as to suggest strongly that the standards for publication are not being applied uniformly.

Clearly the success of selective publication turns as much upon the ways in which the deciding justices apply, or purport to apply, the standards of Rule 976, as it does upon the strength of the standards themselves.\textsuperscript{25} In theory, a majority of the panel of justices deciding the case must agree that an opinion warrants publication.\textsuperscript{26} In actuality, however, many extrinsic factors operate, and often supercede the standards of the rule. Because the very judges who decide the cases and author the opinions are given the discretion to decide which opinions meet the publication standards, there is much room for abuses of that discretion. Some opinions which according to the criteria should not be published, frequently are, solely because "in too many cases the author has simply fallen in love with his literary effort."\textsuperscript{27} In such instances it is a touchy matter for his two colleagues to decide that the opinion does not merit publication under the rules. Furthermore, the converse is also true: an opinion may fall squarely within the criteria but its author will urge his associates to vote for nonpublication, and collegiality will require that the associates compromise their beliefs. Additionally, the standards often are not applied as strictly by colleagues, when, for example, the author is a temporary judge sitting by assignment, or has greater expertise and experience in the particular field of law.\textsuperscript{28} Nonpublication of an otherwise publishable opinion may also result merely from a desire to prevent embarrassment of a trial judge or former colleague who presided over the lower court proceedings.\textsuperscript{29}

\textsuperscript{24} See Judicial Committee of California, Annual Report of the Administrative Office of the California Courts, at 75 (1972), cited in, Appellate Opinions in California, supra note 3, at 762.

\textsuperscript{25} See generally Goodwin, Partial Publication: A Proposal for a Change in the "Packaging" of California Court of Appeal Opinions to Provide More Useful Information for the Consumer, 19 Santa Clara L. Rev. 53 (1979) [hereinafter cited as Goodwin].

\textsuperscript{26} Cal. R. Ct. 976(c). See note 18 supra.

\textsuperscript{27} Gardner, supra note 5, at 10.

\textsuperscript{28} Goodwin, supra note 25, at 59.

\textsuperscript{29} See Goodwin, supra note 25, at 59.
Examples of more patent abuses can be found. Recently, two justices in Division 4 of the Second District reversed their prior decision to publish an opinion because they did not like the third justice's subsequent proposed dissent. Rumors circulate about justices who, regardless of their convictions as to the merits of a case, consistently take the position opposite to a colleague on published decisions merely to further personal grudges against the colleague. Other justices conceivably may decide published cases in ways that help further a particular public image they wish to portray. Some justices may feel obligated not to publish opinions in which the holding is a reversal, to avoid antagonizing trial judges by reversing them publicly. Finally, there may be a tendency to develop certain "unwritten rules" such as an agreement to refrain from publishing any opinion in which an attorney appears as a party to the dispute.

Court Rule 978 allows anyone to request the publication of an unpublished opinion by first filing an appeal with the court rendering the opinion, and later, if unsuccessful, by transmitting the request to the Supreme Court. However, the effectiveness of this procedure as a means of curbing abuses of discretion is immediately suspect. Such abuses are extremely difficult to discover, and impossible to prove without inside information. Rarely does anyone other than the parties to the case and their attorneys even know about the matter at all, much less what goes on in the justices' chambers. Furthermore, courts may be understandably reluctant to air their own dirty laundry, even if brought to their attention.

Thus, it is clear that subjective factors and biased personal motives totally extrinsic to, or in a direct clash with, the criteria of Rule 976 can lead to abuses of judicial discretion in selecting publishable opinions. This in turn can result in a non-uniform and morally objectionable practice of selective publication in California.

B. Conflicts With Common Law Notions of Precedent and Stare Decisis

Prior to the adoption of the current selective publication rules, California courts had long recognized the value of unreported decisions as precedent. It is a well-settled and fundamental guarantee of our common law system that litigants with similar claims have a right to expect

31. See note 23 supra.
32. "The fact that [a] case was not ordered reported in the official reports cannot be taken to indicate . . . that this court disapproved the doctrine announced therein." MacDonald v. MacDonald, 155 Cal. 665, 672, 102 P. 927, 930 (1909).
equal treatment from the courts.\textsuperscript{33} Judges are obligated to consider the principles developed in earlier cases in arriving at their own solutions to the case at hand.\textsuperscript{34} Admittedly, the California scheme is aimed partly at sparing practitioners the time and expense of researching high numbers of theoretically superfluous opinions. However, the danger is that important substantive decisions can often be cast aside with the unpublishables, either through judicial indiscretion or non-uniform application of the criteria. This state of affairs is intolerable, according to commentators, in a common law legal system based on stare decisis.\textsuperscript{35}

Perhaps the dilemma is part of the larger question of whether the proper role of the intermediate appellate judiciary is to settle disputes (or correct erroneous dispute resolutions by the lower courts) or to develop “the law.” Many appellate justices see themselves primarily as “lawmakers,” who have a duty to see that only those cases which help “develop the law” go into print.\textsuperscript{36} Conversely, the role of the attorney is portrayed as directing all efforts toward a resolution of the particular dispute which is most favorable to the particular client. Not surprisingly, this polarity is reflected in recent studies. A 1974 poll of Los Angeles attorneys revealed a two to one vote against the present California system\textsuperscript{37} and in favor of publishing all opinions. On the other hand, legislation previously proposed requiring total publication has encountered strong opposition from the judicial lobby. Whichever way one chooses to resolve this conflict in ideology, the fact is indisputable that selective publication by necessity removes some cases from the universe of opinions which would otherwise become part of the body of common law from which “precedent” is established.

Furthermore, some commentators have argued that total publication is necessary because often it is the very frequency with which issues arise that is the true measure of their importance.\textsuperscript{38} For example, the United States Supreme Court’s departure from the “voluntariness” test in criminal confessions in \textit{Miranda v. Arizona}\textsuperscript{39} was arguably attributa-

\textsuperscript{34} Note, \textit{Written Opinions in the Modern Legal System}, 41 ALBANY L. REV. 813, 816 (1977).
\textsuperscript{35} \textit{See Appellate Opinions in California, supra} note 3, at 766.
\textsuperscript{36} The philosophy of these justices was perhaps best verbalized by Justice Cardozo in 1909, there in relation to the \textit{highest} appellate court of New York:

\textit{The function (of the court) is not declaring justice between man and man, but of settling the law. The court exists not for the individual litigant, but for the indefinite body of litigants whose causes are potentially involved in the specific cause at issue. The wrongs of aggrieved suitors are only algebraic symbols from which the court is to work out the formula of justice.}

\textit{CARDOZO, JURISDICTION OF THE COURT OF APPEAL OF THE STATE OF NEW YORK 6 (2d ed. 1909).}

\textsuperscript{37} L. A. DAILY J., Jan. 8, 1974, at 1, col. 4.
\textsuperscript{39} 384 U.S. 436 (1966).
ble in part to the sheer quantity of petitions in which the issue was raised. Each alone was insignificant, but the pressure created by the volume had great cumulative import. Without total publication, this cumulative factor is absent from the judicial decision-making process of the state supreme court.

Moreover, the combination of selective publication with the state supreme court's power to decertify published opinions leads to still another dilemma. Because only published Court of Appeal opinions have any precedential value, the Supreme Court can limit silently and completely the growth of the law merely by decertifying those opinions which do get published selectively. Total publication, on the other hand, would force the Supreme Court to reach that result by disapproving entire opinions after hearing the appeal, and by expressly stating in its own opinion the reasons for each reversal.

There is a final and more abstract argument in favor of total publication, which has as its foundation the philosophical theories of Social Darwinism. An analogy may be drawn to the biological concept of natural selection. Each human being has a wealth of individual and peculiar characteristics. Although not every person is best constructed to suit his present environment, there is a valid biological reason for this: environments change, and characteristics which are not optimal in today's world may be precisely the ones which are essential to survival in tomorrow's. Hence, these particular characteristics insure that the human race will not become extinct, but rather will develop and adapt, when circumstances change. By the same token, not every legal case presents issues which are relevant under the criteria of Rule 976 today. These issues, however, may be the very issues which will at some future time be of paramount concern as society changes. By having these decisions a matter of record, changing trends in the common law may be accomplished less abruptly, and more "naturally," with the benefit of past adjudications on the subject.

40. The California Supreme Court's power to decertify is not specifically authorized anywhere. However, Rule 976(c) contains language which has been construed as granting this power. As it reads, Rule 976 gives the courts of appeal the right to publish opinions meeting certain criteria "unless otherwise directed by the Supreme Court." See note 18 supra.

41. A detailed analysis of decertification is beyond the scope of this article. For an excellent discussion of the problems related to decertification, see Biggs, Censoring the Law in California: Decertification Revisited, 30 Hastings L.J. 1577 (1979); Note, Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law, 50 So. Cal. L. Rev. 1181 (1977).

42. An excellent exposition of this philosophy appears in R. Hofstadler, Social Darwinism in American Thought (1959).
C. Denial of Public Access to the Writings of the Court

Commentators additionally contend that without total publication of appellate decisions, a serious threat to one of our most essential freedoms—the right of the public to have access to judicial interpretations of the law—is created. As one writer has said:

[A]ristocracy perpetuated itself through the exclusive, monopolistic control of the knowledge of the law. . . . [E]liminating written law has throughout history proved to be the first priority of the tyrant . . . . By compelling lawmakers to commit their rules to writing, the citizens were assured a method of reviewing in gauging the law’s exercise. The written rule could be compared with established practice."43

Of course, nonpublication does not mean the public is denied access to opinions. For all practical purposes, however, unpublished opinions will never reach the public’s eye.

Indeed, this is seemingly inconsistent with the maxim that ignorance of the law is no excuse, as was recognized nearly one hundred years ago:

[D]ecisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions. . . .44

Free access relates directly to the issue of stare decisis and the public’s right to demand consistent adjudication. But more importantly, public access to all opinions provides a necessary check on the activities of our judiciary. It is much easier for a justice to write outstanding opinions for publication when only a handful are published each year. But, it is only by public scrutiny of all his work that the true worth of a justice can be evaluated, and although in theory every opinion, published or not, is available for inspection by anyone requesting it, this total scrutiny is only possible when every opinion must be published.

Moreover, the actual practices of most Court of Appeal panels multiplies this need for added public access. Generally, each case is assigned first to an individual justice in the three-judge panel who bears primary responsibility for its preparation. This justice typically must summarize the facts, isolate the issues, research the law, and prepare a draft opinion of the decision which is circulated to the other two justices

44. Nash v. Lathrop, 152 Mass. 29, 6 N.E. 559, 560 (1886).
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prior to oral argument. In cases where argument is not predicted to be
significant, it is a short step from this draft to a final opinion. Although
this procedure is attractive for its speed and efficiency, it all too often
results in the rendition of a one-man decision. Drafts are sometimes
accepted on faith, with little or no independent research or analysis by
other panel members. As a result, the chances that such a one-man
decision is incorrect, poorly reasoned, or even unjust are greatly in-
creased. But most importantly, this fact, combined with the ability to
bury an opinion by nonpublication, effectively means individual jus-
tices who decide cases incorrectly can rest without fear, for their work
will be scrutinized neither by the public, nor by their fellow justices.
Hence, seen in this context, nonpublication means that no checks and
balances of any kind exist. Justice Gardner of the Fourth Appellate
District once conceded that "anonymity and irresponsibility go hand in
hand, in all branches of government." Viewed in light of the forego-
ing, easy public access to the writings of the court is a highly persuasive
justification in favor of total publication.

D. Effect on the Outcome of Cases

Commentators and jurists alike all concede that published opinions
require more work than nonpublished ones: "It is clear also that the
judicial time and effort essential for the development of an opinion to
be published for posterity . . . is necessarily greater than that sufficient
to enable a judge to provide a statement . . . [to] the parties." Indeed,
a 1972 report by the Federal Judicial Center went on to say:

a limitation on the publication of opinions . . . affects greatly the
time and resources that must be devoted to opinion preparation. An
opinion prepared to inform the parties of the reasons for the decision
is quite a different thing from an opinion that will be pub-
ished. . . .

Some jurists maintain that less effort expended in the nonpublished
opinions means the remaining cases, the "important" ones, will be ap-

45. Justice Thompson of the Second Appellate District, in an excellent survey of the practical
problems of California Appellate Court functioning, stated in contrast to the above that an abso-
lute of appellate adjudication should be that "[t]he decision of an appellate court must represent
the collective judgment of its members sitting as a panel on the case." Thompson, Mitigating the
46. Id. at 478.
47. Gardner, supra note 5.
48. STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, ADVISORY COUNCIL FOR APPEL-
LATE JUSTICE, part I, prelim. statmt., at 1. See also B. Witkin, MANUAL OF APPELLATE COURT
OPINIONS 25 (1977) [hereinafter cited as WITKIN].
49. FEDERAL JUDICIAL CENTER, RECOMMENDATION AND REPORT TO THE JUDICIAL CON-
FEERENCE OF THE UNITED STATES (1972), cited in Stern, The Enigma of Unpublished Opinions, 64
proached with greater creativity and enthusiasm. Justice Frankfurter once commented that

[句judgments are surer and opinions more accurate if they proceed from minds freshly informed . . . . The strain of an unmanageable load of business destroys the serenity of spirit essential to the painful process of hard thinking on which are dependent wise decisions. . . .50]

At the very outset, the question arises whether it is inherently unfair, if not a violation of a fundamental right to equal justice for all, for one litigant to be denied the benefit of added time in researching his case, merely because the decision is not to be published. Admittedly, some reduction in time could and should flow from nonpublication due to, for example, the ability to shorten factual statements or procedural histories. However, the danger which accrues from the "less effort" phenomenon is that in reality it often hallmarks diminished care in legal analysis of the issues.

Justice Traynor once pointed out how human nature dictates that the very process of writing opinions helps the writer reason more carefully.51 Logically extending this, it becomes clear that the added exposure that publication affords creates greater incentive to be more precise in analytical reasoning. The fact of the matter, however, is that this different level of care between the analysis done in the published versus the nonpublished cases may be so marked that in some instances the actual substantive result—reversal or affirmance—can be at stake.

The following hypothetical will aptly illustrate this danger: a justice first believes that a case is simple and ordinary, following a quick perusal of the draft opinion, when the authoring and concurring justices initially decided on nonpublication. Now the author changes his mind and opts for publication, however, so the justice re-examines the issues carefully for the first time and concludes that he now disagrees with the majority holding. As a result, the associate justice decides to write a dissent, whereas before the decision to publish he would have simply signed along in concurrence. Clearly, a well-reasoned dissenting opinion could have great significance on a petition for a hearing by the supreme court. Yet, but for the decision to publish, and the resulting higher degree of analysis and reasoning by this particular justice, no dissent would have even appeared. Moreover, the dissenting justice, armed then with his more careful analysis of the case, might have con-

vinced the majority to rule the other way, had he done this analysis before the decision to publish the majority opinion.

Therein lies the strongest criticism of selective publication, for no one can ever know how many unpublished cases might have been decided differently had the justices expended the same amount of intellectual effort that they would have for the very same published decision.

PRIOR PROPOSALS FOR REFORM OF PUBLICATION RULES

Criticizing an existing system is of course much easier than devising one which is better. Nonetheless, some commentators have accepted the challenge and offered proposals for improving our system of selective publication. The major ones are discussed below.

A. California Supreme Court Committee Recommendations

In response to the tide of criticisms, Chief Justice Bird, in 1978, appointed a committee to study the selective publication system in California. Their final recommendations included: (1) broadening the standards for publication to include all fact cases of first impressions, all cases with dissenting and reasoned concurring opinions, opinions creating or resolving legal conflicts, and those that make significant research or analytical contributions to the law; (2) creating an index and file of unpublished opinions so that attorneys may have “full and ready access” to all unpublished Court of Appeal opinions in petitions to the state supreme court “whenever it appears that an unpublished opinion conflicts with the case in which review is sought.”

The first recommendation answers those critics who fear selective publication will destroy stare decisis. Virtually every case could be characterized as being within this broadened criterion for publication. The second and third suggestions also aim to restore litigants’ rights to rely on all cases as precedent, by permitting citation of unpublished opinions in petitions to the supreme court. Unfortunately, however, allowing citation only for supreme court petitions is wastefully under-inclusive. This would only increase the already voluminous number of petitions to the supreme court, and would fail to place the burden of consistent decision on the proper courts, i.e., the Courts of Appeal rendering the decision.

B. ABA Commission Proposals

The ABA Commission on Standards of Judicial Administration ad-

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52. See generally CALIFORNIA REPORT OF THE CHIEF JUSTICE’S ADVISORY COMMITTEE FOR AN EFFECTIVE PUBLICATION RULE (June 1, 1979).
vances a two-step plan: (1) the appellate courts should reshape their approach and habits so as to make the publication decision a careful judgment of each panel member; and (2) with each published opinion, the court should furnish a statement of the reasons for publication.

The first proposition may have noble intentions, but the ABA has apparently neglected to tell us how this reshaping can be accomplished. The second suggestion might, however, succeed in inhibiting abuses of judicial discretion. In addition, it would place, in theory, no added burden on the court, since even under the present rules, justices must have a valid reason for publication. Instead, the court would merely be required to articulate its reasons. Unfortunately, some jurists believe that publication rates would drop significantly if written reasons were to be required. Perhaps this is an indirect admission that ulterior motives do in fact enter into the decision of whether to publish, motives which would not fare well under public scrutiny.

C. Partial Publication

The most recently suggested alternative is that of partial publication of opinions:

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. An appropriate caption would be included in the opinion indicating that the remainder is prescribed 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.

Partial publication would, according to its proponents, accomplish the following main objectives: (1) allow the broadening of publication standards, without increasing the number of pages printed, by reducing the average length of published opinions; and (2) increase the total number of published cases, thereby making more precedent available.

This proposal is attractive, and it is clear that some jurists are doing in effect, if not in form, exactly what the partial publicationists have

53. A.B.A. COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, "STANDARDS RELATING TO APPELLATE COURTS" 3.37 (tent. draft).
54. Goodwin, supra note 25, at 66.
55. Goodwin, supra note 25, at 66.
The fact remains, however, that partial publication does not in any way prevent any of the abuses of discretion which have been generated under the selective publication scheme. Justices still may publish the wrong cases or bury the virtuous ones. All the criticisms which flow from less time being spent on nonpublished cases, and the resulting dangers of incorrect decisions in those cases, are still applicable under a partial publication program. Finally, public access to the writings of the courts is not really improved by this scheme.

A Proposal: Independent Panels to Select Cases for Publication

Based upon all of the foregoing, it is submitted that the most preferable modification to the selective publication scheme is to place the responsibility for publication decisions in a selection panel independent of the appellate courts. Admittedly, an independent panel would neither eliminate all the present failings nor refute all the existing criticisms of selective publication, but it would help strike a healthier balance between the competing interests and policies at stake.

A. How the Panel Would Function

The panel would be composed of both legal scholars and practicing attorneys. The supreme court would set guidelines regarding eligibility of panel members, methods of selection, terms of service, and compensation. The panel would function by receiving copies of the final written versions of all courts of appeal opinions, and then reviewing them to decide which ones merit publication according to the criteria of Rule 976. The panel's decision would be subject to review by the same mechanism which the present system employs—by petition to the California Supreme Court.

56. One example of this is Justice Gardner's opinion in People v. Johnson, 82 Cal. App. 3d 183, 147 Cal. Rptr. 55 (1978). The opinion first dealt extensively with the main issue of the case, but then summarily stated:

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.

Id. at 189, 147 Cal. Rptr. at 59. The remaining six issues were quickly disposed of in two pages. Other examples appear in Goodwin, supra note 25.

57. Retired jurists have been suggested by some commentators as a source of panel members as well. However, that could very well lead to a return to the major flaw of the present selective publication scheme—the abuses of discretion. For example, a retired justice sitting on the new selection panel might be inclined to favor the opinions of former colleagues, or use other extrinsic factors in his choice of publishable cases.

58. The present selective publication system is subject to review pursuant to the procedures outlined in Court Rule 978. See note 23 supra.
B. Strengths and Weaknesses of the Independent Panel Scheme

The independent panel strategy should result in numerous improvements over the present system, the most important being the curbing of abuses of judicial discretion. If properly selected, panel members will review the opinions free from the personal biases, the ulterior motives, and the problematic subjectivity of the authors. This in turn will result in more consistent publication rates among the different districts and their component divisions. In addition, it will allow for a more controlled growth of printed authority, since the number of volumes of the official reporter can be restricted or increased as desired, by controlling the percentages of published cases.

Furthermore, the quality of opinion writing should improve significantly. Justices will now need to devote their utmost attention, from the point of view of both analytical reasoning and draftsmanship, to virtually all cases (except, of course, those which even by the strictest standards are simple applications of fact to well-settled law).59 The burden will be placed back upon the justices to compose consistently well-reasoned opinions for fear that if the independent panel decides they meet the publication criteria, the opinions will go into the books for all the world to see. This system therefore should lay to rest the fear that unpublished cases may be decided differently than published ones.

Moreover, the selection panel could become quite competent at its task. By constantly reviewing opinions from the angle of publishability, the panel, in time, will become highly knowledgeable of the precedents in active areas of litigation and skillful in applying the publication criteria to new opinions.60 Similarly, it will be able to see larger trends in the law than individual justices can, and will gain all-encompassing insights from its constant state-wide survey of opinions.

Unfortunately, this scheme will likely have its drawbacks as well. It will be extremely difficult to locate enough competent people to serve on the panel,61 as well as to acquire sufficient funds to compensate them, and much added expense will be required to maintain a staff for the panel.62 In addition, it is impossible to guarantee a “blue ribbon” panel. However, the point is not that an independent panel necessarily will be more upstanding or principled than the judiciary—corruption and incompetence can exist at any level of government. Rather, the

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59. Admittedly, there are always, of course, a number of cases which reach the Court of Appeal each year, particularly in the criminal law area, which by no stretch of the imagination need to be published. These are the “easy cases” for which most of the dangers of the present selective publication system do not attach.
60. See Witkin, supra note 48, at 31.
61. See Witkin, supra note 48, at 32.
62. Goodwin, supra note 22, at 64.
idea is that by separating the authors of the opinions from the publication staff, a more objective decision may be had.

Others may object that independent panels will remove what is essentially a judicial function from the judiciary. Since only published cases are citable as precedent, those who control the publication decision also, in effect, control the development of case law. There are two responses to this argument. First, the supreme court still will retain ultimate power to review any panel choices. Secondly, the judiciary has already been given the opportunity during the past 15 years under the present system to shoulder this function and has failed to do so properly.

Moreover, justices undoubtedly will resist this proposal vehemently, claiming that in the interest of judicial economy the author of the opinion should know beforehand whether the decision will be published. In reality, however, this added burden will not be great. As discussed above, justices generally know which cases clearly will not fall within the publication criteria. These cases need not receive the highest degree of drafting finesse that requires unnecessary added time. Now, all the cases that are potentially publishable will receive the increased time and attention that they deserve. Undeniably, this universe of potentially publishable cases will be larger than the universe of actually published opinions under the old system where the justices themselves controlled publication, and some extra time and effort will now be mandated. Nevertheless, this is a price which we must require our justices to pay, to insure properly that the process of selective publication is not abused and mistreated.

**Conclusion**

The reasons that led to the creation of our present selective publication system were valid reasons, and are still relevant today. Over the years, however, many shortcomings and abuses of the system have been brought to light. No one solution can solve all the conflicts inherent in selective publication, because reconciling the different criticisms often boils down to a fundamental and nondebatable choice of policy. It is impossible to devise a method to satisfy both those who believe total publication is necessary for the sake of precedent and those who believe the flood of judicial prose is presently overwhelming. In balancing these opposing factors, the use of independent panels to decide which opinions are publishable would seem to offer the best compro-

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63. See generally Witkin, supra note 48.
mise system, and the only system which would eliminate substantially abuses of judicial discretion.

Perhaps the further improvement of our computerized information storage and retrieval systems, as well as the creation of better and less costly systems, will offer a more permanent solution someday in the future. Until such time, however, the independent selection panel system can and should perform admirably as an interim remedy for the present-day problems of selective publication.