MALTHUS THE FEDERAL JUDGE:
A COMPREHENSIVE ECONOMIC DEFENSE OF SELECTIVE PUBLICATION OF JUDICIAL OPINIONS

Shlomo Z. Maza

INTRODUCTION:

The practice (non-practice?) of non-publication and its accompanying non or limited
citation rules is perhaps unique in our legal system. The significance of the development of non-
publication practices and rules can not be overstated, with approximately eighty percent of all
cases ending in non-published rulings. Every circuit has some form of non publication rule, as
do all but four of the states. While exact formulations of the rule vary, they all recognize and
even urge that not all cases that come before a judge will result in a precedent producing
published opinion.

Yet despite its universal acceptance, limited publication is subject to widespread
academic opprobrium. The scholarly opposition has been both fierce and varied; however, it
rests largely on Constitutional or policy arguments. Judges, the prime players in this debate,

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1 St. John’s University School of Law, J.D. Candidate, May 2011
3 See Martha Dragich Pearson, The Citation of Unpublished Opinions as Precedent, 55 HASTINGS L.J. 1235, 1237-38 (2004) (that academic commentary on limited publication has been “overwhelmingly negative” and providing brief summary of examples of such criticism.)
4 This article will not focus on the Constitutional issues. It is sufficient to note that the only case to ever hold non-publication unconstitutional has itself been vacated on other grounds, and that no other case since has seriously challenged the practice. For an analysis of some of the relevant constitutional arguments see, e.g., Richard S. Arnold, Unpublished Opinions: A Comment, 1 J. App. Prac. & Process 219 (1999) (questioning whether a prohibition on citing unpublished opinions could be reconciled with the judicial power conferred on the federal courts by Article III of the Constitution), 79 IND. L.J. 711
have not been silent. Much of the scholarly writing on either side of this debate has been penned by active members of the judiciary. These differences of opinion have not been limited to the theoretical world of academia, and came to a head in a dispute between the Courts of Appeals for the Eighth and Ninth Circuits. In Anastasoff v. U.S., Judge Richard Arnold, writing for the Eighth Circuit ruled that non-publication rules are unconstitutional. In Hart v. Massanori, Judge Alex Kozinski, writing for the Ninth Circuit, in what can only be termed a direct challenge to Anastasoff, held the opposite.

There are two fundamental points of origin underlying any discussion of non-publication. The first is the sheer amount of cases on the modern judicial docket. The second point, inextricably related to the first, is that an incredibly high amount of the cases before our judges are simply too easy to merit the full attention of a judge, let alone three or more. These are not seriously debated. Any controversy revolves around whether these, and the points to follow, justify the practice. Accordingly, the question commonly debated by commentators is whether or not non-publication is justified. This question presupposes that total publication is ideal, and only the unfortunate reality of finite resources prompts this debate. Even by its supporters, then, the

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6 Anastasoff v. U.S., 223 F.3d 898 (8th Cir. 2000) (vacated on other grounds)

7 Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001)

8 See 53 VILL. L. REV. at 997 (citing to Judge Kozinski)

9 See Scott E. Grant, Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1, 47 B.C. L Rev. 705, 733 (2006) (recognizing that there are “truly easy” cases that do not need or merit full judicial treatment, and then concluding that unpublished opinions need be rethought), Patrick J. Schiltz, Much Ado About Little: Explaining the Sturm and Drang Over the Citation of Unpublished Opinions, 62 WASH. & LEE L. REV. 1429 (2005) (saying, in an article on balance supporting Rule 32.1, that “critics of the federal judiciary often fail to recognize that many appeals are extremely easy”); David Greenwald and Frederick A.O. Schwartz Jr., The Censorial Judiciary, 35 U.C. DAVIS L. REV. 1133, 1136 (2002) (saying that the impression of the authors is that such cases are generally as uninteresting as the judges who author them assert).
issue is framed as the correct, but less than perfect, choice. The obvious analogy is being stuck between the infamous rock and the notorious hard place.

Even though it is true that the realities of our court system alone justify non-publication, this author believes that supporters of non-publication do themselves a fundamental disservice by their willingness to allow the issue to be framed in such a way. This article will use the tools of economic analysis to examine the nature of legal precedent and its role in our legal system, and will provide a theoretical justification for the practice’s widespread practical application. Objective analysis demonstrates that even with infinite resources, total publication would have a deleterious effect on our legal system.

Part I will provide a background of non-publication, including its history, a numerical analysis, and a brief presentation of the rules of the circuits. It will also discuss the impact of modern technology on these rules, and address the claim that technological advancements make limited publication rules obsolete. Part II will present the arguments in support of non-publication, including the traditional “rock and a hard place” argument as well as two economics-based arguments. Part III will examine the nature of legal precedent, and will present economic modeling of the benefits and costs of legal precedent, which will make clear the inherent economic nature of the arguments supporting non-publication. This part will also include this article’s central thesis: that application of the tools of economic analysis to the practice of non-publication has two significant benefits. First, that superficially disparate justifications of non-publication can be combined into one economic model, and second that this model demonstrates that even with infinite resources, the unrestrained growth of precedents will actually have a negative effect on overall legal clarity. Part IV, in turn, will present and rebut any economic based rationales for total publication.
Even though pure efficiency dictates a system of limited publication, it is possible that policy considerations would validate production of precedents past an otherwise economically unjustifiable point. Part V will provide an overview of the most persuasive policy arguments against non-publication, and will provide analysis showing them to be in truth not persuasive. This part will also provide a policy defense for non-publication that may make limited publication more palatable to its opponents. Based on the prior parts Part VI will explain why expanding the judiciary, the most commonly suggested alternative approach to the practical problem of publication miss the point, and why only limited publication will work. Finally, this part will lay out a recommendation for a slightly modified non-publication system.

PART I: HISTORY AND STATUS OF LIMITED PUBLICATION RULES

1. History and Background

The modern history of selective publication must begin with the “caseload explosion” of the middle and latter parts of the last century. This has been chronicled in detail in many other places, and does not require undue repetition. Faced with growing concern about the legal profession’s ability to assimilate judicial opinions in the face of this caseload explosion, the Judicial Conference of the United States of 1964 adopted a resolution allowing for selective publication of only those opinions thought to be of “general precedential value.” This broad and somewhat vague standard was clarified in 1973 when the Advisory Council for Appellate Justice promulgated a model rule for selective publication, which proposed a list of specific criteria. Along with the model rule, the council recommended the adoption of accompanying non-citation

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rules. By the mid-1970s all of the federal appellate courts had rules calling for selective
publication, and most had rules regulating citation to such opinions. More recently, in August
2003 the Advisory Committee of the United States Judicial Conference Committee, in the face of
staunch judicial opposition, proposed to amend the Federal Rules of Appellate Procedure by
adding a new provision, Rule 32.1, which would prohibit complete bans of citation to
unpublished opinions.  

Every circuit has its own version of these rules. However, the differences are negligible
and not material to this discussion. The Fourth Circuit’s standards,12 which are typical, provide
for publication if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this
   Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains a historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a
decision of another circuit.13

Language in the rules of other circuits indicates non publication where publication would
not “add significantly to the body of law,” (Fed Cir.) or if “no jurisprudential purpose would be
served by a written opinion” (2nd Cir.)14; where there is a separate concurring or dissenting

11 For a thorough account of the rule’s involved history see Patrick J. Schiltz, Much Ado About Little:
Explaining the Sturm and Drang Over the Citation of Unpublished Opinions, 62 WASH. & LEE L. REV.
1429 (2005).
12 Selected for no particular reason
14 David Greenwald and Frederick A. O. Schwartz Jr., The Censorial Judiciary, 35 U. C. DAVIS L. REV.
opinion, and the author “requests publication of the disposition of the Court and the separate” opinion” (9th Cir.)\(^{15}\)

Where there is any difference in the circuits is in their non-citation rules. Nevertheless, here also there is a great deal of uniformity. Four of the circuits (the Second, Seventh, Ninth, and Federal Circuits) have an outright prohibition on citation.\(^{16}\) The Second Circuit even instructs that its unpublished opinions “shall not be cited or otherwise used…before this or any other court.”\(^{17}\) Another five strongly disfavor and discourage such citation (the First, Fourth, Sixth Eighth, and Tenth Circuits). The remainder (the Fifth, Eleventh and D.C. Circuits) permit citation. However, the D.C. Circuit is alone in granting such opinions precedential authority when cited. These rules have since been preempted by the new Rule 32.1 of the FRAP. However, the new rule does not in any way require that courts grant such opinions precedential authority; it merely permits citation to them as non-binding secondary authority.

The effect of non-publication has been staggering. As of the early 1990’s, over sixty percent of federal appellate decisions were not published. Today, that figure exceeds eighty percent.\(^{18}\) In 2008, the courts of appeals heard a total of 29,608 cases, of which 24,231 were unpublished for a percentage of 81.84%.\(^{19}\) This is actually down from the 83.54% reached in 2007.\(^{20}\) For district courts, 97% of opinions go unpublished.\(^{21}\) The growth of unpublished opinions is best illustrated by West’s Federal Appendix: In 2001, West launched the Federal

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\(^{15}\) 9th Cir R. 36.1
\(^{16}\) All of the circuits permit citation to unpublished opinions to show res judicata, collateral estoppel, or other procedural doctrines in procedurally related cases.
\(^{17}\) 2d Cir. R. 0.23
\(^{18}\) CHRISTOPHER P. BANKS & DAVID M. O’BRIEN, COURTS AND JUDICIAL POLICYMAKING 292 (Charlyce Jones Owen ed.) (Pearson Prentice Hall 2008)
\(^{19}\) Administrative Office of U.S. Courts, Judicial Facts and Figures, U.S. Courts of Appeals.
\(^{20}\) Id.
Appendix, a new print reporter which published ‘unpublished’ opinions. By the end of 2001, the series had reached Volume 14. Currently, the series is up to volume 329. This does not even count the unpublished opinions of the Fifth and Eleventh Circuits, which are not published in the Appendix.

2. An introductory discussion of non-publication and non-citation, or why non-publication is now more relevant than ever before

Before the advent of modern technology the terms non-published and non-precedential were synonymous. The reality was that only very few people had access to non-published opinions; an unpublished opinion could not be precedent simply because the vast majority of the legal profession would never see it. However, this merger of terminology began to diverge in the late 1980’s. Beginning in the late eighties and early nineties WestLaw and LexisNexis began to make unpublished opinions available online, and later through the published Federal Appendix. Today, virtually all unpublished opinions are available on these services. Further, in the late nineties courts began making these opinions available on their own websites through PACER. In 2002, this trend became federal law under the E-Government Act of 2002.

Some commentators have argued that this divergence renders non-citation moot and wrong. However, this misses the point. The universal access to unpublished opinions which has created this divergence only heightens the need for non-citation. It is the fear of ungrounded and unguided reliance, not awareness of the opinion, that mandates non-citation. This point was made by Judge Kozinski, writing in Hart:

\[23\] Public Access to Court Electronic Records
“Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish. Without...precisely crafted holdings...zealous counsel would be tempted to seize upon superficial similarities...Faced with the prospect of parties citing these dispositions as precedent...judges would have to pay much closer attention to how they word their unpublished opinions...In short, judges would have to start treating unpublished dispositions...as mini-opinions.”

This is not made irrelevant by the new Rule 32.1. The rule requires that appellate courts allow citation to unpublished opinions. However, it does not in any way mandate that courts grant such citations any precedent; the level of authority granted to such citations is left to the court. And, because at the end of the day judges are bound to look at these citations with some reservations, that level of authority is likely to stay low.

Therefore, the practical effect of the Rule 32.1 is to once again merge terminology: All opinions are in fact published somewhere; un-published and non-published are simply ways to indicate that an opinion is subject to local non-precedential rules. Accordingly, this article will use these terms interchangeably, all meant to refer to the holding back of authority from opinions designated as having been treated with something less than the full measure of effort, focus, and time required to produce binding precedent.

PART II: ARGUMENTS FOR NON-PUBLICATION.

A published opinion is not merely the recording of a judges ruling. It is the creation of law, binding on all in its jurisdiction. As such, we expect and demand that a judge approach the

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25  266 F.3d at 1178
26  After all, the judge will likely have written some unpublished opinions, and will be all too aware of the reality of the process described by Judge Kozinski.
27  There will be nothing stopping judges from acting as if all such citations had been blocked out by black marker ink. Of course, if the judge is satisfied with the prior court’s exposition of law and its applicability to the present case, the present judge can choose to rely on the cited unpublished opinion.
writing of a binding opinion with utmost care and caution, in full realization of the far reaching consequences of a single precedential opinion. This is especially true because unlike the legislature there are few checks and balances imposed on the judiciary as the creator of law. Judges, to their credit, are not unaware of this. In drafting an opinion, a judge must consider all the facts, carefully culling those that are relevant and important from those that are not. Great care must be taken to ensure that the announced rule is not too narrow, nor does it sweep too broadly. It must be consistent with all other law, creating an unfailingly uniform and unswerving body of law. On top of all this, a judge should take care to reflect on the announced rule; this demands “fully adequate time to contemplate, think, write and re-write.” Judge Kozinski has explained that he goes through at fifty drafts of opinions intended for publication. The reality is that writing and publishing an opinion is extremely demanding – of time, effort and focus. This reality has observable consequences, all of which justify non-publication and its accompanying non-citation rules.

1. The Rock and the Hard Place: The reality of severely strained judicial resources.

Judges’ paramount responsibility is to settle cases and controversies. To do this a judge must obviously hear the case. Yet the caseload explosion referenced above has made it

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28 For the balance of this article, unless otherwise noted, opinion is meant to be understood as a written, binding precedent producing, published opinion.
30 The reader will note Judge Kozinski’s prominence in this article. This is unavoidable; as perhaps the foremost, and certainly the most visible, supporter of non-publication Judge Kozinski occupies a unique place in this debate.
32 See Richard A. Posner, Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights, 59 U. CHI. L. REV. 433, 449 (“the duty to resolve the dispute at hand is primary”).
increasingly difficult for judges to fulfill this primary responsibility. Take, for example, the
Ninth Circuit. In 2002, that court disposed of 492 cases per judge. Assuming judges can devote
2000 hours a year to judging, a judge would have about four hours to resolve each case. That is
four hours to read both parties’ briefs and motions, hear oral arguments, conference with
colleagues, and draft and write an opinion. This does not include any time spent on a case where
the opinion is written by another judge, nor does it include time spent on concurring or
dissenting opinions. The notion that cases can be resolved in this amount of time is a nonstarter.
Further, the Ninth Circuit is far from our busiest circuit; that honor goes to the Eleventh Circuit,
with 843 active cases per judge. This translates to less than two and a half hours per case. This
picture is significantly bleaker for the district courts. There are approximately four times as many
district court judges as appellate, yet roughly six times as many cases are filed in the district
courts, and approximately seven times as many pending cases. Further, this shows no signs of
slowing; caseloads only continue to swell. The reality is that it is simply impossible for judges to
stay even close to current with their caseloads unless they adopt some sort of non-publication
practice. Even the strongest proponents of total publication must admit that when the other
choice is an insurmountable backlog of cases, limited publication is the lesser of two evils.

2. The Importance Factor: Why some cases simply do not make good precedent.

33 “Hear” is used loosely; it is intended to include even a ruling issued based solely on the written briefs
and or motions supplied by the parties. It is obvious that a judge can not rule on a case the existence of
which he has no knowledge.
34 This works out to about 38.5 hours per week. (2000/52 = 38.462) This assumes no vacation, and puts
aside any and all other responsibilities a judge may have.
35 See David C. Vladeck & Mitu Gulati, Judicial Triage: Reflections on the Debate Over Unpublished
of Appeals
37 The alternative – even more hastily produced published opinions – is equally unpalatable, even if it
were possible.
Some cases simply do not make good precedent. For example, cases that turn on obscure facts that are unlikely to be repeated do not merit the incredibly demanding process of being turned into published opinions. Even if the same facts did come up before the court again, considering the amount of time needed to write an opinion, it is possible that this later case could also be resolved with the total amount of time spent still less than would have been required to publish an opinion in the first instance.\footnote{And of course, even if the first instance had resulted in a published opinion, resolution of the second instance would still require at least some minimal amount of time.} Further, when a judge considers the relative obscurity of a particular fact pattern, the calculation is not the simply the odds of reoccurrence. Rather, it must be the odds of reoccurrence in this same jurisdiction, which is obviously less likely. This is because of the nature of binding as opposed to persuasive precedent.\footnote{This distinction also addresses another potential argument. One can argue that while it is true that these obscure facts are unlikely to be repeated, perhaps the rules established in such cases will be usable in other, more likely, circumstances using, for example, an \textit{a fortiori} argument. However, any argument built in such a manner, however strong, would still be an extension of the law, and would only be persuasive, not binding.}

The corollary of obscure facts is settled law. Certain types of cases come up before a judge time after time after time. Here too there is no need for creating binding precedent; there is little benefit in reiterating the same point of law countless times.

That there are cases that do not make good precedent is unrelated to the time constraints facing the judiciary. Even with infinite resources, one can question the wisdom of producing precedents that have minimal, or in some cases zero, importance. However, the reality is that our judiciary does have finite resources, and every published opinion has as its opportunity cost time spent on other cases. When confronted with obscure facts and settled law, these cases are simply not important enough to warrant the price paid in extremely strained judicial resources that publication would demand. In economic terms, the demand for precedents that deal with issues of settled law or obscure facts is not high enough to justify the cost of supplying such precedents.
Of course, many precedents do add a great amount of clarity to the legal system – these are of high importance. However, as the number of precedents grows it becomes more likely that any individual precedent is either an issue of settled law or obscure fact. These add little clarity to the legal system.

3. Conflict Generation: Why the unlimited growth of precedent is not a desirable outcome.

The most commonly given reason for non-publication is the caseload explosion; that the reality of our court system simply does not allow for total publication. However, even if time allowed there are several reasons why unlimited growth of precedent is not a desirable outcome. Chief among them is that the common law will grow beyond any wieldable extent. In 1972 Judge Charles Joiner wrote that

“Unlimited proliferation of published opinions constitutes a burden and threat to a cohesive body of law…There are limits on the capacity of judges and lawyers to produce, research, and assimilate the sheer mass of judicial opinions. These limits are dangerously close at present….Common law in the United States could be crushed by its own weight if present trends continue unabated.”

Accordingly, Judge Joiner urged the adoption of a system of limited publication. However, he was not the first legal scholar to be concerned about the unchecked growth of precedent; concerns about unlimited publication can be found as far back as the 17th century when Lord Coke and Francis Bacon, Lord Chancellor of Great Britain, fearing that law books

40 Of course it is not quite as simple as a straightforward chronological progression. One of the earliest precedents created may deal with obscure facts, and the hypothetical one millionth precedent may be of vital importance. Further, new areas of law do arise that require their own new and original precedent. However, it is a question of likelihood. As the general stock of precedent grows it becomes more likely that the marginal benefit, or importance, of a new precedent is diminishing.

41 Outlined above

42 Charles W. Joiner, Limiting Publication of Judicial Opinions, 56 JUDICATURE 195, 195 (1972)
would grow to be like “elephantine libri, of infinite length,” urging them to lose their “present authority and relevance” urged exclusion from law reports of cases “merely of iteration and repetition.” Concerns were not limited to the British side of the Atlantic. In 1824 two American commentators argued that the “multiplication of reports” which is “impossible to be borne…weakens the authority of each other and perplexes the judgment.”

In 1915, Judge Winslow, the chief justice of the Wisconsin Supreme Court wrote:

“The law library of the future staggers the imagination as one thinks of multitudes of shelves which will stretch away into the dim distance, rank upon rank, and tier upon tier, all loaded with their many volumes of precious precedents. One shrinks from the contemplation of the intellectual giants who will be competent to keep track of the authorities and make briefs in those days; they, as well as the judges who pass upon the briefs, must be supermen indeed.”

Judge Winslow could not have possibly foreseen the technological advances in the modern practice of law. Judge Joiner wrote in the era of brick and mortar libraries; he could never have imagined the existence of an endless virtual library. Indeed, the availability on the Internet of every opinion from every jurisdiction, allowing unlimited legal research, only underscores the timeliness of his prediction.

This concern was echoed in a 1999 article by Judge Boyce Martin: “There is value in keeping that body cohesive and understandable, and not muddying the water with a needless torrent of published opinions.” Although it is true that all bodies of law benefit from the

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44 Id.
45 Id.
clarification that is to be gained by subsequent jurisprudence,\textsuperscript{49} this is not without limit. However, it is not just that countless repetition is not necessary; it is in fact deleterious.

Even with perfect knowledge of all published opinions, unbridled growth of precedent would lead not to further clarity, but only to confusion and conflict. Judges are necessarily going to see things differently, even those things upon whose basic principles they agree. Even if they are in perfect harmony, two judges sitting in different courts are bound to transcribe their thoughts differently. This will inescapably result in slight discrepancies in their written opinions. Lawyers, trained\textsuperscript{50} from law school through practice to tease out the smallest bit of language in support of their arguments, will seize these discrepancies to best advocate for their clients. They will point out that what seems to be clear is perhaps not so clear (rather, it is “muddy”). Inevitably, this will result in the generation of conflicting case law. With all opinions available online, what was true in 1824 is even truer now: This muddying perplexes even the most capable attorneys and judges, and weakens the authority and value of any opinion; the term “muddying the water” is an even more fitting turn of phrase than perhaps Judge Martin intended.

The generation of conflicts is indeed exacerbated by the caseload explosion. As judges have less and less time to spend on their cases, the clarity of their writing will suffer, inevitably leading to more and more unintended conflicts. However, it is important to realize that even if judges had limitless time to produce perfectly written and elucidated opinions perpetual production of precedent inevitably creates conflicts and ambiguities in the legal system.\textsuperscript{51}

\textsuperscript{49} This is what is meant by “settled” or “unsettled” area of law. At some point, all areas of the law were relatively unsettled, and only clarified through subsequent judicial exegesis. However, this does not mean that this process should continue indefinitely, or that it will always be beneficial. See above.

\textsuperscript{50} Extensively and exhaustively

\textsuperscript{51} Conflict generation is caused by human nature and the nature of the writing process, and exaggerated by the legal system and legal training. Take for example, giants of the judiciary such as Holmes, Cardozo, and Posner. It is absurd to posit that every one of their opinions has been understood by all subsequent
Lastly, whether due to lack of awareness or good lawyering, these conflicts will have a snowball effect. As soon as even one conflict is created, it will spawn an ever-growing chain of conflicting case law. Once an argument has been made it can not be unmade; regardless of red flags on Westlaw and stop signs on Lexis it exists in perpetuity, available for perusal by all. As the number of precedents increases, the number of conflicts will increase exponentially. As the number of conflicts increases, the total level of clarity in the legal system will decrease.

PART III: OF DIMINISHING MARGINAL RETURNS, ECONOMIC ANALYSIS, AND LEGAL PRECEDENT

1. Diminishing marginal returns: conflicting case law and low-quality inputs.

The rule of diminishing marginal returns is perhaps the most famous law in the study of economics, and application of its principles to the question of publication clearly justifies non-publication. The law of diminishing marginal returns states that when production of a good is a function of both fixed and variable inputs, at some quantity increases in the variable input will see decreasing increases in output. Here, if valuable precedential opinions are the good to be produced, then the variable input in their production, the source, or raw material, of precedent is published opinions. The fixed input is judicial resources. Accordingly, the law of diminishing marginal returns as applied to non-publication clearly predicts that as the variable input of lawyers – including other judges – to stand for the same exact proposition or to have the same holding. Surely, then, the same is true for judges of less literary skills.

This is not the forum to discuss the ethical implications of such zealous advocacy; it is enough to understand that the present system can and will encourage, and even perhaps mandate, that a lawyer make such arguments.

This is in essence an application of Part II, 2-3 – The unlimited growth of precedent is not a desirable outcome.

Samuelson & Nordhaus, Microeconomics, 17th ed. 110 (McGraw Hill 2001)

published opinions rises, at some quantity the fixed input of judges will produce an ever-decreasing increase in valuable precedent.\textsuperscript{56}

However, this is only half of the story. Even though the law of diminishing marginal returns is universally accepted as an observable phenomenon and is a fundamental principle of the study of economics, economists have long struggled to prove it is true, and to explain why it should be. Modern economists, assuming each unit of input to be identical, explain the phenomenon by hypothesizing that too many workers get in each others way; this decreases the productivity of each worker.\textsuperscript{57} Earlier economists, such as Malthus\textsuperscript{58} and Ricardo,\textsuperscript{59} however, attributed the successive diminishment of output to the decreasing quality of the inputs.\textsuperscript{60} This historical uncertainty on a theoretical level actually reinforces the relevance of the law of diminishing marginal returns to the writing of opinions. As seen above,\textsuperscript{61} both the Importance factor and the Conflicts factor demonstrate why an ever-increasing amount of precedent is undesirable. These reasons remove any latent theoretical ambiguity or reservations that may be encountered when applying the law of diminishing marginal returns to the issue here:

If the goal of publication is the production of valuable and usable precedent, then obscure facts and settled issues – the “Importance Factor” - are poorly suited for this. In economic terms, such opinions can be deemed low quality. This is the equivalent of the ‘classic’ theory proposed by Malthus that diminishing marginal returns is caused by decreasing quality of the variable

\textsuperscript{56} Decreasing marginal returns may even devolve into decreasing returns at some point. Decreasing marginal returns means that there is still some overall increase; illustrated by the MP\textsubscript{V1} curve falling. Decreasing returns means that output is actually decreasing; here the MP\textsubscript{V1} curve has crossed the axis and is now a negative number.
\textsuperscript{57} The classic example assumes the fixed input to be the amount of machinery and the variable input to be labor. As more workers are hired, and they all simultaneously try to use the limited machinery they will, in scientific terms, “bump into each other.”
\textsuperscript{58} Thomas Robert Malthus, 1766-1834
\textsuperscript{59} David Ricardo, 1772-1823
\textsuperscript{60} The classic example of this is, famously, Malthus’s observation about land use and population growth.
\textsuperscript{61} Supra, Part II, 3
input.\textsuperscript{62} Non-publication also dovetails very convincingly with more modern theory. The employer who hired too many workers obviously did not intend for them to get in each other’s way. So too here, the unintentional but inevitable conflicts in case law caused by overproduction of precedent get in the way of each other, making any given precedent less reliable, which in turn means that all precedents are less valuable.\textsuperscript{63}

2. An Economic Model of the Nature of Legal Precedents

The application of diminishing marginal returns to legal precedent is made especially powerful by the nature of legal precedents. Every law student knows that some precedents are “worth more” than others, and we have demonstrated that the worth of any individual precedent is likely to decrease as the overall stock of precedents increases.\textsuperscript{64} We have also seen that precedents create conflicts in the legal system. Accordingly, the value of any precedent can be expressed as the excess of its importance over the conflicts it generates, or Importance – Conflicts. Further, we have seen that these have an inverse relationship: a higher amounts of precedent is correlated with both lower importance and greater conflict generation for any

\textsuperscript{62} Note that the decreasing quality of inputs is cause by the importance factor. However, limited judicial resources and the resulting lower quality of opinions also results in lower quality inputs. Accordingly, even the basic ‘rock and a hard place’ justification is borne out by rigorous economic analysis and modeling.

\textsuperscript{63} See 53 Vill. L. Rev 973 (claiming that “Malthusian” predictions of the failure of the courts have been greatly overstated; that the courts are in fact “still standing.”) This is erroneous for two reasons. First, the tremendous amount of literature bemoaning the snail’s pace of our current judicial process indicates that one can quibble about just how well our courts work. While they may in fact be “still standing,” there is no reason to aspire to such a low goal. Further, even if it is correct that our courts function perfectly smoothly, perhaps this is only due to the courts adapting to these challenges. To put this in economic terms, one can play out the comparison to Malthus’s famous “error.” Malthus’s only mistake was in failing to anticipate new technology. Here, new technology, or non-publication, is the development that prevented the failure of the courts. This commentator was right in terming this a Malthusian prophecy; the mistake was in not realizing that this only supports non-publication.

\textsuperscript{64} Take, for example the famous decision by Judge Learned Hand in 1947, United States v. Carroll Towing, 159 F.2d 169. Cited literally hundreds upon hundreds of times, for a calculus of negligence none of those cases are as important as the original opinion.
individual precedent. What this means is that as precedents increase it is more likely that any individual precedent will deal with either settled law or obscure facts, thus decreasing its importance. At the same time, the likelihood of this precedent creating conflicts is only increasing.\footnote{In fact, it increases at an increasing rate. See Part II, 3, above, and the “snowball effect.”}

Simple algebra illustrates the importance of this phenomenon. If $X > Y$, then as $X$ decreases and $Y$ increases, the distance between them will shrink. If this continues, $Y$ will inevitably end up being greater than $X$. As importance decreases, and conflicts increase, the continuing production of precedent will not only exhibit decreasing marginal increases in overall clarity, it will eventually exhibit negative marginal returns. In other words, at some point increasing production of precedents will have a net negative impact on the overall clarity of our legal system, regardless of judicial resources. This is illustrated by the graphs below:
Consistent with our explanation above, the individual graphs of importance and conflicts, respectively, demonstrate that as total precedents increase, importance decreases while conflicts increase. \(^{66}\) Because the horizontal axis remains total number of precedents in both models, the two graphs can be superimposed onto each other, arriving at the bottom graph. We have shown that overall Clarity is best defined as Importance – Conflicts, and this graph demonstrates that there is some equilibrium amount of precedents that produces maximum overall clarity, and that past this point Importance < Conflicts. In other words, at some point more precedent must lead to less overall clarity.\(^ {67}\)

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\(^{66}\) Because these are simple straight lines, the marginal graph is simply a mirror. Therefore, not only is this true in the aggregate it is also true on a marginal level. The marginal impact of each additional precedent mirrors the overall level of conflicts and importance.

\(^{67}\) These graphs are admittedly simplified in a number of ways. For one, Importance is probably not a straight decreasing slope. In fact, in the beginning more precedents probably lead to more clarity. Further, while marginal importance is decreasing, one can quibble with the depiction of overall importance as decreasing, and claim that unneeded precedents should be depicted as a flat slope, not a decreasing slope. For another, Conflicts is not best depicted as a simple increasing line with a constant slope. In fact, total conflicts will probably start small and then exhibit an increasing slope, as conflicts increase exponentially.
This model also explains why expanding the judiciary is really an irrelevant suggestion. The phenomenon of diminishing returns from legal precedent is one that is inextricably the result of the inherent nature of legal precedents. Imperfectly drafted published opinions accelerate the generation of conflicts, which shifts the equilibrium point to the left. However, the generation of conflicts is the inevitable result of precedent production, and decreasing importance of precedents is an inherent truth of our precedent based case-law system. Because adding judges does not change the inherent nature of legal precedent, it can only serve to affect the two lines, and thereby shift the equilibrium point representing optimal precedent production. It will not change the fact that there is such a point.\textsuperscript{68}

PART IV: ARGUMENTS AGAINST NON-PUBLICATION

Analysis reveals that the very nature of precedents dictates that there is some equilibrium point of optimal precedent production. Nevertheless, there are those who argue that full publication is economically warranted. These efficiency based arguments simply stress the obvious benefits of precedents. As we will see, this simplicity is their weakness.

1. More precedents Results in Less and Cheaper Litigation

This is perhaps the fundamental argument against non-publication. The premise is that precedents serve to clarify and settle the law. This in turn guides any parties in a dispute, enabling them to easily and efficiently accurately ascertain the relative strengths and weaknesses of their case. More importantly, promulgating clear standards guides parties in shaping their transactions in an efficient and cost-effective manner even before any dispute has arisen. Perfect

\textsuperscript{68} Of course, it must be noted that this article does not claim to ascertain that equilibrium point.
knowledge of the law allows the parties to engage in Coasian bargaining to their mutual benefit. Further, even in those instances where parties can not come to an agreement\textsuperscript{69} the availability of precedent will enhance judges’ ability to rule quickly and consistently.

2. *The Subsidized Nature of the Courts*

The subsidized nature of the courts demands publication and citation. The pre-eminent\textsuperscript{70} rationale for the public subsidy of the resolution of private controversies is the production of precedent through the publication and dispersion of opinions. In the language of economics, this is a positive externality that provides a public, non-excludable benefit.\textsuperscript{71} Therefore, the argument goes, non-publication is akin to robbing taxpayers. This in turn leads to:

3. *Precedents Are Only Valuable If They Are Continuously Renewed And Replenished*

Viewed economically, the body of precedents in any given area of law is a capital stock. It yields profits to its investors – the public – in the form of valuable information about legal rights and obligations. However, like all capital assets, the body of precedent depreciates. As the case law recedes further and further into the past, it can become obsolete. Therefore, if precedent is to retain its value and usefulness, it must stay relevant. This can only be done by replenishing

\textsuperscript{69} Perhaps because of a bilateral monopoly, or because transaction costs are too high, or because of a difference of opinion as to the controlling law, or even perhaps because of simple dislike.

\textsuperscript{70} Arguably only

\textsuperscript{71} It is non excludable because even if one party wants to opt out, the other party may not be amenable. Further, many government regulations are mandatory; they can not be contracted around. Lastly, even if the parties may and do agree to contract around the relevant issue, the ability to even engage in this sort of Coasian bargaining is itself a product of the certainty of the rules promulgated by judicial opinions. In other words, by opting out one opts in.
the stock of precedent; by replacing old case law with new case law that reaffirms the legal principle for which it stands.\(^72\)

4. Rebuttal, Including Empirical Evidence

Simplistically, the economic arguments against non-publication boil down to the assertion that precedents are good. Because they are so related to each other, their rebuttal will be combined to one section.

The first argument is that precedent reduces litigation by promulgating the rules of society and creating and maintaining a consistent and uniform body of law. This is undoubtedly true, to a point. At some point, however, the law of diminishing marginal returns, discussed above,\(^73\) eliminates this benefit. In fact, as seen above,\(^74\) in our era of universal access to judicial writings excess precedent production will only increase litigation. This in turn refutes the claim that the subsidized nature of the courts demands total publication. While it is true that the public subsidy demands that the public get something back for its money, it is simplistic to stop the analysis there. It is more accurate to say that the public subsidy demands that the public get the greatest possible return on its investment. This means that when publication stops being efficient, the public subsidy actually demands non-publication.

Empirical analysis only supports this theoretical claim that more precedent will not result in less litigation. Rather, the opposite is observable: there has been both an increase in the amount of precedent produced and the amount of litigation in the courts. This is illustrated by the astronomical growth of the Federal Reporter. The Federal Reporter began in 1880, and the first

\(^{72}\) See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 7th Ed, §20.1 (Wolters Kluwer 2007) (hereinafter “Posner”)

\(^{73}\) Supra, Part II, 4

\(^{74}\) Id.
series covers 64 years in 300 volumes. The second series began in 1924 and covers the next 69 years, up to 1993, in 999 volumes. The third series began in 1993, and today\textsuperscript{75} is up to Volume 614.\textsuperscript{76} This means that in 17 years the Third Series has covered more than half as many volumes as the entire Second Series did in 69 years. However, the rate of publication has only gone down. Clearly, both litigation\textsuperscript{77} and total precedent production have increased.

This in turn reveals that concern over the required replenishing of the capital stock of precedents is not a relevant concern. As shown above, even with restrictions on publication, the body of precedent only continues to grow. After all, twenty percent of an ever increasing number is itself an ever increasing number.\textsuperscript{78} The body of precedent is not just being replenished; it is still growing prodigiously.

PART V: POLICY CONSIDERATIONS

Even though pure economic efficiency leads inevitably to a system of limited publication, efficiency should not be the only consideration. It is possible that as a society we may make a judgment that certain policy considerations are so important as to support an inefficient outcome. In fact, opponents of limited publication have identified several policy goals that at first glance seem valid, and are deserving of consideration and analysis.

1. \textit{The Issues}

\hspace{1em} a. \textsc{Accountability and Transparency of the Judiciary}

\textsuperscript{75} October 15, 2010
\textsuperscript{76} This does not include “advance sheets”
\textsuperscript{77} We know that the rate of publication has gone down from about 40\% to just under 20\%. See Part I, 1, supra. If \(x(.4)\) \{some old rate of publication\} = \(y\) \{some old amount of precedent\} then for “\(y\)” to increase even as the rate of publication decreases to .2, then “\(x\)” \{the amount of litigation\} must be increasing.
\textsuperscript{78} This does not dispute the theoretical requirement; it merely claims that the need is being met.
The foremost of the policy arguments, this argument is concerned with possible evils of allowing judges the option of non-publication. The fear is that judges will be able to use non-publication to further their own agendas. Judge Patricia Wald of the D.C. Circuit observed in 1995 that she has personally seen

“judges compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming debate….I have even seen wily would be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug, though most will not stay put for long.”

Judges may also ‘unpublish’ an opinion as a shield for poorly reasoned opinions. Judges may simply be lazy, or perhaps motivated by politics or policy, or even simply corrupt. Judge Richard Posner wrote that “nonpublication encourages judicial sloppiness. Or worse, the unpublished opinion provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty.” Whatever the reason, non-publication only serves to allow for and further these undesirable practices.

Judge Wald’s observation also raises another argument against non-publication, one that is related to accountability. It is easy to imagine the displeasure a revelation of this sort might engender in a losing litigant. Such revelations, indeed even the possibility of such an occurrence, could completely undermine public confidence in the courts. In order to avoid this, the argument goes, it is imperative that we promote transparency at any cost; we must make sure that judges

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80 See Posner at §19.6 (articulating that outright corruption is rare to the point of irrelevance).
82 The other, troubling, implication of this is that cases that deserve publication are often held back from publication. This is considered a distinct argument against non-publication and is discussed below.
83 See Posner, *supra* note 57 at §19.6, for a discussion of what motivates judges.
84 To put it mildly.
convey the reasoning behind all of their opinions. This argument, obviously, only supports publication; its conclusions do not mandate citation.

b. NON-PUBLICATION & NOVEL ISSUES OF LAW

This argument is really an extension of the accountability argument. It claims that while the rules providing for non-publication may require that judges only refrain from publishing those cases that revolve around settled areas of the law, this is not the case. The reality is that judges commonly withhold publication even when confronted with a novel question of law. One study found that 24% of all unpublished opinions were reversals. Each of those opinions consisted of an appellate judge overturning a trial judge; it is extremely unlikely that all of these reversals were completely devoid of any novel questions of law, or even interpretation of fact. Further support is garnered by the presence in large numbers of unpublished opinions of both dissenting and concurring opinions. This indicates that not even the presiding judges found this case to be simple. Still further support is garnered from the observance of a fair share of unpublished opinions where further analysis clearly reveals that the court’s full attention and focus was called for. In one case, the Supreme Court articulated its great surprise and no small displeasure that a court of appeals went so far as to declare unconstitutional an Act of Congress in an unpublished opinion.

2. Deeper Analysis

86 Id.
88 Vladeck and Gulati, supra note 85 at 1684-91 (discussing three particularly egregious examples)
a. **THE PROBLEMS OF ACCOUNTABILITY, TRANSPARENCY, AND INAPPROPRIATE USE OF NON-PUBLICATION**

There are two responses to this argument. The first in essence denies the claim; the second nonetheless proposes a solution. It is no secret that judges have very few checks on their authority; this is a subject that has been discussed and debated since the Constitutional convention\(^90\) by hosts of voices in multitudes of articles and speeches, and has no doubt spurred some not insignificant degree of political discourse and rhetoric.\(^91\) What is a new trick is to lay this at the feet of non-publication. For better or worse the preeminent, if not only, substantial check on our judiciary is the possibility of appellate review and reversal. This is no more or less true for unpublished opinions. The litigants in such cases have the same right of review as any and all other litigants. To suggest that mandatory publication would somehow significantly increase judicial accountability is a canard.

Some\(^92\) have argued that appealibility does not excuse non-publication because many technically appealable decisions are in reality not. Further, even those cases granted review are often disposed of summarily and by the judge’s clerk. This too is a canard. While this may be true, again, publication would have no impact on this. Rather, it is due to, among others things, the great discretion afforded judges on a wide variety of rulings and decisions. Also, those cases disposed of “summarily and by the judge’s clerk” are disposed of in this manner not because they are unpublished, but because they are easy. It is inconsistent to argue on the one hand that the reversal rate of unpublished opinions indicates inappropriate use of non-publication, and on

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\(^90\) See, e.g., ROBERT YATES, LETTERS OF BRUTUS, (“The Anti-Federalist”) NOS. XI and XV (arguing that the judiciary’s powers will swallow all the powers of both the federal and state governments); see also THE FEDERALIST No. 78 (Alexander Hamilton) (“this independence of the judges is equally requisite to guard the Const”).

\(^91\) Assuming there is a difference between these two.

\(^92\) Greenwald and Schwartz, *supra* note 87 at 998
the other hand that unpublished opinions are not appealable. A last observation is that if in fact judges are intentionally ducking accountability it is highly unlikely that publication will address this; judges, intelligent people that they are, will find other ways to continue to do so.

Nonetheless, there is a relatively cheap and simple solution to the problem, real or perceived, of judicial laziness and sloppiness. Whether it is because they do not want to be embarrassed or because they want to develop a reputation for accuracy and scholarly achievement and acumen, judges do not want to be overturned. However, at the moment there is no difference between having a published or unpublished opinion overturned. This means that for a judge who, say, only wants to play as much golf as possible, all the incentive is to not take the time publishing requires; there is more gain at no greater cost. This could be changed by taking advantage of judicial aversion to embarrassment. Judicial rating services, which already provide statistics detailing how often a judge is overturned, should identify which of those were on supposedly ‘easy’ unpublished opinions. This would bring back into balance the cost/benefit analysis of judicial laziness or sloppiness.

Lastly, non-publication does not decrease transparency. The distinction between published and unpublished opinions is not its clarity to the parties involved, but rather the “judicial time and effort” required to make it accessible to rest of the world, “for posterity.” To the litigating parties, who are already familiar with the facts, an unpublished opinion is essentially “a letter from the court…announcing the result and the essential rationale of the court’s decision.” Moreover, there is no guarantee or requirement that our courts be transparent. When appeal is discretionary, a court may simply, in a two word statement, deny

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93 Federal Judicial Center, *Standards for Publication of Judicial Opinions* 3 (1973)
94 266 F.3d at 1177-78
certiorari; the court is not obligated to explain itself. Even where appeal is as a matter of right, a court may issue its ruling in a one word holding of “Affirmed,” as many courts often do.\footnote{Even if there were a duty of transparency, that duty would be owed to the litigating parties, not outside observers.}

b. NON-PUBLICATION & NOVEL ISSUES OF LAW

Again, there are two responses to this claim, the first in essence denying its validity and the second working with it. The claim that a significant percentage of unpublished opinions in fact involve novel issues is not as simple as it may appear. At its heart, this is an empirical question, and like most empirical questions, there are many who dispute this. Judge Kozinski definitively denies it.\footnote{266 F.3d at 1178 n.35; see also Boyce F. Martin, Jr., \textit{In Defense of Unpublished Opinions}, 60 OHIO ST. L.J. 177, 192 (1999) (the publication decision is “an easy call to make,” and that it is “seldom a potential pratfall”).} Even among those commentators who disagree with Judge Kozinski about the overall wisdom and necessity of non-publication there are those who agree that unpublished opinions deal largely with settled law.\footnote{Patrick J. Schiltz, Much Ado About Little: Explaining the Sturm and Drang Over the Citation of Unpublished Opinions, 62 Wash. & Lee L. Rev. 1429 (2005)}

Further, even if it is true that unpublished opinions often address novel issues of law, perhaps this is not so bad. It is inefficient that the first court to address a novel issue should bind all subsequent courts. It is more efficient to allow an issue to ‘percolate’ and accumulate some depth of substantive legal thought. The judge most likely to come to the correct result is the judge who has the benefit of this percolation. Non-publication, therefore, serves a vital policy purpose: it allows judges to perform their primary duty of resolving cases where they may be less than totally sure of or comfortable with the result, and still leave their colleagues a window of opportunity to craft a better rule. Further, there is no danger in doing this. While it may be true that in some instances judges avoid difficult issues, they will be resolved. Even Judge Wald
recognized this: “We do occasionally sweep troublesome issues under the rug, *though most will not stay put for long.*”98 (Emphasis supplied.)

PART VI: CONCLUSION AND RECOMMENDATIONS

At this point several things are clear. It is clear that the reality faced by our courts makes full attention to every case an impossibility. It is clear that selective publication is an excellent solution to this problem. Not only does it enable the judiciary to conduct the judicial triage that is necessary to control dockets, it is itself a worthwhile endeavor. It has been demonstrated both theoretically and empirically that precedents exhibit diminishing marginal returns; unlimited publication would not be desirable even if possible. The economic critiques of non-publication are simply not accurate.

It is also clear that technological advances have not made non-publication moot, obsolete, or irrelevant. In fact, a clear understanding of the economic theory underlying non-publication shows that modern technology only makes more imperative a system that limits the production of precedent.

It is also clear that the policy based criticisms of selective publication are really ad hominem attacks. The problems of transparency and accountability are in actuality critiques of our entire judicial system, and not materially worsened by non-publication. This is also true of the difficulties facing an appellant seeking reversal.

Most importantly, it is clear that the decrease in overall clarity that is the unavoidable result of total publication is caused by the inherent nature of legal precedents. Decreasing importance and increasing conflict generation are inevitable in our legal system. Therefore, any

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other approach\textsuperscript{99} can only change the calculus of where exactly is the equilibrium point of maximum clarity.

This is not to say that selective publication is perfect as it is. Therefore, to head off any concern about the inappropriate use of non-publication, judicial ratings services should specify how often a judge is overturned on unpublished opinions.\textsuperscript{100} This would balance judicial incentives.

This article has demonstrated that regardless of the circumstances of judicial dockets, the very nature of legal precedent justifies and demands a system of limited publication. However, it is also clear that the reality of strained judicial resources exacerbates this need.\textsuperscript{101}

Limited publication has long occupied a tenuous and uneasy position between theoretic and academic disdain and real world universality. The rigorous analysis of this article has provided a strong theoretical basis, supported by empirical observations, for this universal acceptance of limited publication. This allows the conclusion of this author: that limited publication is not simply the lesser of two evils, but rather is in and of itself the optimal and most efficient course.

\textsuperscript{99} Such as enlarging the judiciary; a popular recommendation. First, though, this solution is not without controversy; a large portion of the judiciary opposes it. Further, as shown above, it would not be an effective solution. Lastly, even if this was the perfect solution, it is not relevant to this discussion. This discussion seeks to answer whether or not the judiciary should practice selective publication. The judiciary has no control over its size; that is a determination for Congress. Therefore, from the perspective of the judiciary the amount of judges is an external, non-mutable reality, exhibiting path determination characteristics.

\textsuperscript{100} The perceptive reader will have noticed an apparent inconsistency: On the one hand, we seek to embarrass judges for having unpublished opinions overturned, yet on the other hand it is claimed that unpublished opinions are the appropriate forum for the “percolation” of difficult issues. This inconsistency is resolved by realizing that the latter is an appropriate use of selective publication, while the former is an inappropriate use whose practice should be curbed. This could be accomplished by simply requiring judges to indicate on unpublished opinions if non-publication is due to the settled nature of the relevant law.

\textsuperscript{101} And actually justifies limited publication on its own.