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I. INTRODUCTION

The great majority of this country's intermediate appellate courts have selective publication rules that limit the publication and use of their decisions. These rules try to ensure that a decision is published only if it has significant precedential value. Most rules also forbid citation of unpublished decisions.

Very little is known about the actual effect of these rules. This uncertainty is reflected in the divergent views expressed by both the defenders and critics of selective publication. The defenders cannot agree on the reasons why selective publication is beneficial; the critics cannot agree on the reasons why it is harmful.

Illustrating the split among the defenders are the contrasting views of circuit court of appeals Judges Philip Nichols, Jr., and Richard Posner. Judge Nichols favors selective publication because he thinks that it avoids unnecessary publication costs. He writes: "[t]he true reason behind the selective publication policy is that it is wrong to ask publishers to publish, libraries to collect, and scholars to read opinions that merely labor the obvious."[1] He adds: "[i]f all the appeals filed in any intermediate federal court ought to be there, the court would have no need for a selective publication policy."[2] On the other hand, Judge Posner thinks that the savings in publication costs may well be more than offset by the loss incurred in not publishing opinions that have potential precedential value.[3] Nevertheless, he favors selective publication be-

* Associate Professor of Law, Southern Illinois University School of Law; B.A. Princeton University 1969; J.D. University of Chicago Law School 1974. The Illinois State Bar Association provided funds and staff support for this study and endorsed its recommendations. *See* Beyler & Britton, *Supreme Court Rule 23: An Empirical Study*, 76 ILL. B.J. 324 (1988). This article contains new results and substantially more detail than the bar journal article. The author thanks his collaborators: Clarold Britton, Jane Beyler, Marcia Mulcahy, Julie Smith, Patricia Rexroad, Verna Hanson, Renee Sanderson, Sheila Hammonds, Jeffrey Williams, who worked on the attorney survey and section council reviews; and Ann Mahoney, Julie Smith, and Angela Duffield for their research assistance.

1. Nichols, *Selective Publication of Opinions: One Judge's View* 35 AM. U.L. REV. 909, 916 (1986).

2. *Id.* at 919.

3. R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 121-23 (1985).

cause he thinks that it saves courts time, which they badly need to cope with rising caseloads. As he puts it, selective publication merely reflects the hard choice that courts pressed for time must make "between preparing but not publishing opinions in many cases and not preparing opinions in those cases at all . . . between giving the parties reasons for the decision . . . and not giving them reasons even though the appeal is . . . not frivolous."[4]

Illustrating the split among the critics are the contrasting views of Professor Render and Professors Reynolds and Richman. Professor Render opposes selective publication because he thinks that it inevitably leads to the loss of much valuable precedent. He writes: "The 'precedential importance' of an opinion . . . cannot be predetermined by its author" because "[a] case that does not seem particularly important today may become important in the future for reasons that are entirely unknown to the court at the time the decision is made."[5] On the other hand, Professors Reynolds and Richman say that selective publication causes no major loss of precedent.[6] Nevertheless, they oppose it because they think that it causes sloppy decisions.[7]

These fundamental differences of opinion among respected judges and scholars demonstrate the need for an empirical study of the beneficial and harmful effects of selective publication. Inevitably, mistakes will occur under selective publication rules. For example, courts may decide not to publish some decisions that, in the judgment of competent third parties, would have had significant precedential value. Similarly, competent third parties might say that some unpublished decisions have misstated the issues, contradicted other decisions, or mistaken the law. What matters is: (1) How great a benefit do the rules produce? (2) How often do these miscues occur?

This Article answers these questions. Part One compares the various selective publication rules as a prelude to the productivity and precedential value studies that follow. Part Two shows that typical selective publication rules increase the courts' productivity by about half a decision per judge for every one percent increase in the percentage of unpublished decisions. This increased productivity helped one state's judges write an extra 1,465 decisions in 1987,

4. *Id.* at 124.

5. Render, *On Unpublished Opinions*, 73 KY. L.J. 145, 153 (1984-85).

6. Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 609 (1981).

7. *Id.* at 601, 631.

thereby saving that state's taxpayers more than $5 million in 1987. Part Three shows that the percentage of miscues committed under these rules is too low to require the taxpayers to forego these savings. Under a typical rule, about 15% of the unpublished decisions would have significant precedential value and fewer than 1% could be reasonably described as sloppy. The former percentage suggests that the rules could be changed to make them work better, but neither percentage suggests that they should be scrapped.

II. A COMPARATIVE ANALYSIS

Table One divides the states and federal circuits into three categories. Twenty-six states have an intermediate appellate court and a selective publication rule; fourteen have no intermediate appellate court; and ten have an intermediate appellate court but no selective publication rule.[8] All thirteen federal circuits have selective publication rules.[9]

8. The following rules, operating procedures and other sources of information were used for each state. *Alaska*: ALASKA APP. R. 214; Court of Appeals of the State of Alaska, Guidelines for Publication of Court of Appeals Decisions (1981); Alaska Court of Appeals, Attorneys' Handbook (1983); *Arizona*: ARIZ. R. CIV. APP. P. 28; *Arkansas*: ARK. SUP. CT. R. 21; *California*: CAL. R. CT. 976, 976.1, 977 & 978; *Colorado*: COLO. APP. R. 35(F); Telephone interview with Deputy Clerk (May 4, 1988); *Georgia*: GA. APP. CT. R. 37; Letter from Victoria McLaughlin to Keith H. Beyler (Mar. 23, 1988) (giving the court's interpretation of Rule 37); *Hawaii*: HAW. APP. R. 2; *Illinois*: ILL. SUP. CT. R. 23, ILL. REV. STAT. Ch. 110A, para. 23 (1987); *Indiana*: IND. R. APP. P. 15; *Iowa*: IOWA SUP. CT. R. 10, *Kansas*: KAN. SUP. CT. R. 7.04; *Kentucky*: KY. R. CIV. P. 76.28; Render, *On Unpublished Opinions*, 73 KY. L.J. 145 (1984-85); *Louisiana*: LA. CT. APP. U. R. 2-16; *Maryland*: MD. R. APP. P. 8-113 and 8-11; *Michigan*: MICH. APP. R. 7.215; Letter from Norbert G. Jaworski to Keith H. Beyler (Feb. 24, 1988) (stating the court's practice under Rule 7.215); *New Jersey*: N.J. CT. R. 1:36; Standards for Publication of Judicial Opinions (1974); *New Mexico*: N.M. R. APP. P. 12-405; Letter from Lynn Pickard to Keith H. Beyler (Feb. 23, 1988) (explaining Rule 12-405); *North Carolina*: N.C. R. APP. P. 30; Letter from Francis E. Dail to Keith H. Beyler (Feb. 29, 1988) (providing further information about Rule 30); *Ohio*: OHIO S. CT. R. REP. OPS. 2; *Oklahoma*: OKLA. R. CIV. APP. P. 1.200; *Pennsylvania*: PA. COMMW. CT. I.O.P. §§ 412-14; *Tennessee*: TENN. CT. APP. R. 10; *Texas*: TEX. R. APP. P. 90; *Virginia*: VA. CODE ANN. § 17-116.010 (Supp. 1985); Letter from David B. Beach to Keith H. Beyler (Feb. 23, 1988) (stating the court's practice under section 17-116.010); *Washington*: WASH. REV. CODE § 2.06.040 (Supp. 1987); State v. Fitzpatrick, 5 Wash. App. 661, 491 P.2d 262 (1971); *Wisconsin*: WIS. STAT. § 809.23 (Supp. 1987).

9. The following rules, operating procedures and other sources of information were used for each circuit. *First*: 1ST CIR. LOC. R. 36.1 & 36.2; *Second*: 2D CIR. LOC. R. 0.23; *Third*: 3D CIR. I.O.P. ch. 5; Letter from M. Elizabeth Ferguson to Keith H. Beyler (Mar. 1, 1988) (explaining the Third Circuit's practice under I.O.P. 5); *Fourth*: 4TH CIR. I.O.P. 36.3, 36.4 & 36.5; *Fifth*: 5TH CIR. I.O.P. 47.5; Letter from Gilbert F. Ganucheau to Keith H. Beyler (Feb. 29, 1988) (explaining the Fifth Circuit's practice under I.O.P. 47.5); *Sixth*: 6TH CIR. R. 24; *Seventh*: 7TH CIR. R. 53; *Eighth*: 8TH CIR. R. APP. 2, Plan for Publication of Opinions; *Ninth*: 9TH CIR. R. 36-1,-2,-3,-4,-5 & -6; *Tenth*: 10TH CIR.

TABLE ONE: COURTS WHICH HAVE SELECTIVE PUBLICATION RULES

Category	States & Circuits							
Intermediate appellate court & selective publication rule	AK	AZ	AR	CA	CO	GA	HI	IL
	IN	IA	KS	KY	LA	MD	MI	NJ
	NM	NC	OH	OK	PA	TN	TX	VA
	WA	WI	1ST	2ND	3RD	4TH	5TH	6TH
	7TH	8TH	9TH	10TH	11TH	D.C.	FED	
No intermediate appellate court	DE	ME	MS	MT	NE	NV	NH	ND
	RI	SD	UT	VT	WV	WY		
No selective publication rule	AL	CT	FL	ID	MA	MN	MO	NY
	OR	SC						

Table Two lists the rules' criteria for making publication decisions.[10] Most rules have the first three criteria, which require publication if the decision (1) involves an important new legal issue or modifies or questions an existing rule of law; (2) has substantial public interest; or (3) considers a conflict or apparent conflict of authority.[11] The other ten criteria are less common and add little extra coverage.[12]

R. 36; *Eleventh*: 11TH CIR. I.O.P. 36; *District of Columbia*: D.C. CIR. R. 11(c) & 14; *Federal*: FED. CIR. R. 47.8(c).

10. This table does not show some differences in the wording or binding effect of these criteria. For example, the sixth criterion ("separate opinion filed") includes all rules giving any form of special consideration to the filing of a separate opinion. Some of these rules say that the decision should be published almost automatically if a separate opinion is filed. *E.g.*, OHIO S. CT. R. REP. OP. 2(E)(7) (should publish if issue is significant). Others say that one vote is enough to require publication if a separate opinion is filed. *E.g.*, ARIZ. S. CT. R. 111(b). Still others leave the normal voting procedure in place but treat the filing of a separate opinion as a factor favoring publication. *E.g.*, 6TH CIR. R. 24(a)(iv).

11. An influential 1973 report had advocated similar criteria. *See* COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973).

12. For example, a decision applying an existing rule to significantly different facts (the fourth criterion) resolves what is usually considered an important new legal issue (the first criterion). Similarly, a court usually reviews legal or legislative history (the fifth criterion) only when it examines an important new legal issue or modifies or questions an existing rule of law (the first criterion).

TABLE TWO: CRITERIA FOR PUBLICATION

Criteria	States & Circuits
1. Involves an important new legal issue or modifies or questions an existing rule of law	AK AZ AR CA CO IL IN IA KS KY LA MI NC NJ NM OH OK TN TX WA WI 1ST 4TH 5TH 6TH 7TH 8TH 9TH D.C.
2. Has substantial public interest	AK AZ CA CO IL IN IA KS KY LA MD MI NJ OH OK TN TX WA WI 4TH 5TH 6TH 7TH 8TH 9TH D.C.
3. Considers a conflict or apparent conflict of authority	AK CA CO IL KS KY LA MI OH OK TN TX WA WI 4TH 5TH 6TH 7TH 8TH D.C.
4. Applies an existing rule to significantly different facts	CA CO KS KY MI OH OK TX WI 1ST 5TH 6TH 8TH
5. Contributes to legal literature by reviewing legal or legislative history	CA IL KS LA NJ OK TN 1ST 4TH 5TH 7TH 8TH
6. Separate opinion filed	AK AZ IL KS OH TX WA 1ST 5TH 6TH 9TH
7. Reverses or reviews a published decision	OH 1ST 6TH 7TH 9TH 10TH D.C.
8. Rule has been overlooked	AZ OK 5TH 9TH D.C.
9. Remand from a higher court	OH 5TH 6TH 7TH
10. Construes a provision of a constitution, statute, ordinance or court rule	MI
11. No recently reported decision applies the rule	MI NJ
12. Reversal not caused by intervening change in the law	6TH
13. Reverses the decision below or affirms on different grounds	5TH
14. No specific criteria	GA HI ID NC PA VA 2ND 3RD 5TH 10TH 11TH

Table Three shows the extent to which the rules restrict citation of unpublished decisions. The no-citation rules (the first category) forbid parties from citing these decisions in unrelated cases.[13] Thus, they can be used only to support contentions like double jeopardy, res judicata, collateral estoppel or law of the case. The

13. *See, e.g.*, ARK. SUP. CT. R. 21.

no-precedential-value rules (the second category) say that unpublished decisions have no *stare decisis* effect.[14] Technically, they are like out-of-state decisions, which may be persuasive, but are not binding. A few rules (the third category) merely discourage parties from citing unpublished decisions without formally restricting their use.[15]

TABLE THREE: RESTRICTIONS ON CITATION

Category	States & Circuits						
No citation	AK	AZ	AR	CA	GA	HI	IL
	IN	IA	KS	KY	LA	NM	NC
	OK	PA	TX	VA	WA	WI	1ST
	2ND	7TH	8TH	9TH	10TH	D.C.	FED
No precedential value	CO	MD	MI	NJ	OH	TN	3RD
Citation merely discouraged	4TH	5TH	6TH	11TH			

It is hard to test whether selective publication has increased the courts' productivity under all thirty-nine rules. The required data are not readily available. Instead, Part Two tests for increased productivity under the Illinois, California and Indiana rules. These states' rules provide a fair test for three reasons. First, the rules are typical. As Table Two indicates, the Illinois and California rules have the three most common criteria (1 through 3) and two of the three next most common criteria (4 through 6). The Indiana rule is less typical, but it still has the two most common criteria (1 and 2). All three rules forbid parties from citing unpublished decisions, as do the great majority of rules listed in Table Three. Second, the rules govern typical intermediate appellate courts. The Appellate Court of Illinois, the California Court of Appeal, and the Indiana Court of Appeals must hear essentially all appeals from final judgments.[16] Moreover, the districts into which they are divided provide a reasonable cross-section of this country's urban, suburban and rural areas.[17] Third, the rules have produced widely varying

14. *See, e.g.*, MO. SP. APP. CT. R. 1092.

15. *E.g.*, 4TH CIR. I.O.P. 36.5 ("Citation of this Court's unpublished dispositions . . . is disfavored").

16. ILL. CONST. art. VI, § 6; CAL. CONST. art. VI, § 4b; IND. CONST. art. VII, § 6.

17. The Appellate Court of Illinois is divided into five districts. The First District includes Chicago, the Second District includes the surrounding suburbs, and the other three districts are predominantly rural. *See* ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, 1984 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 75 (hereinafter "*Annual Reports*"). The California Court of Appeal is divided into six districts which

percentages of unpublished decisions. As Part Two's tables will show, California's current percentages (84-91%) are at the top of the spectrum, while Illinois' (53-68%) and Indiana's (56-71%) are toward the middle. In earlier years, Illinois' percentages were near the bottom of the spectrum.[18]

An even harder problem arises in studying the extent to which miscues are committed under selective publication rules. Courts have filed tens of thousands of unpublished decisions annually for the past decade. No one can look at all of these decisions, or even at random samples for every rule and year. Instead, Part Three tests for miscues under the Illinois rule in 1984. This rule and year provide a fair test for essentially the same reasons. The Illinois rule has typical provisions, governs a typical intermediate appellate court, and has produced a typical percentage (69%) of unpublished decisions in 1984. This percentage is lower than the current California (84-91%) percentages, but is fairly close to the current Illinois (53-68%) and Indiana (56-71%) percentages. It is also fairly close to the federal circuit courts' averages (49-63%) in recent years.[19]

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also cover urban, suburban and rural areas. *See* CAL. GOV'T CODE § 69100 (West Supp. 1989) The same is true of the Indiana Court of Appeals, which is divided into four districts. *See* IND. CODE § 33-2.1-2-2 (Supp. 1981). All subsequent references to annual reports of administrative offices, judicial councils or courts will be cited as "1984 ILL. ANN. REP." with appropriate changes in the state and year.

18. *See infra* Tables four, six and eight.

19. One earlier study reported that the federal circuit courts' average was 61.7% for the 1978-79 reporting year. *See* Reynolds & Richman, *supra* note 6, at 587. Another earlier study reported that the averages were 48.8-54.1% for the 1981 through 1984 statistical years. D. STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 40 (1985). The following six circuit courts provided 1987 data, and it is consistent with the earlier averages:

Cir	Pub	UnPub	UnPub%
4th	336	1,355	80.1%
5th	837	954	53.3%
6th	482	2,020	80.7%
7th	862	424	33.0%
8th	666	535	44.5%
11th	493	833	62.8%
Tot	3,676	6,181	62.4%

Letter from Suzanne G. Pitts, Administrative Analyst for the United States Court of Appeals for the Fourth Circuit, to Keith Beyler (June 30, 1988); Correspondence from the Office of the Clerk, United States Court of Appeals for the Fifth Circuit to Keith Beyler (June 29, 1988); Telephone interview with Lynn Clasgens, United States Court of Appeals for the Sixth Circuit (July 12, 1988); Correspondence from the Administrative Office for the United States Court of Appeals for the Seventh Circuit to Keith Beyler (June 30, 1988); Letter from Michelle McCloud, Statistical Deputy Clerk for the Eighth

III. THE PRODUCTIVITY STUDY

Appellate caseloads have exploded during the 1970s and 1980s. The number of appellate judges has also increased, but not enough to keep the judges' caseloads constant. As a result, judges have less time to make and to write their decisions.

The Illinois data illustrate this trend. In 1970, when the Appellate Court of Illinois had 26 judges, parties filed 1,856 appeals, the judges wrote an average of 39 decisions, and they participated in 78 other decisions written by other judges.[20] In 1987, when the court had 44 judges, parties filed 7,826 appeals, the judges wrote an average of 102 decisions, and they participated in 204 other decisions written by other judges.[21] Thus, while the number of filings increased by 322%, the number of appellate judges increased by only 69%. The judges have closed part of this gap by increasing the number of decisions per judge by 162%. The rest of the gap is reflected in increased backlog and delay.

The California data reflect the same trend. In 1970, when the California Court of Appeal had 47 judges, parties filed 8,039 appeals, the judges wrote an average of 72 decisions, and they participated in 144 other decisions written by other judges.[22] In 1987, when the court had 85 judges, parties filed 17,377 appeals, the judges wrote an average of 105 decisions, and they participated in 210 other decisions written by other judges.[23] Thus, while the number of filings increased by 116%, the number of appellate judges increased by only 81%. The judges have closed this gap by increasing the number of decisions per judge by 46%.

Consider what these numbers mean in terms of the time that

Circuit (Aug. 18, 1988); Telephone interview with Vicki King, Deputy Clerk for the United States Court of Appeals for the Eleventh Circuit (June 28, 1988). The Ninth Circuit also reported that 55% of its decisions were left unpublished for the period January 1, 1984 through July 1988. Letter from Cathy M. Catterson, Deputy Clerk, to Keith Beyler (undated).

20. 1970 ILL. ANN. REP. 8, 26, 27 (the court had 30 judges after the November election). The Administrative Office did not begin reporting the number of written decisions until 1973. Multiplying the number of dispositions (1,079) in 1970 by the 1973 ratio of dispositions to decisions (.95) yielded an estimated 1,025 written decisions for 1970. The ratio of dispositions to decisions is slightly less than one because a few decisions dispose of two or more consolidated cases.

21. 1987 ILL. ANN. REP., Trend of Cases Tables.

22. 1971 CAL. ANN. REP. 91, 149-51. California reports its statistics for fiscal years rather than calendar years. These "1970" statistics were for the fiscal year that ran from July 1, 1969 through June 30, 1970. The statistics allow for the fact that three judges were added mid-year.

23. 1988 CAL. ANN. REP. 41, 43, 57 (using "full-time judge equivalents" for the number of judges).

judges now have to make and write their decisions. In 1987, the average Illinois or California judge wrote one decision every two and one-third working days.[24] Within this time, the judge had to read the briefs, read the important parts of the record, read the cited cases, do additional research, listen to oral argument and draft the decision. Within this same time, the judge also had to perform most of these same tasks in two more cases in which the judge was expected to join in, concur with or dissent from a decision written by another judge.

How has it been possible for judges to make and to write decisions this fast? While the judges may be working more hours each day, they have probably not increased their working hours enough to account for the increases (46-162%) in their productivity. Similarly, these increases have not been due to better law office technology.[25] The two most likely causes are selective publication and increased research staff.

Selective publication could help judges write more decisions by letting them spend less time researching and polishing the decisions that they intend to leave unpublished. Nevertheless, when Reynolds and Richman studied the federal circuit courts' productivity in the 1978-79 reporting year, they found that it did not correlate with the percentage of decisions left unpublished.[26] If their

24. This calculation assumes that there are slightly fewer than 240 working days per year.

25. The two major changes in law office technology have been: (1) the use of personal computers for word processing; and (2) the use of the computer-assisted research services provided by LEXIS and Westlaw. Neither of these changes accounts for the 162% increase in the Appellate Court of Illinois' productivity between 1975 and 1987. The Appellate Court did not get personal computers for word processing until the beginning of 1987. Telephone Interview with William Madden, Associate Director, Administrative Office of Illinois Courts (Oct. 11, 1988). Yet, all districts and divisions were at or near their maximum productivity around 1983 or 1984. *See* Table Four, column three, *infra*. Similarly, computer-assisted legal research first became generally available in one district in 1985 and in the others in 1987. *Id.* Even now, the judges do not seem to benefit much from it. For example, one fourth district judge was aware of only one LEXIS search that had been done for his district in the past twelve months. Telephone Interview with the Honorable Frederick Green, Appellate Court of Illinois, Fourth District (Oct. 4, 1988).

26. Reynolds & Richman, *supra* note 6, at 595-97. I originally agreed with Reynolds and Richman that limited publication probably has little effect on productivity. Beyler, *An Appraisal of Supreme Court Rule 23*, 72 ILL. B. J. 80, 84-86 (1983). I gave two reasons for this conclusion: (1) the Appellate Court of Illinois' productivity increased only slightly from 1980 to 1982 despite a substantial increase in the percentage of unpublished decisions; and (2) the unpublished decisions that I reviewed were of sufficient quality to be published with no further changes. As will be apparent momentarily, I was wrong to rely on just a short-term comparison of two years' data. When I conducted this more thorough study, I again found that the Appellate Court's unpublished decisions could have been published "as is," but that does not necessarily mean that the court would

finding held true for other courts and years, the case for selective publication would be far weaker.

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have done so. People have a natural tendency to produce several extra drafts of anything destined for publication, and those extra drafts may improve the final product only marginally. Hence, a reader might perceive little difference between published and unpublished decisions, even though by not publishing the decisions, the court may have sharply reduced its editing time.

TABLE FOUR: APPELLATE COURT OF ILLINOIS DATA FOR PRODUCTIVITY STUDY

DIST/DIV	YEAR	DEC/JUDG	UNPUB	RE$/JUDG
FIRST #1	75	48.5	17.5%	$16,727
	76	60.3	40.7%	$19,861
	77	73.8	39.0%	$16,901
	78	70.8	35.0%	$18,337
	79	83.5	37.1%	$16,344
	80	90.3	39.6%	$15,623
	81	97.0	47.7%	$17,226
	82	117.5	76.0%	$18,397
	83	101.5	72.5%	$19,186
	84	96.9	72.8%	$19,869
	85	91.4	70.1%	$21,840
	86	85.5	63.2%	$23,133
	87	84.0	64.0%	$22,059
FIRST #2	75	55.8	14.3%	$16,727
	76	51.0	41.7%	$19,861
	77	67.3	43.5%	$16,901
	78	73.5	41.8%	$18,337
	79	78.0	41.0%	$16,344
	80	88.5	44.6%	$15,623
	81	95.5	48.7%	$17,226
	82	109.3	70.0%	$18,397
	83	97.2	73.5%	$19,186
	84	109.9	71.9%	$19,869
	85	91.7	69.9%	$21,840
	86	89.3	66.1%	$23,133
	87	102.3	64.8%	$22,059
FIRST #3	75	59.5	7.1%	$16,727
	76	60.8	24.7%	$19,861
	77	65.3	41.4%	$16,901
	78	78.0	38.5%	$18,337
	79	74.3	43.1%	$16,344
	80	83.8	52.2%	$15,623
	81	91.8	58.6%	$17,226
	82	105.3	78.6%	$18,397
	83	101.5	82.8%	$19,186
	84	98.6	78.4%	$19,869
	85	93.1	77.2%	$21,840
	86	87.1	66.4%	$23,133
	87	96.5	63.2%	$22,059
FIRST #4	75	55.0	6.8%	$16,727
	76	49.0	23.0%	$19,861
	77	65.8	19.8%	$16,901
	78	71.0	26.4%	$18,337
	79	81.5	39.9%	$16,344
	80	83.0	41.9%	$15,623
	81	107.5	52.3%	$17,226
	82	104.0	69.5%	$18,397
	83	104.1	72.7%	$19,186
	84	101.2	73.0%	$19,869
	85	94.8	67.8%	$21,840
	86	89.3	66.7%	$23,133
	87	97.0	68.3%	$22,059
FIRST #5	75	55.5	10.4%	$16,727
	76	66.3	37.4%	$19,861
	77	65.5	32.1%	$16,901
	78	75.5	38.4%	$18,337
	79	81.0	36.7%	$16,344
	80	84.8	46.6%	$15,623
	81	102.0	51.0%	$17,226
FIRST #5 [cont.]	82	116.0	67.9%	$18,397
	83	107.0	67.0%	$19,186
	84	85.3	59.8%	$19,869
	85	88.8	71.0%	$21,840
	86	82.4	59.2%	$23,133
	87	101.3	52.8%	$22,059
SECOND	75	75.8	13.8%	$0
	76	77.1	29.8%	$10,485
	77	75.6	32.0%	$12,771
	78	99.8	51.2%	$11,798
	79	85.3	44.9%	$20,681
	80	97.0	47.8%	$36,589
	81	101.6	58.1%	$34,663
	82	85.3	65.3%	$34,132
	83	97.0	66.3%	$36,100
	84	98.4	67.1%	$35,572
	85	98.7	61.1%	$35,687
	86	109.1	56.9%	$37,018
	87	103.9	52.7%	$32,940
THIRD	75	75.0	5.7%	$0
	76	91.3	16.4%	$0
	77	87.0	18.4%	$0
	78	66.6	24.9%	$0
	79	70.6	21.8%	$7,435
	80	112.4	17.6%	$13,526
	81	105.2	35.6%	$23,693
	82	100.6	66.2%	$28,086
	83	108.6	62.2%	$28,158
	84	92.8	62.5%	$30,035
	85	102.0	56.7%	$33,764
	86	103.4	54.4%	$34,911
	87	104.6	53.0%	$34,957
FOURTH	75	90.3	22.4%	$0
	76	112.0	48.9%	$0
	77	120.9	55.7%	$17,777
	78	103.8	55.7%	$22,386
	79	91.6	61.2%	$18,660
	80	120.0	64.3%	$32,542
	81	118.6	66.3%	$34,831
	82	113.7	63.8%	$35,103
	83	123.0	67.0%	$39,415
	84	115.0	66.3%	$42,567
	85	120.8	64.9%	$42,980
	86	132.4	63.9%	$35,361
	87	128.2	56.6%	$41,537
FIFTH	75	70.0	16.3%	$0
	76	83.6	42.7%	$0
	77	93.4	48.2%	$16,152
	78	93.6	55.8%	$18,293
	79	100.8	49.0%	$23,424
	80	88.6	50.6%	$26,297
	81	76.6	57.7%	$26,431
	82	81.8	67.2%	$26,932
	83	105.2	70.0%	$24,668
	84	104.0	69.2%	$28,591
	85	109.4	62.0%	$30,661
	86	96.4	53.1%	$32,242
	87	97.6	57.4%	$32,358

The Reynolds-Richman study has two built in limitations, however, which suggest that its conclusion may be incorrect. First, the study is based on the small number of data points provided by a single year's data.[27] Second, it neither accounted for nor controlled other variables that might affect productivity.[28] The present study removes the first problem, reduces the second, and concludes, as did another recent study by Marvell and Moody,[29] that selective publication significantly enhances the courts' productivity.

A. Productivity In Illinois: 1975-87

Table Four gives the data used to test the extent to which selective publication and increased research staff may have helped boost the Appellate Court of Illinois' productivity during the 1975-87 time period. This thirteen-year period begins with the first year in which a significant number of Illinois decisions were left unpublished.[30] It ends with the most recent year for which the Illinois data were available when this study was done. The table's first two columns list the various districts, divisions and years, and the third through fifth columns give the data for those units and years.

In particular, the third column (Dec/Judg) reports each unit's productivity measured in decisions per judge. Specifically, this measure totals the number of majority opinions, per curiam opinions, and unpublished orders,[31] and divides that total by the

27. *Id.* at 597, Table 7.

28. *Id.* at 595 n.60, 596-97.

29. Marvel & Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REF. 415, 441-42 (1988).

30. Prior to 1975, the Illinois rule permitted the court to file an unpublished decision only if no error of law appeared, the decision would have no precedential value, and the sufficiency of the record to support the judgment below constituted the only point at issue. ILL. REV. STAT. ch. 110A, para. 23 (1973). The court disposed of only 27 cases under this version. Administrative Office of the Illinois Courts, Select Data for the Years 1970-1986 (unpublished). The rule was revised in 1975 to permit the court to file an unpublished decision if it would have no precedential value, the appeal presented no substantial question, or the court lacked jurisdiction. ILL. REV. STAT. ch. 110A, para. 23 (1975). The current version has more narrow criteria and specifies which decisions should be published instead of which should not be published. ILL. REV. STAT. ch. 110A, para. 23 (1987).

31. The *Annual Reports* list this statistic each year in a table entitled "Abstract Summary of the Number of Opinions And Rule 23 Orders Written by Judges of the Appellate Court." *E.g.*, 1984 ILL. ANN. REP. 88. The Administrative Office provided further data which broke down the number of the First District decisions by division for 1975-79, indicated which divisions filed the per curiam opinions listed for 1980 and 1981, and showed which district and division should receive credit for decisions by the court's Industrial Commission division in worker's compensation cases. Letter from Jerry Gott to Keith Beyler (Jan. 12, 1988); Trend of Cases in the Appellate Court: 1987 (unpublished

number of judges, including an allowance for retired or trial court judges sitting by temporary assignment for all or part of the year.[32] For example, the First Division of the First District wrote 150 majority opinions, 10 per curiam opinions, and 34 unpublished orders for a total of 194 decisions in 1975. That year, the division had four regularly assigned judges and no temporarily assigned judges. Thus, the division's productivity was 48.5 decisions per judge which appears as the first entry in column three.

The fourth column (Unpub) reports each unit's percentage of unpublished decisions. As just noted, unpublished orders accounted for 34 of the 194 decisions written by the first division of the first district in 1975. Thus, its percentage of unpublished decisions was 17.5%, and this percentage appears as the first entry in column four.

The fifth column (Re$/Judg) reports the amount spent per judge on each unit's research department, with all amounts restated in constant 1987 dollars so that year-to-year differences reflect real dollar changes instead of the effects of inflation. For example, the first district's research department cost $158,425 in 1975, which, when multiplied by the ratio of the 1987 consumer price index to the 1975 index, equals $334,540 in 1987 dollars.[33] Because twenty judges served on the first district that year, the amount spent per judge was $16,727, which appears as the first entry in column five.

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table). Upon plotting the data, it became apparent that the 140 decisions per judge reported by the Third District in 1981 was far out of line. A further investigation revealed: (1) During part of the year, the Third District granted various dismissals in the form of unpublished, single paragraph orders, for which it claimed statistical credit as written decisions. (2) It later stopped this practice in response to criticism it received from other districts. (3) This brief episode of playing with the numbers increased the unpublished dismissals from 2 in 1980 to 176 in 1981. Letter from Judge Albert Scott to Keith Beyler (Mar. 7, 1988); Telephone interview with Jerry Gott, Assistant Director, Administrative Office of the Illinois Courts (Mar. 10, 1988). To eliminate the effect of this brief episode, table four gives the Third District credit for 174 fewer unpublished decisions (176 minus 2) in 1981 than the number shown in the *Annual Report*.

32. The *Annual Report* lists the judges serving on a particular date, usually December 31st. *E.g.*, 1984 ILL. ANN. REP. 81. The Administrative Director's report shows the periods for which judges were assigned to the Appellate Court. *E.g.*, *id.* at 32-33. Part-year assignments were calculated to the nearest tenth of a year.

33. The consumer price indices for the period studied were: 1975 (161.2); 1976 (170.5); 1977 (181.5); 1978 (195.4); 1979 (217.4); 1980 (246.8); 1981 (272.4); 1982 (289.1); 1983 (298.4); 1984 (311.1); 1985 (322.2); 1986 (328.4); 1987 (340.4). 1988 STATISTICAL ABSTRACT OF THE UNITED STATES 450 (Table 783, col. 1); BNA LABOR RELATIONS REPORTER LRX 170 (All Urban Consumers, Year Average). The correlation on the research expenditure per judge was also performed on the actual expenditures with no inflation adjustment, and the correlation coefficient for the unadjusted variable also passed the significance test.

The same amount also appears later in the table because this research department serves all divisions of the first district.

The dollar amounts shown in column five reflect the only increases in the appellate court's research staff in this time period.[34] These dollar amounts include money spent for support staff and office rental, not just attorney salaries. As a result, the ratio of research department attorneys to judges is smaller than the expenses per judge seem to suggest.[35]

An examination of the data in the third through fifth columns shows three things. First, most districts and divisions steadily increased their productivity until about 1983 or 1984, after which it tended to decline. Second, most districts and divisions steadily increased their percentage of unpublished decisions until about 1983 or 1984, after which this percentage also tended to decline.[36] Third, the research department expense per judge rose more often than not when productivity was rising, but the expense continued to rise after productivity began to fall. Thus, productivity seems more strongly related to the percentage of unpublished decisions than the research department expense per judge.

The scatterplots in Charts One and Two confirm this observation. Chart One plots productivity against the percentage of unpublished decisions, and Chart Two plots it against the research department expense per judge. Each chart also shows the "regression line" which provides the "best fit" for the data points. Because the line in the first chart appears to fit the points better than does the line in the second chart, it seems likely that productivity is more strongly related to the percentage of unpublished decisions than the research department expense per judge.

Table Five reports the results of applying certain standard statistical measures to these data points. The top half of the table shows how productivity (Dec/Judg) correlates with the percentage of un-

34. The number of personal law clerks, two, did not increase between 1975 and 1987. *Compare* ILL. REV. STAT. ch. 37, para. 60 (1975) *with* ILL. REV. STAT. ch. 37, para. 60 (1987). Some of the earlier entries in column five show no expenditures because some districts did not have research departments until several years after 1975.

35. The number of research department attorneys and the average cost per attorney for each district in 1987 was: 1st - 12 attorneys, $38,600 per attorney; 2d - 7 attorneys, $37,600 per attorney; 3d - 4 attorneys, $43,700 per attorney; 4th - 4 attorneys, $52,000 per attorney; 5th - 4 attorneys, $40,400 per attorney. Telephone Interview with Jacki Stemke, Administrative Office of the Illinois Courts (Aug. 16, 1988).

36. This decline may have been due to public criticism of selective publication. *See e.g.*, Resolution of Ill. State Bar Association, 1983 Annual Meeting (June 24, 1983) (Agenda Item IX.A) (calling for the repeal of the Illinois selective publication rule), *quoted in*, Beyler, *supra* note 24, at 80, n.2.

Chart 1.
IMPACT OF SELECTIVE PUBLICATION
ALL ILLINOIS DISTRICTS

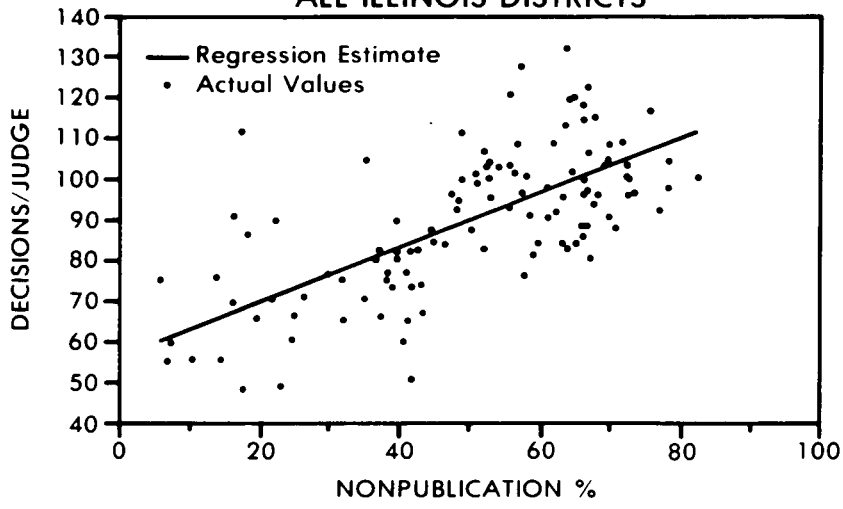
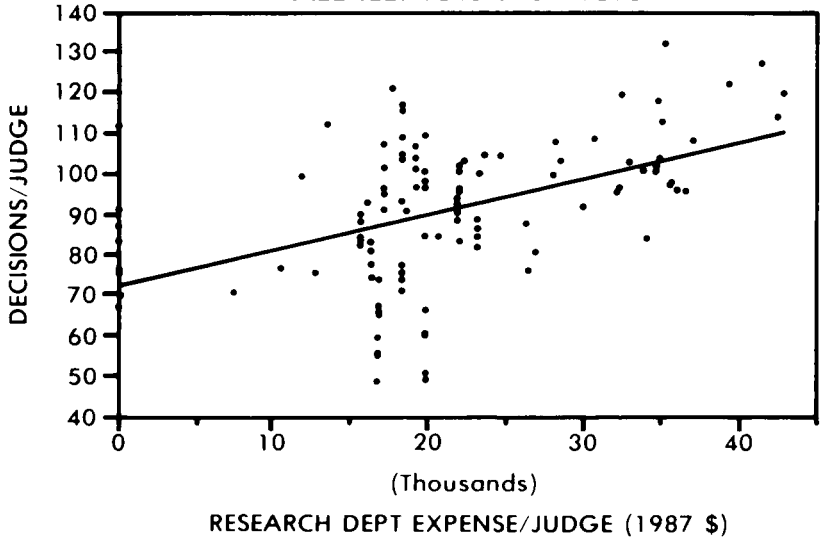


Chart 2.
IMPACT OF RESEARCH DEPARTMENT EXPENSES
ALL ILLINOIS DISTRICTS



published decisions (Unpub) and the research department expense per judge (Re$/Judg). To the right of each variable is the correlation coefficient (R) measuring how close the relationship comes to a perfect linear relationship. The largest possible absolute value is 1, which would indicate a perfect linear relationship; a value of 0 would indicate no linear relationship.[37]

The R value of .68 for the first variable (Unpub) indicates a very strong linear relationship with productivity. The R value of .47 for the second variable (Re$/Judg) indicates a slightly weaker linear relationship, but the right-hand entries show that both values pass the .05 significance test. Passing this test means that there is less than a 5% chance of getting values as high as these if the variables had no linear relationship with productivity. Indeed, the chance of that happening is far less than 5%.[38]

TABLE FIVE: RESULTS FOR ILLINOIS DATA

Correlation With Dec/Judg		
Unpub	$ = .68	Significant (.05) = YES
Re$/Judg	= .47	= YES

Regression Model

Dec/Judg = 56.4 + .57 * Unpub + .00026 * Re$/Judg

R Squared = .47

A common mistake is to assume that correlation implies causation. This conclusion is not automatic. Two variables may correlate only because some other variable has caused them to rise and fall in tandem.[39]

This problem could arise if courts use their research departments primarily to prepare unpublished decisions. Then, as those departments expanded or contracted, productivity and the percentage of unpublished decisions could simultaneously rise or fall. In

37. M. NORUSIS, SPSS^X INTRODUCTORY STATISTICS GUIDE 92 (1983).

38. These R values would also have been significant at the .0005 level, so the chance of there being no linear relationship is actually less than .05%. The 5% significance level (.05) is commonly used in statistical analyses. W. GUENTHER, CONCEPTS OF STATISTICAL INFERENCE 89 (1965).

39. M. NORUSIS, *supra* note 37, at 93. Another potential problem is that knowing two variables correlate does not indicate which way the cause-effect relationship runs. For example, suppose publishers set ceilings on the number of unpublished decisions. Then, as the courts' productivity rose, they would have to leave a higher percentage of decisions unpublished. In this scenario, causation would run from productivity to the percentage of unpublished decisions. Publishers have set no ceilings, however, so causation more likely runs from the percentage of unpublished decisions to productivity.

this scenario, however, productivity should correlate just as well with the research department expense per judge as it does with the percentage of unpublished decisions. Table Five shows that it does not, however, so changes in the size of the research departments cannot explain the correlation between productivity and the percentage of unpublished decisions.

This important finding is also supported by the findings of another recent study by Marvell and Moody.[40] These scholars did a regression analysis on productivity data for forty-four states. They found that not publishing opinions is "an effective efficiency measure" which has "a highly significant impact" on productivity.[41] On the other hand, they found that staff attorneys have a more uncertain impact. Specifically, they found that increasing the ratio of staff attorneys to judges may increase productivity in states with large intermediate appellate courts, but "[b]ecause the significance level is low, this is far from certain."[42]

The bottom half of Table Five shows the results of building a regression model to predict productivity.[43] This model is similar to the regression models developed by the Law School Admission Council/Law School Admission Service which use the applicant's Law School Admission Test (LSAT) score and undergraduate grade point average (UGPA) to predict an applicant's potential grade point average in the first year of law school.[44] The LSAT-UGPA models use a formula to make their predictions, and so does the model in Table Five.

The formula's coefficients show the predicted trade-offs. The first coefficient (.57) indicates that a 1% increase in the percentage of unpublished decisions would enhance the court's productivity

40. Marvel & Moody, *supra* note 29, at 438.

41. *Id.* at 438.

42. *Id.* at 437. Marvel and Moody found that adding law clerks (as opposed to staff attorneys) enhances productivity and that giving each judge a second law clerk would increase the courts' productivity by about 10%. *Id.* In Illinois, the Appellate Court judges had two law clerks throughout the study period, *see supra* note 31, so the present study could not test whether adding law clerks enhances productivity.

43. This model was built using the forced-entry method that required it to include both variables. Because the number of decisions per judge correlates so well with the percentage of unpublished decisions, this two-variable model has only slightly more explanatory power than the single-variable model that includes only the percentage of unpublished decisions. Nevertheless, the two-variable model was used in order to measure the tradeoff between productivity and the percentage of unpublished decisions when full account is taken of the effect of research department expenditures. If measuring the tradeoff in this manner had been deemed unimportant, the model would have been: Dec/Judg = 58.1 + .65 Unpub.

44. *See* LSAT/LSDAS Report Data — Annual Index Calculation.

by .57 decisions per judge. The second coefficient (.00026) indicates that a $1,000 increase in the research department expense per judge would enhance the court's productivity by .26 decisions per judge. Because the Illinois judges average one decision every two and one-third working days, taking the first step gains the equivalent of a little more than an extra day's output per judge. Taking the second step gains a little more than half of an extra day's output per judge.

The entry beneath the formula ("R Squared") measures the proportion of the variation in productivity that the model explains.[45] Its largest possible value is 1, which would indicate a 100% explanation, while a value of 0 would indicate no explanation. This model's R Squared value is relatively high. For example, the LSAT-UGPA model for the author's law school has an R Squared value of .20 which means it explains only 20% of the variation in first-year grade point averages.[46] On the other hand, the model developed here has an R Squared value of .47 which means it explains 47% of the variation in productivity. Thus, this model has more than twice as much explanatory power as the familiar model used in the admission process.

B. Productivity In California: 1969-87

Table Six gives the data used to test the extent to which selective publication may have helped boost the California Court of Appeal's productivity during the 1969-87 time period. This nineteen-year period begins with the first year in which the Judicial Council reported the percentage of unpublished decisions by district.[47] It ends with the most recent year for which the California data were available when this study was done.

The table's first two columns list the various districts and years, and the third and fourth columns give the data. Although some districts are subdivided into divisions, the table gives no division-by-division breakdown because the Judicial Council does not report the number of decisions written by each division. Similarly, the table does not include the research department expense per judge because the Judicial Council does not report that expense.

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45. M. NORUSIS, *supra* note 37, at 140-43.

46. Memorandum from Deborah L. Palser, Director of Test Production and Quality Control, to Law School Admission Officers (Apr. 20, 1988); Telephone interview with Deborah L. Palser (Aug. 3, 1988).

47. *Compare* 1970 CAL. ANN. REP. 88 *with* 1969 CAL. ANN. REP. 128-29. As noted earlier, the California Judicial Council reports by fiscal year, and the years referred to herein are those in which the fiscal year ended. See *supra* note 22.

TABLE SIX: CALIFORNIA COURT OF APPEAL DATA FOR PRODUCTIVITY STUDY

DISTRICT	YEAR	DEC/JUDG	UNPUB
FIRST	69	62.98	58.0%
	70	63.58	57.0%
	71	74.66	70.0%
	72	84.82	73.0%
	73	89.21	83.0%
	74	95.80	86.0%
	75	96.98	82.0%
	76	108.95	85.9%
	77	111.39	83.3%
	78	91.19	86.6%
	79	102.19	79.0%
	80	97.31	82.3%
	81	91.18	82.5%
	82	103.94	86.1%
	83	98.94	84.0%
	84	106.64	84.0%
	85	123.66	87.0%
	86	119.99	86.0%
	87	110.83	84.0%
SECOND	69	78.13	55.0%
	70	87.60	64.0%
	71	85.91	73.0%
	72	94.84	80.0%
	73	76.41	83.0%
	74	85.49	82.0%
	75	101.58	82.0%
	76	98.96	80.2%
	77	107.29	78.8%
	78	107.44	83.2%
	79	109.22	81.4%
	80	102.82	80.3%
	81	106.94	82.6%
	82	114.79	86.7%
	83	90.15	85.0%
	84	86.07	82.0%
	85	86.78	85.0%
	86	96.36	85.0%
	87	92.12	86.0%
THIRD	69	57.00	58.0%
	70	70.05	60.0%
	71	75.40	71.0%
	72	103.81	81.0%
	73	78.13	85.0%
	74	78.63	87.0%
	75	80.11	93.0%
	76	97.52	88.0%
	77	98.22	85.3%
	78	84.66	90.3%
	79	80.46	82.3%
THIRD [cont.]	80	81.14	86.1%
	81	100.14	86.5%
	82	130.62	87.4%
	83	126.15	93.0%
	84	120.08	91.0%
	85	108.77	88.0%
	86	117.41	89.0%
	87	116.91	91.0%
FOURTH	69	71.6	59.0%
	70	55.3	60.0%
	71	71.3	72.0%
	72	82.9	86.0%
	73	75.9	88.0%
	74	88.4	90.0%
	75	95.7	89.0%
	76	98.2	88.6%
	77	108.6	88.8%
	78	127.3	92.0%
	79	110.9	88.4%
	80	124.5	86.2%
	81	126.6	87.8%
	82	133.9	88.7%
	83	123.5	89.0%
	84	110.6	84.0%
	85	115.9	86.0%
	86	122.2	87.0%
	87	122.6	88.0%
FIFTH	69	57.3	30.0%
	70	48.8	45.0%
	71	62.9	59.0%
	72	61.2	75.0%
	73	67.4	81.0%
	74	69.4	78.0%
	75	84.9	86.0%
	76	96.0	84.7%
	77	111.0	86.4%
	78	119.4	90.0%
	79	105.8	83.8%
	80	106.6	84.0%
	81	93.3	87.1%
	82	101.2	90.6%
	83	109.6	89.0%
	84	121.1	86.0%
	85	117.4	85.0%
	86	108.9	85.0%
	87	89.5	84.0%
SIXTH	85	96.3	88.0%
	86	119.8	87.0%
	87	122.3	90.0%

The productivity and publication figures appearing in the third and fourth columns were calculated in essentially the same way as they were for the Illinois table. The productivity statistic (Dec/Judg) again totals the majority opinions, per curiam opinions, and

unpublished decisions,[48] and divides that total by the number of judges, including an allowance for temporarily assigned judges.[49] The percentage of unpublished decisions (Unpub) is based on the percentage reported by the Judicial Council.[50]

Chart Three plots the percentage of unpublished decisions against the number of decisions per judge and again shows the regression line that provides the best fit for the data points. Because the line appears to fit the data points reasonably well, it seems likely that the California data will also show a relationship between productivity and the percentage of unpublished decisions.

Table Seven reports the results of applying the same statistical measures as before. The correlation coefficient of .70 for the percentage of unpublished decisions is slightly higher than the Illinois coefficient (.68) and easily passes the .05 significance test. Similarly, the R Squared value of .49 for this regression model is slightly higher than for the Illinois model (.47), which means it has slightly more explanatory power.

TABLE SEVEN: RESULTS FOR CALIFORNIA DATA

Correlation With Dec/Judg		
Unpub	R = .70	Significant (.05) = YES
Regression Model		
Dec/Judg = −5.7 + 1.3 * Unpub		
R Squared = .49		

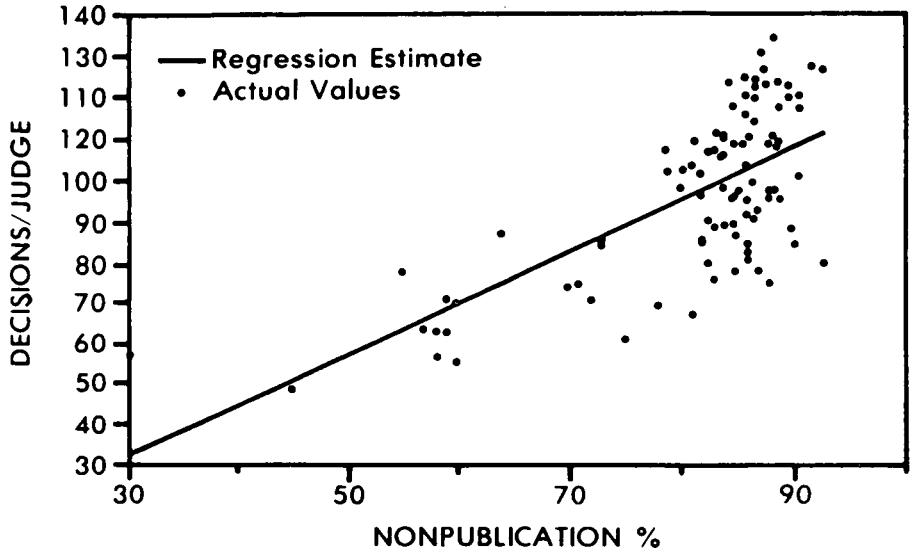
The California model probably overstates the trade-off between productivity and the percentage of unpublished decisions. It predicts a 1% increase in the percentage of unpublished decisions would enhance the courts' productivity by 1.3 decisions per judge. If the research department expense per judge were known, however, adding that second variable would probably reduce the predicted trade-off to a level closer to that shown in the Illinois model (.57 extra decisions per judge).

48. The Judicial Council reports the number of cases each district disposed of by written opinion. *E.g.*, 1987 CAL. ANN. REP. 92, Table T-10. These numbers were multiplied by the ratio of decisions to cases for the particular year to estimate the number of decisions each district wrote. These annual ratios varied from .98 to 1.02. Although the ratios would normally be slightly less than one, reporting inconsistencies have caused them to go slightly above 1 since 1984. *Id.* at 93, Table T-13, n. a.

49. *E.g.*, *id.* at 93, Table T-11 (reporting the "full-time judge-equivalents" for each district).

50. *E.g.*, *id.* at 98, Table T-19 (reporting the percentage of published decisions for each district).

Chart 3.
IMPACT OF SELECTIVE PUBLICATION
ALL CALIFORNIA DISTRICTS



The California model is also unreliable if the percentage of unpublished decisions falls below 50%. The California data include only two points where the percentage falls below that level, and a regression model is properly used to interpolate within the data range, not extrapolate beyond it.[51] For example, the model shows the number of decisions would be negative if the percentage of unpublished decisions dropped to zero. Obviously, that could not happen.

C. Productivity In Indiana: 1981-87

Table Eight gives the data used to test the extent to which selective publication may have helped boost the Indiana Court of Appeals' productivity during the 1981-87 time period. This seven year period begins with the first full year in which the *Northeastern Reporter* listed the Court of Appeals' unpublished decisions. It ends with the most recent year for which those tables were available when this study was done.

Again, the first two columns list the various districts and years, and the third and fourth columns give the data for those districts

51. *See* E. PEDHAZUR, MULTIPLE REGRESSION IN BEHAVIORAL RESEARCH 412-13 (2d ed. 1982).

and years. The productivity (Dec/Judg) and publication (Unpub) statistics were calculated in essentially the same way as before. They are based on the data in the *Northeastern Reporter*, however, not in the *Annual Reports*.[52]

TABLE EIGHT: INDIANA COURT OF APPEALS DATA FOR PRODUCTIVITY STUDY

DISTRICT	YEAR	DEC/JUDG	UNPUB	DISTRICT	YEAR	DEC/JUDG	UNPUB
FIRST	81	44.0	38.3%	THIRD	81	47.7	44.8%
	82	47.3	47.8%		82	51.3	55.2%
	83	61.7	52.1%		83	59.3	51.7%
	84	69.0	60.0%		84	65.7	53.4%
	85	58.3	51.8%		85	45.0	45.6%
	86	59.7	53.4%		86	51.0	47.5%
	87	58.3	56.1%		87	64.0	56.5%
SECOND	81	55.3	63.4%	FOURTH	81	35.0	43.9%
	82	61.7	71.4%		82	57.0	62.2%
	83	61.7	69.0%		83	68.0	64.2%
	84	52.0	66.4%		84	56.0	59.8%
	85	48.7	66.4%		85	56.0	64.4%
	86	42.7	62.7%		86	61.3	58.2%
	87	55.3	70.9%		87	65.0	67.5%

Chart Four plots the percentage of unpublished decisions against the number of decisions per judge and shows the regression line which provides the best fit for the data points. It is apparent that the line does not fit the data points nearly as well as it did in the previous charts.

Table Nine reports the results of applying the same statistical measures as before. As expected, the correlation coefficient for Indiana (.47) is much lower than for Illinois (.68) and California (.70). Because it passes the .05 significance test, however, the chance of there being no linear relationship between productivity and the percentage of unpublished decisions is still less than 5%. The Indiana model predicts a 1% increase in the percentage of unpublished decisions would enhance the courts' productivity by .44 decisions per judge, which is smaller than the trade-off shown in the Illinois or California models.

52. The *Annual Reports* could not be used because they give no breakdown of published and unpublished decisions. The number of decisions listed in the *Northeastern Reports* differs by as much as 10% from the figure given in the *Annual Reports*. Unfortunately, the court's staff could not explain this discrepancy. Telephone interview with Ms. Blue, Deputy Clerk of the Indiana Appellate Court (Mar. 3, 1988).

Chart 4.
IMPACT OF SELECTIVE PUBLICATION
ALL INDIANA DISTRICTS

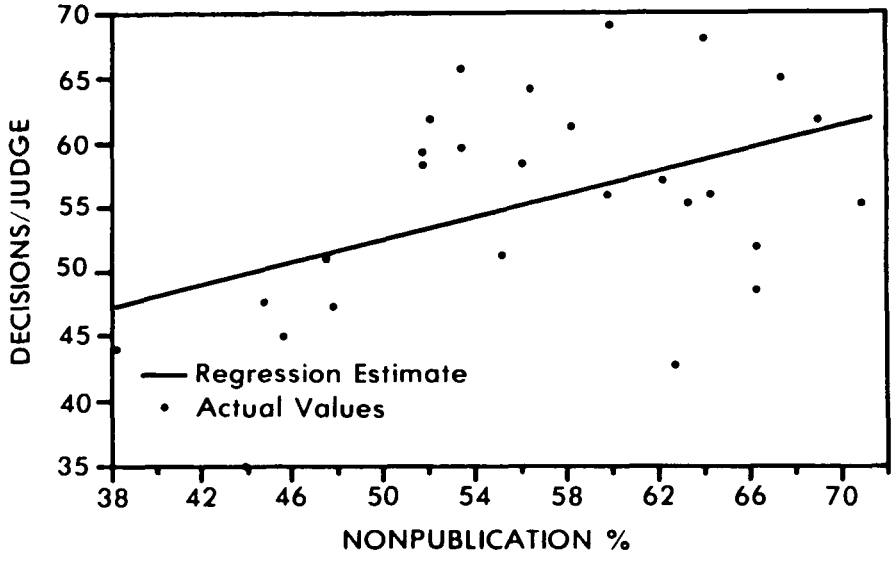


TABLE NINE: RESULTS FOR INDIANA DATA

Correlation With Dec/Judg

Unpub R = .47 Significant (.05) = YES

Regression Model

Dec/Judg = 30.5 + .44 * Unpub

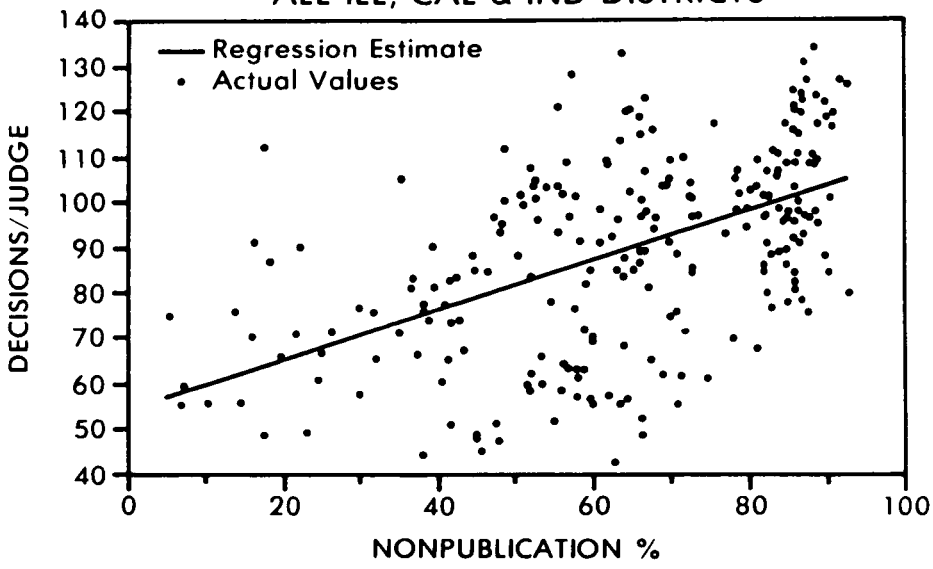
R Squared = .22

D. Productivity in All Three States

Chart Five plots the percentage of unpublished decisions against the number of decisions per judge for all districts, divisions and years included in the study. Again, it shows the regression line that provides the best fit for the data points.

Table Ten shows the results of applying the same statistical measures as before. As expected, the correlation coefficient of .53 lies between the higher values for Illinois (.68) and California (.70) and the lower value for Indiana (.47). This coefficient passes the .05 significance test. The three-state model differs only slightly from the Illinois model. It predicts that a 1% increase in the percentage of unpublished decisions would enhance the courts' pro-

Chart 5.
IMPACT OF SELECTIVE PUBLICATION
ALL ILL, CAL & IND DISTRICTS



ductivity by .55 decisions per judge; the Illinois model predicts an enhancement of .57 decisions per judge.

TABLE TEN: RESULTS FOR ALL THREE STATES' DATA

Correlation with Dec/Judge

Unpub R = .53 Significant (.05) = YES

Regression Model

Dec/Judg = 54.1 + .55 * Unpub

R Squared = .28

Technically, the model shown in Table Ten violates the usual assumption that the data points result from independent observations.[53] The 243 data points on which this model is based were collected from 19 districts and divisions, not 243 districts and divisions. To test whether this technical violation matters, each district's and division's average percentage of unpublished decisions and average number of decisions per judge were calculated, yield-

53. M. NORUSIS, *supra* note 37, at 138. As Norusis explains, the regression model assumes that all observations are statistically independent, so that they are in no way influenced by each other. Repeated measures from the same experimental unit violate this assumption. *Id.*

ing one data point per unit for a total of 19 independent observations. The correlation coefficient (.47) for these data points passed the .05 significance test, and the regression model differed very little from the model shown in Table Ten.[54]

E. General Conclusions

The present study finds that productivity correlates with the percentage of unpublished decisions. This finding contrasts with that made by Reynolds and Richman, who found no such correlation when they examined the federal circuit courts' data for the 1978-79 reporting year.[55] The two built-in limitations in their study probably explain, however, why they might have missed the correlation found both here and by Marvel and Moody.

First, the 1978-79 reporting year gave Reynolds and Richman only eleven data points.[56] The number of data points is a crucial variable in the formula used to test for a significant correlation.[57] As that number decreases, the formula sets a higher threshold, which makes a correlation harder to prove.[58]

Second, their study neither accounted for nor controlled other variables that affect productivity. For example, their table shows that the Fifth Circuit had the second highest productivity despite having the third lowest percentage of unpublished decisions.[59] As they later note, the Fifth Circuit filed and received credit for many one-line decisions which said only: "Affirmed. See Local Rule 21."[60] A circuit issuing one-line decisions could easily have relatively high productivity despite having a relatively low percentage of unpublished decisions.[61] Thus, the effect of one-line decisions could hide the effect of selective publication.

The present study greatly reduced the chance for other variables to hide the correlation. It accounted for the most likely alternative

54. The model based on these period averages was: Dec/Judg = 49.5 + .59 * Unpub.

55. Reynolds & Richman, *supra* note 6, at 596-97.

56. *Id.* at 597, Table 7.

57. *See* M. NORUSIS, *supra* note 37, at 94; Marvel & Moody, *supra* note 29, at 421 (criticizing cross-section studies).

58. Reynolds and Richman cite an unpublished study by Professor Hoffman which apparently covered more than one year's data and still found essentially no relationship between nonpublication and productivity. Reynolds & Richman, *supra* note 6, at 595-96 nn. 60 & 65. Thus, the problem seems to run deeper than the number of data points.

59. *Id.* at 597, Table 7.

60. *Id.* at 603.

61. Marvel and Moody were unable to test for this effect because their data did not distinguish between very short memo opinions and those of normal length. Marvel & Moody, *supra* note 29, at 438-39.

source of productivity increases by including the research department expense per judge in the Illinois model. It tended to control variations in the methods used to boost productivity by focusing on state appellate courts and by limiting the number of states. For example, although the federal circuit courts vary in their use of one-line decisions,[62] the appellate courts of a single state will probably use one-line decisions either everywhere or nowhere. If the study had included more states, the failure to account for other variations in the courts' practices would probably have had the same effect that it seems to have had in the Reynolds-Richman study. A proper research design would have had to account for the many state-to-state differences identified by Marvel and Moody, including the number of staff attorneys per judge, the number of law clerks per judge, the percentage of memo opinions, the average panel size, the percentage of cases decided without oral argument, and the percentage of summary dispositions.[63]

A simple calculation shows that selective publication can have substantial value in coping with the caseload explosion. In 1987, the Appellate Court of Illinois filed 4,491 decisions, left 58.4% of them unpublished, and spent $1,271,008 on its research departments. If it had published all of its decisions, the Illinois model predicts that productivity would have declined by 33.3 decisions per judge, reducing total output by 1,465 decisions.[64] The state's taxpayers could have offset that reduction either by paying for more judges or paying for larger research departments.

The average cost for Appellate Court judges was $223,000 in 1987 — $80,000 for their salaries, $67,000 for their law clerks, and $76,000 for other items such as support staff and office rental.[65] Assuming that the state would have been unwilling to let the backlog of cases grow any larger, 24 extra judges would have been required to produce these 1,465 decisions.[66] Thus, selective

62. *See* Reynolds & Richman, *supra* note 6, at 603-04.

63. Marvel and Moody, *supra* note 29, at 431.

64. The reduction in productivity was calculated by multiplying the coefficient of Unpub (.57) by the projected decline in the percentage of unpublished decisions (from 58.4% to 0%). The result was 33.3 fewer decisions per judge. Multiplying this result by the number of judges (44) yielded an estimated reduction of 1,465 decisions. Technically, this estimate involves a small extrapolation beyond the data range, for the Illinois data table has no points where the percentage of unpublished decisions falls below 5%. *See supra* Table 4, column 4.

65. Telephone interview with Jacki Stemke, Administrative Office of the Illinois Courts (Aug. 25, 1988); Administrative Office of Illinois Courts, Accounting Division Report (unpublished tables giving the total cost for contractual services for each district).

66. Calculating the required number is complicated by the fact that adding more judges without spending more on the research departments would further reduce the

publication saved the taxpayers just under $5.4 million.

Expanding the research departments to help produce the decisions would probably have cost even more. To offset the projected decline in productivity, the research department expense would have had to rise by $128,000 per judge.[67] When multiplied by the 44 judges who served in 1987, the total cost would have been just over $5.6 million.

IV. THE PRECEDENTIAL VALUE STUDY

The price paid for selective publication is twofold. Some unpublished decisions might have contained valuable precedent that attorneys could have used to give better legal advice. The judges could also be spending so little time on their unpublished decisions that the results have become suspect.

Any opinion about a decision's precedential value is inescapably subjective. Two attorneys reviewing the same decision may reach opposite conclusions about whether it should have been published because they disagree about the decision's relative importance or about the level of importance that merits publication. The effect of these individual biases may be even greater if the attorneys represented the parties involved in the decision.

Individual bias may explain why different studies have drawn different conclusions about the precedential value of unpublished decisions. When Newbern and Wilson surveyed the parties' attorneys in certain Arkansas cases, nearly half faulted the court for not

courts' productivity due to the decline in the research department expense per judge. The model predicts that publishing all decisions would cut productivity from the 1987 average of 102.1 decisions per judge to the projected average of 68.8 decisions per judge. Adding 24 judges to bring the total to 68 would reduce the research department expense per judge by $10,196. The model predicts that this would further reduce productivity by 2.7 decisions per judge to an estimated 66.1 decisions per judge. At that rate, 68 judges would produce 4,494 decisions without selective publication, which is only three more than the 4,491 produced by 44 judges using selective publication. It should also be noted that increasing the number of judges could lower productivity somewhat through various diseconomies of scale, so that the required number of judges could run higher than the estimate given in the text.

67. The increased expense per judge was calculated by dividing the required productivity increase (33.3 decisions per judge) by the coefficient of Re$/Judg (.00026). This estimate involves a substantial extrapolation beyond the data range, however, because the Illinois data table has no points where this expense exceeds $43,000. *See supra* Table 4, column 5. Greatly expanding the research departments beyond their present size would probably prove inefficient, as there would be too few judges to make effective use of the greatly enlarged research staff. Thus, the estimate of $128,000 per judge is probably too low.

publishing the decision in their case.[68] On the other hand, Professors Reynolds and Richman found new law declared in less than one percent of their sample of unpublished federal circuit court decisions.[69]

Because the parties' attorneys will tend to think that the decision was more important than would an uninvolved attorney, the Newbern-Wilson survey probably overstates the extent to which unpublished decisions contain valuable precedent. But the Reynolds-Richman study may understate it. As law professors, Reynolds and Richman may have less-than-average need for the kind of information typically contained in unpublished decisions.

The present study used a two-step process of exclusion and review to determine how many Illinois decisions left unpublished in 1984 would have had significant precedential value. This process was designed to secure the opinions of well-qualified attorneys practicing in the areas of law most affected by those decisions. It was also designed to minimize the risk that individual bias would taint the final results.

The first step was to ask the parties' attorneys whether they thought that the court should have published the decision. It was assumed that these attorneys would tend to think that the decision had more precedential value than would an uninvolved attorney. Therefore, if none of them said that the decision should have been published, their opinion was accepted and the decision was excluded from further review.

If one or more of the parties' attorneys said that the decision should have been published, the second step was to ask for a review by the Illinois State Bar Association section council specializing in the area of law most affected by the decision. These section councils have from one to three dozen members, most of whom are practicing attorneys. The members are appointed on the basis of experience and recognition in the relevant field of law. The section councils generally delegated the review of each decision to one or more members. If the review was delegated to a single member, this member's vote was dispositive of the decision's precedential

68. Newbern & Wilson, *Rule 21: Unprecedent and the Disappearing Court*, 32 ARK. L. REV. 37, 39-41 (1978).

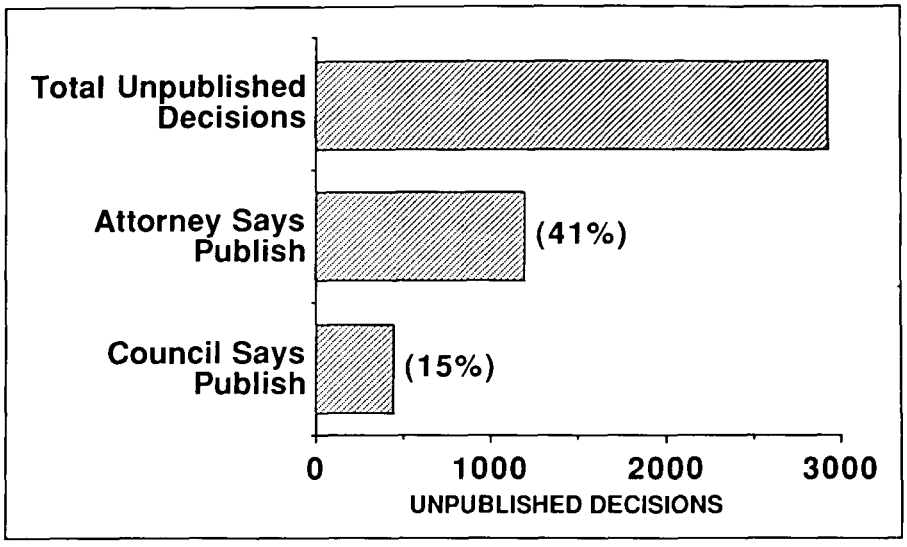
69. Reynolds & Richman, *supra* note 6, at 609. The National Center for State Courts reached a similar conclusion in their study of 1,000 unpublished decisions filed by the California Court of Appeal over a three-month period in 1975. *See* Western Regional Office of the National Center for State Courts, Report on Unpublished Opinions of the California Courts of Appeal 6-7, 11-12 (1976) (concluding that about 1.4% of these decisions warranted publication).

value. If the review was delegated to more than one member, the majority vote was dispositive. Over 150 section council members participated, ensuring that no member's biases had significant impact.

Chart Six summarizes the final results. The first bar shows the total number (2,929) of unpublished decisions filed by the Appellate Court of Illinois in 1984. The second bar shows that one or more of the parties' attorneys said that 41% of them (1,192) should have been published. The third bar shows that the section councils agreed that 15% of them (446) should have been published. The next five sections give the underlying data, the general conclusions, and some minor rule changes suggested by these results.

Chart 6

PRECEDENTIAL VALUE STUDY RESULTS



A. Collecting the Decisions

Before the exclusion and review process could begin, the unpublished decisions had to be collected. They were identified using data extracted from a database developed by the Administrative Office of Illinois Courts, supplemented by tables in the *Illinois Appellate Reports*.[70] When these decisions were compared with the court's published decisions, the comparison showed that the typical unpublished decision differs in subject area, length, disposition and subsequent history.

Table Eleven compares published and unpublished decisions in terms of subject area.[71] The two columns show a substantially different mix. Criminal justice accounts for only 34.0% of the published decisions, but 64.2% of the unpublished decisions. Thus, the typical published decision affects some area of civil law or procedure, while the typical unpublished decision affects criminal law or procedure.

The civil practice and procedure percentages indicate a further difference between published and unpublished decisions. This subject area accounts for fewer than one-tenth (5.6% out of 66.0%) of the published decisions in the civil subject areas, but more than one-fourth (9.2% out of 35.8%) of the unpublished decisions in those areas. Thus, an unpublished civil decision is far more likely to turn on procedural points.

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70. The number of decisions (2,929) identified in this way was .7% lower than the number shown in the *Annual Report*. This lower number is more reliable because it is based on a cross-check of three sources: (1) the Administrative Office database; (2) the tables in the *Illinois Appellate Reports*; and (3) the five districts' own decision lists. With the Administrative Office database as the starting point, several databases were developed containing the additional information obtained through the attorney survey and the section council review. The statistics given in this part of the article were developed from those databases. The author will supply copies and technical details upon request.

71. The survey questionnaire asked the parties' attorneys to identify the area of law most affected by the decision from a list of twenty subject areas corresponding to section councils of the Illinois State Bar Association. The attorneys' responses were usually accepted as the basis for the final coding. The author's research assistant coded the published decisions. The percentages for published decisions total more than 100% due to rounding. Table Eleven lists nineteen subject areas, rather than twenty, because no published or unpublished decisions were filed in the area of antitrust law.

TABLE ELEVEN: SUBJECT AREA MOST AFFECTED BY THE DECISIONS

Subject Area	% Published	% Unpublished
Administrative Law	3%	3%
Civil Practice & Procedure	6%	9%
Commercial, Banking & Bankruptcy	6%	3%
Constitutional Law	1%	0%
Corporate & Securities Law	2%	0%
Criminal Justice	34%	64%
Employee Benefits	1%	0%
Environmental Control Law	1%	0%
Estate Planning, Probate & Trust	3%	1%
Family Law	8%	7%
Insurance	5%	1%
Labor Law	2%	1%
Local Government Law	7%	1%
Public Utilities & Transportation	1%	0%
Real Estate Law	5%	4%
School Law	1%	1%
State Taxation	1%	0%
Tort Law	11%	5%
Workers' Compensation	4%	1%

Unpublished decisions are also much shorter than published decisions. The average length of the published decisions filed in 1984 was about thirteen double-spaced pages.[72] The average length of the unpublished decisions was only six double-spaced pages. More than 80% of the unpublished decisions were no more than eight double-spaced pages, and more than 90% were no more than ten double-spaced pages.

Unpublished decisions also affirm the lower court more often. The published decisions filed in 1984 affirmed the lower court 51% of time. The unpublished decisions affirmed it 78% of the time. On the other side of the coin, the percentage of reversals with or without a remand was 26% for published decisions and 13% for unpublished decisions.

Finally, unpublished decisions differ in their subsequent history. Parties filed petitions for leave to appeal from about 56% of the

72. The page length of the average published decision was estimated by: (1) counting the number of words on a sample of pages in the unpublished decisions filed by each district; (2) counting the number of words on a sample of pages in the *Illinois Appellate Reports*; (3) using these counts to estimate each district's ratio of typewritten to printed pages; (4) counting the page length (excluding headnotes) of every twentieth published decision; (5) multiplying it by the appropriate ratio; and (6) averaging these estimated page lengths.

published decisions, but from only 25% of the unpublished decisions. Similarly, the Supreme Court of Illinois granted 17% of the petitions from published decisions, but only 5% of those from unpublished decisions.[73]

B. The Attorney Survey

The parties' attorneys were surveyed on all but 367 of the unpublished decisions. These 367 decisions were *Anders* orders, which are filed when a criminal defendant's attorney seeks to withdraw because the appeal presents no issues of arguable merit.[74] These decisions essentially say that the court has reviewed the record and concluded that the attorney is right. They have no conceivable precedential value and were excluded without asking the parties' attorneys for their opinion.

Opinions were sought for the other 2,562 decisions by sending questionnaires to an attorney for each party (or group of parties) listed in the Administrative Office database.[75] The questionnaire asked whether the attorney felt that the decision should have been published, and, if so, why. It also asked about the area of law most affected by the decision, the attorney's level of experience, and the attorney's general opinion of the Illinois selective publication rule. If the attorney had more than one unpublished decision, the attorney filled out a separate questionnaire for each decision, but answered the background and general opinion questions only once.

A total of 4,994 questionnaires were sent, and 3,690 responses were received from 1,516 attorneys. The response rate (74%) was high for three reasons. First, the cooperation given by several public agencies ensured a high response rate for criminal justice deci-

73. The *Annual Report* shows that 1,476 petitions were filed and 166 petitions were granted in 1984. *See* 1984 ILL. ANN. REP. at 79-80. Some petitions filed or granted in 1984 were undoubtedly from decisions made by the Appellate Court in 1983, but it was assumed that these numbers would be approximately the same as for the Appellate Court's 1984 decisions. Subtracting the 726 petitions for leave to appeal from unpublished decisions from the total number of petitions left an estimated 750 petitions for leave to appeal from published decisions. This figure represents 56% of the 1,335 published decisions filed in 1984. Similarly, subtracting the 39 petitions granted from unpublished decisions from the total number of petitions granted in 1984 left an estimated 127 petitions granted from published decisions. This figure represents 17% of the number of petitions (750) just estimated. The figures for unpublished decisions were contained in the Administrative Office database.

74. *See* Anders v. California, 386 U.S. 738 (1967).

75. Questionnaires were not sent to parties who appeared *pro se*. In a few instances, a questionnaire could not be sent to an attorney because the database lacked the attorney's address.

sions.[76] Second, the controversial nature of the subject helped produce a large initial response. Third, follow-up telephone calls boosted the response rate by about ten to twenty percent.[77]

Because criminal appellate work is done by a relatively small number of attorneys who handle a large number of appeals, more than three-fourths of the responding attorneys were involved in civil rather than criminal appellate work. The responding attorneys had practiced law for an average of 15 years and had participated in an average of 37 appeals, including 31 in the Appellate Court of Illinois. The attorneys had received an average of 13 unpublished decisions from that court.

The attorneys who answered the general opinion question expressed approval of the Illinois rule 64% of the time. More than half of these attorneys qualified their approval, however, by saying that the rule is used too often. Various shades of disapproval were expressed by 29% of the attorneys, and 7% expressed no opinion. The attorneys' general opinions correlated with their years of legal experience. The more years that the attorney had practiced law, the more likely the attorney was to disapprove of the rule. On the other hand, the attorneys' general opinions did not correlate with their appellate experience. Having handled more appeals or received more unpublished decisions made the attorney neither more nor less likely to disapprove of the rule.

The question asking whether the decision should have been published produced significantly different responses from criminal and civil attorneys. The attorneys involved in the criminal justice decisions said 74% of the time that the decision should not have been published. The other responses expressed this opinion only 54% of the time. A further significant difference appeared in the answers given by appellants' and appellees' attorneys. For criminal justice decisions, the percentage who said that the decision should not have been published was 67% for appellants versus 83% for appellees. For the other decisions, the percentages were 45% for appellants versus 58% for appellees.

76. The State's Attorneys Service Commission and the State Appellate Defender's Office provided a 100% response on the decisions involving their offices, which handle nearly all criminal appeals in the Second through Fifth Districts. The Cook County State's Attorneys Office and the Cook County Public Defender's Office also cooperated, and they handle most of the First District criminal appeals.

77. Follow-up telephone calls were made to all nonresponding attorneys who: (1) had more than one unpublished decision; (2) were involved in a decision for which no response was received from any attorney; or (3) were involved in a decision which another attorney said should have been published.

After the responses were tallied individually, they were grouped by decision. One or more attorneys said that 928 decisions should have been published. All attorneys who responded on 1,369 decisions said that they were properly left unpublished or that they had no opinion about publication. No attorney responded on 265 decisions.

A closer look at the first group of decisions revealed substantial disagreement among the attorneys. The level of disagreement was tested by examining the 643 decisions in this group for which there were multiple responses. Of these, 466 decisions (69%) were ones where the response favoring publication was counterbalanced by at least one response opposing publication. Thus, the vote for publication was seldom unanimous.

The final results reported earlier in Chart Six include an allowance for nonresponses which assumes that the nonresponding attorneys' answers would not differ significantly from those given by the responding attorneys.[78] This assumption meant that a nonresponding attorney would have favored publication of about 79 of the 265 decisions for which there was no response. It also meant that a nonresponding attorney would have favored publication of about 185 decisions for which there was only a partial response. Thus, a response by all attorneys would have identified about 1,192 decisions (41%) that one or more attorneys would have said should have been published.

C. The Section Council Review

The 928 decisions actually identified by the responding attorneys were sent for review by the appropriate section councils. The section council members assigned to review a decision received a copy of the decision, the questionnaires returned by the parties' attorneys, their own questionnaire, and a set of instructions. The questionnaire asked them whether the decision should have been published, and, if so, why. The instructions told them to base their assessment on the needs of attorneys practicing in the area of law most affected by the decision.

The section councils provided 1,368 responses on 880 decisions. The councils said that the court should have published 344 of them. They said that 523 of them properly were left unpublished; they reached a tie vote on 13 decisions. The councils had not re-

78. Because the attorneys' responses differed for civil and criminal decisions, this difference was taken into account in estimating the nonresponding attorneys' probable responses.

sponded on 48 decisions by the time that the database had to be closed. The councils' assessments correlated well with the attorneys' agreement or disagreement about publication. When the attorneys agreed that the decision should have been published, the councils favored publication 61% of the time. When the attorneys disagreed, however, the councils favored publication only 27% of the time.

The final results reported in Chart Six include an allowance for nonresponses that assumes that the responses on unreviewed decisions would not differ from those on reviewed decisions. This assumption meant that the section councils would also have favored publication of about 83 of the estimated 264 extra decisions that would have been identified if all attorneys had responded to the survey. It meant that the section councils would also have favored publication of about 19 of the 48 decisions sent to them, but not reviewed before the database had to be closed. Thus, a full response at both levels would have identified about 446 (15%) decisions that should have been published.

Table Twelve shows the final results in the various subject areas. The bottom three entries highlight the overall result and the strikingly different results for criminal justice decisions and those affecting civil law or procedure. Only 9% of the criminal justice decisions were thought to have significant precedential value, but 27% of the decisions affecting civil law or procedure were thought to contain valuable precedent.

The percentages for the various areas of civil law and procedure follow no discernable pattern. The high percentages for school law and state taxation might suggest that the percentages would rise as the total number of published and unpublished decisions in the subject area declined. Plotting these numbers against each other disproved this hypothesis. Very few published or unpublished decisions were filed in the areas of corporate and securities law, constitutional law, employee benefits, and public utilities and transportation law, but the unpublished decisions in those areas contained essentially no valuable precedent.

TABLE TWELVE: FINAL RESULTS BY SUBJECT AREA

Subject Area	% Should Have Been Published
Administrative Law	25%
Civil Practice & Procedure	25%
Commercial, Banking & Bankruptcy	34%
Constitutional Law	0%
Corporate & Securities Law	0%
Criminal Justice	9%
Employee Benefits	0%
Estate Planning, Probate & Trust	22%
Family Law	22%
Insurance	21%
Labor Law	31%
Local Government Law	29%
Public Utilities & Transportation	0%
Real Estate Law	26%
School Law	50%
State Taxation	60%
Tort Law	36%
Workers' Compensation	32%
ALL DECISIONS	15%
CRIMINAL JUSTICE DECISIONS	9%
CIVIL LAW & PROCEDURE DECISIONS	27%

The comments made by the attorneys and section council members were checked to see whether they thought that the court had used selective publication to hide a bad decision, a sloppy decision, or one which would have publicly embarrassed the trial court. The attorneys said that selective publication was used to hide a bad decision in 19 (.6%) instances. In only one of them did a section council member support the attorney's complaint.[79] The attorneys said that selective publication was used to hide a sloppy decision in 23 (.8%) instances. In only one of them did a section council member support the attorney's complaint, and then only to agree that the court had ducked the main issue.[80] The attorneys said that

79. The council members did not review two of these decisions because the complaining attorney said that they should not have been published; the council members did not complete their review of two others before the database had to be closed. Two complaints that the decision misstated the issues and record could not be reviewed because the briefs and record were not included in the review package. (The more common complaint was that the court had departed from precedent.) Even if all unreviewed or incompletely reviewed complaints were valid, the valid complaints would still account for only .2% of the decisions.

80. The council members did not review one decision because the complaining attorney said that the decision should not have been published; they did not complete their review of three others before the database had to be closed; and they could not review

selective publication was used to avoid publicly embarrassing the trial court in 6 (.2%) instances. In only one of them did the section council member think that the trial court had clearly mishandled the case, and this member thought that the decision still had no interest to anyone but the parties.[81]

D. General Conclusions

The finding that 15% of the unpublished decisions contained valuable precedent differs from the Reynolds-Richman finding that new law was declared in fewer than 1% of the unpublished federal court decisions that they examined.[82] This difference probably indicates that an attorney who practices in the area of law most affected by an unpublished decision tends to find it more valuable than would two law professors who may not teach in that area.

Nevertheless, the higher percentage still supports the statement by Reynolds and Richman that lost precedent is not a major problem.[83] When attorneys who practice criminal law find that 91% of the unpublished criminal justice decisions would not be helpful to them, the harm in not publishing is minimal. The harm is greater when 27% of the unpublished decisions affecting civil law and procedure would have had value to attorneys practicing in those areas, but this percentage shows a need for minor rule changes and greater sensitivity, not the abandonment of selective publication.

The finding that fewer than 1% of the unpublished Illinois decisions could reasonably be described as sloppy also differs from the Reynolds-Richman finding that 46% of the unpublished federal circuit court decisions failed to meet minimum standards.[84] Unlike the other difference, however, this one matters. For Reynolds and Richman say that sloppy decisions are a serious problem with selective publication.[85]

According to them, an unpublished decision fails to meet mini-

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seven complaints that the decision misstated the issues and record because the briefs and record were not included in the review package. (The more common complaint was that the decision mishandled precedent or that it contained sloppy writing.) Even if all unreviewed or incompletely reviewed complaints were valid, the valid complaints would still account for only .4% of the decisions.

81. The council members did not complete their review of two decisions before the database had to be closed. Even if both unreviewed complaints were valid, the valid complaints would still account for only .1% of the decisions.

82. Reynolds & Richman, *supra* note 6, at 609.

83. *Id.*

84. *Id.* at 602, Table Ten (46% is the average of the percentages of unreasoned opinions reported for the various circuits).

85. *Id.* at 603.

mum standards if it fails to say what the case is about or gives no reasons for the decision.[86] Because the Illinois selective publication rule requires that every unpublished decision "succinctly state the facts, the contentions of the parties, [and] the reasons for the decision,"[87] an unpublished Illinois decision would fail to meet these standards only if the Illinois court violated this part of the Illinois rule. Other courts may not have this provision in their rules, but they may still file reasoned decisions as a matter of custom or constitutional command.[88] Thus, substandard decisions are neither an inevitable nor universal result of selective publication.

Finally there are two reasons why selective publication could raise productivity without lowering quality significantly. First, an unpublished decision addresses only the parties and their attorneys, and meeting their needs can take fewer words and less time than would meeting the needs of persons unfamiliar with the case. Second, selective publication encourages judges to skip the final drafts that only marginally improve the decision, so the frosting is lost but not the cake.

E. Suggested Rule Changes

Although selective publication produces far greater benefits than harm, the rules still could be changed to make them work better. The following five changes would be beneficial and would not increase the courts' workload significantly.

1. New Issues Under A Constitution, Statute, Ordinance Or Court Rule

The largest group of unpublished Illinois decisions that should have been published were the thirty-six decisions thought to involve important new issues under a statute, ordinance or court rule. One view expressed by the attorneys was that selective publication is denying them some extra guidance they need in interpreting statutes.

Attorneys tend to think that a statute has no sure meaning until a court says what it means. Some believe that a statute is only evidence of the law until interpreted by the courts,[89] and others

86. *Id.* at 601-02 n.75.

87. ILL. REV. STAT. ch. 110A, para. 23 (1987). The rule further requires that the decision state the disposition and the names of the participating judges.

88. *See, e.g.*, CAL. CONST. art. VI, § 14 ("Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.")

89. *See* W. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 193 (1980).

have had hard experience with the occasional decision interpreting a statute in an unexpected way. For example, courts interpret the word "shall" to mean "may" in some statutes,[90] and "may" to mean "shall" in other statutes.[91] As a result, a decision saying that "may" means "may" or "shall" means "shall" has precedential value, due to the assurance it gives that the particular statute will not receive one of these unexpected interpretations. Attorneys need not fear an increase in the number of published decisions interpreting statutes because the annotated statutes organize these decisions so well. They are divided by statute and subdivided by topic; thus, they tend not to be commingled with a large number of irrelevant decisions.

The selective publication rule adopted by Michigan requires publication of decisions considering new constitutional and statutory issues, as well as ordinances and court rules.[92] Adding a criterion of this kind could remind courts of the attorneys' need for more guidance in this area.[93]

2. A Procedure To Request Publication

The parties' attorneys asked for publication of only 19 of the 928 decisions that one or more of them said should have been published. The attorneys' comments show that many were unaware of their right to request publication. Table thirteen shows that, when this study was conducted, more than two-thirds of the rules said nothing about publication requests.[94]

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90. *E.g.*, People v. Baker, 123 Ill. 2d 233, 526 N.E.2d 157 (1988).

91. *E.g.*, Laue v. Leifheit, 105 Ill. 2d 191, 473 N.E.2d 939 (1984).

92. MICH. APP. R. 7.215(B)(2).

93. The suggested change could be made by adding the following language to describe the new criterion: "the decision involves an important new legal issue under a constitution, statute, ordinance or court rule."

94. Illinois has since amended its rule to include a provision allowing for publication requests. ILL. SUP. CT. R. 23, 124 Ill. 2d R.11 (amendment effective Jan. 1, 1989).

TABLE THIRTEEN: PROVISION FOR PUBLICATION REQUESTS

Category	States & Circuits						
Express provision for publication requests	CA 4TH	KS 7TH	MI 9TH	NC D.C.	OK FED	WI	1ST
No express provision	AK	AZ	AR	CO	GA	HI	IL
	IN	IA	KY	LA	MD	NJ	NM
	OH	PA	TN	TX	VA	WA	2ND
	3RD	5TH	6TH	8TH	10TH	11TH	

Adding a provision for publication requests could prove harmful if courts had to spend substantial time acting on them. Parties probably will not make these requests as a matter of course, because they will want to focus the court's attention on the merits of the case rather than the publication decision. In addition, public law offices are often involved in the unpublished criminal justice decisions, and these offices have a strong incentive to screen out marginal requests so that the requests that they do make will have greater credibility.

Adding a provision for publication requests could also prove harmful if institutions facing repeat litigation made these requests, but their one-time opponents did not.[95] For example, an insurance company might have strong reason to ask for publication of a favorable decision interpreting its policy, but an insured would have no reason to ask for publication in the opposite circumstance if the claim were a one-time claim. When an institution appears on one side of the case, however, another institution or group is often involved on the opposite side. For example, a member of the plaintiff's personal injury bar will often represent the insurance company's opponent. Similarly, criminal justice appeals often involve public law offices on both sides of the appeal.[96]

Some attorneys might hesitate to make requests when a higher court might grant a hearing or the intermediate court might grant a rehearing. To overcome their hesitation, the rules could permit a request even after the decision becomes final. A provision incorpo-

95. Circuit Judge Richard Posner has expressed this fear. *See* R. POSNER, *supra* note 3, at 126.

96. The State's Attorney's Service Commission or the Cook County State's Attorney was opposed by the Appellate Public Defender's Office or the Cook County Public Defender 78% of the time in the unpublished criminal justice decisions that the Appellate Court of Illinois filed in 1984.

rating this feature is given in the margin below.[97]

3. Citation of Conflicting Decisions

One problem inherent in selective publication rules is that conflicting decisions may remain undiscovered. A more serious problem is that attorneys who know of conflicting decisions may be unable to bring them to the courts' attention. Because the no-citation rules prohibit citation in unrelated cases, an attorney would risk censure for citing unpublished decisions to show such a conflict. Conflicts in the law were a matter of concern to a substantial number of attorneys and section council members who participated in the study. It is unclear how many perceived conflicts were with prior unpublished decisions. Nevertheless, 180 attorney responses and 150 section council responses gave conflicts in the law as a reason for publishing the decision.

The problem a no-citation rule can cause is illustrated by a recent Indiana case.[98] There, an attorney lost a case on one side of an issue after having lost a prior case on the opposite side of the same issue. When he called the Indiana Court of Appeals' attention to the conflict, the court rebuked him for violating the no-citation rule. He then asked the Supreme Court of Indiana to resolve the conflict, but the court declined to do so.

However rare this worst-case scenario might be, it so discredits selective publication that the rules should be revised to avoid it. When attorneys are seeking a hearing in a higher court or a rehearing in the intermediate court, the rules should permit them to cite unpublished decisions to support a contention that conflicting decisions exist within the intermediate court. Permitting citation for this limited purpose would not give unpublished decisions precedential value, nor would it force attorneys to begin collecting

97. The suggested change could be made (with appropriate changes in court designation and method of review) by adding the following language:

> Any party may request that the panel change the designation of its decision from an unpublished decision to a published decision. A party shall make a request for publication by filing with the clerk four copies of a letter stating why the decision should be published and by mailing a copy of the letter to each party not joining in the request. The time to file a request for publication extends until 30 days after the later of the following events: (1) the time to file a petition for leave to appeal to the supreme court expires; or (2) the supreme court denies leave to appeal.

98. Qazi v. Qazi, 503 N.E.2d 894 (Ind. 1987) (Shephard, J., dissenting from denial of transfer). The slip opinion gives additional facts not appearing in the printed opinion. Qazi v. Qazi, No. Z. 585-A-172 slip op. (Ind. filed Feb. 10, 1987).

them.[99] Instead, it would merely provide the means for resolving a conflict in a proceeding that might otherwise unwittingly create or continue the conflict.[100]

4. Decisions With Separate Opinions

Many attorneys find it incongruous that the court may file an unpublished decision in a case in which a dissenting or concurring opinion is also filed. Their general sense is that a decision should be left unpublished only if the law is already clear. They further believe that a decision accompanied by a separate opinion must have some precedential value.

Unpublished decisions rarely provoke concurring or dissenting opinions. Of the 2,929 unpublished Illinois decisions filed in 1985, only 21 (.7%) had dissenting opinions and only 2 (.07%) had concurring opinions. Contrary to the conventional wisdom, more than two-thirds of these decisions were found to have had minimal precedential value. Nevertheless, public confidence in selective publication would be enhanced at little cost if it were known that the judges' disagreements will always appear in the official reports where everyone can see them.

Judge Nichols opposes automatic publication of these decisions on the ground that it would "work adversely on the dissenter, constraining him not to dissent.[101] He adds that he would never insist on publication of a decision from which he dissented because "it would result in making the decision I objected to precedential instead of nonprecedential . . . and I would be 'bound' by it afterwards."[102] His first argument assumes wrongly that an automatic rule will cause judges to vote for a result that they consider wrong on the merits. His second argument implies that the current rules permit judges to vote against publication based on nothing more than their desire not to be bound by the decision in a future case.

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99. Unpublished decisions are already saved by the State's Attorneys Service Commission, the Appellate Public Defender, the Cook County State's Attorney, and the Cook County Public Defender.

100. The suggested change could be made by adding the following italicized words (with appropriate changes in court designation and method of review) to the critical sentence appearing in many no-citation rules:

> They may be invoked, however, to support contentions such as double jeopardy, res judicata, collateral estoppel, or law of the case, *and they may be invoked in a petition for leave to appeal to the supreme court or in a petition for rehearing in the appellate court to support a contention that conflicting decisions exist within the appellate court.*

101. Nichols, *supra* note 1, at 925.

102. *Id.*

Such an argument can only diminish public confidence in selective publication.

5. Reaffirmation of Ancient Authority

As Table Two indicated, most selective publication rules state that a decision should be published if it modifies or questions an existing rule of law (criterion 1). This implies that the decision should not be published if it merely reaffirms an existing rule of law. Although this kind of decision usually has minimal precedential value, it may have far greater value if it reaffirms a rule of law that has not been applied in many years. Such a decision provides assurance that intervening changes in the law and the passage of time have not made the old rule obsolete. In addition, publishing the decision ensures that the rule that it reaffirms will appear in computer-assisted research databases like Lexis and Westlaw, which exclude many older appellate decisions.

The Michigan rule requires publication of this kind of decision.[103] Similarly, the New Jersey rule requires publication if the decision resolves a substantial question on which the only case law antedates the 1948 reorganization of that state's court system.[104] Because different areas of law experience different rates of change, the Michigan provision seems preferable to one setting a specific cut-off date.[105]

V. CONCLUSION

Selective publication is beneficial, and the minor rule changes recommended here would make it even more beneficial. The rules have substantially increased the courts' productivity at a modest cost in terms of lost precedent and sloppy decisions. Of greater concern, than selective publication, are the rising appellate caseloads that selective publication rules make necessary. Unless we keep the judges' caseloads at reasonable levels, we will face far more serious problems than a modest loss of precedent and an occasional sloppy decision.

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103. MICH. APP. R. 7.215(B)(4).

104. New Jersey Standards for Publication of Judicial Opinions 2 (1974).

105. The suggested change could be made by adding the following language to describe the new criterion: "the decision reaffirms a principle of law not applied in a recently reported decision."