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Parades of Horribles, Circles of Hell: Ethical Dimensions of the Publication Controversy

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Abstract

This article examines the ethical dimensions of the controversy over no-citation rules and current publication practices. In the literature concerning that controversy, ethical concerns are often mentioned, but usually in tandem with other concerns. Professor Caudill isolates and categorizes the different types of ethical dilemmas, and demonstrates that at different levels of the controversy, the ethical concerns are different. He identifies three levels—the controversy over no-citation rules, the broader controversy over publication practices, and the even broader controversy over privatization of law (the so-called disappearing trial, ADR, and the end of law as we know it).

**PARADES OF HORRIBLES, CIRCLES OF HELL:
ETHICAL DIMENSIONS OF THE PUBLICATION CONTROVERSY**

David S. Caudill*

“...Abandon every hope, all you who enter.”

Dante, *Inferno*, Canto III: 9¹

I. INTRODUCTION: PARADES OF HORRIBLES

Rhetorical recourse to a “parade of horrors” need not have a pejorative connotation. In policy debates, for example, opponents and proponents of a new rule or regulation typically rely on predictions of the adverse effects of accepting or rejecting, respectively, the proposal. Sometimes the benefits of a particular course of action—whether to change or to keep a law—will outweigh the realistically identified burdens. Nevertheless, in the controversy surrounding proposed Rule 32.1² and publication practices generally, many suspect that the dueling parades of horrors are exaggerated. Indeed, as Professor Stephen Barnett points out, if proposed Rule

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¹ THE DIVINE COMEDY OF DANTE ALIGHIERI, vol. 1, INFERNO 55 (ed. & trans. Robert M. Durling, 1996).

² Rule 32.1 of the Federal Rules of Appellate Procedure, entitled “Citing Judicial Dispositions,” is a proposed amendment published for comment in August 2003 by the Advisory Committee on Appellate Rules; if adopted, the rule would allow citation to unpublished opinions in every federal circuit.

32.1 would be as disastrous as its opponents claim, then the majority of federal circuits would be rushing to prohibit citation of unpublished opinions in their own rules;³ conversely, if prohibiting citation of unpublished opinions was as problematic as the proponents of Rule 32.1 claim, then the four circuits that prohibit citation would embrace the salvation offered by Rule 32.1. Since both “systems” of citation are currently in place, both sides in the Rule 32.1 debate can claim that the other side has no evidence to support its predictive parade of horrors. As to the broader but related issues of whether current publication practices are pragmatically necessary or extremely troubling, both sides in that debate also enlist parades of horrors (that are likewise susceptible to charges of exaggeration).⁴ Significantly, however, supporters of such practices as unpublication and depublication predict a dire situation if it were otherwise, while critics seek to disclose the hidden parade of horrors that now exist. Finally, when defenders of no-citation rules and the practice of writing unpublished opinions respond, they unwittingly create a parade of horrors by virtue of their justificatory revelations. Lots of parades here, so let me explain.

The first parade of horrors, offered in support of Rule 32.1, includes (i) the hardships on attorneys who have to figure out the conflicting citation rules in each circuit; (ii) First Amendment and prior restraint concerns (“no-citation rules...are profoundly antithetical to American values”⁵); (iii) the dissonance between no-citation rules and the fact that unpublished

³ See *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rule-Making, and Federal Public Defenders*, in this symposium, _____ WASH. & LEE L. REV. _____ (2005).

⁴ Regarding pragmatic necessities, see generally Boyce F. Martin, *In Defense of Unpublished Opinions*, 60 OHIO ST. L. J. 177 (1999); regarding the extremely troubling aspects of current publication practices, see generally Penelope J. Pether, *Inequitable Injunctions: The Scandal of Private Judging in U.S. Courts*, 56 STAN L. REV. 1435 (2004).

⁵ See Memorandum from Patrick Schiltz to Advisory Committee on Appellate Rules, March 18, 2004, at 46 (discussing arguments for adopting Rule 32.1).

opinions are available, insightful, used by attorneys, and cited by judges; (iv) arbitrariness and injustice because like cases may not be treated alike; (v) lack of judicial accountability and loss of public confidence in the judiciary; and (vi) the appearance—perhaps reality—that wealthy litigants get published opinions while the poor do not.⁶ If that parade appears to you as exaggerated, then—with apologies to comedian Jeff Foxworthy⁷—you may be an opponent of Rule 32.1

The second parade of horrors, offered by opponents of Rule 32.1 is even bigger, reflecting both the benign fact that opposition to a controversial proposal is traditionally more likely than support,⁸ *and* the unseemly fact that the opposition to Rule 32.1 was an organized campaign—repetitive, even identical, comments were sent to the Committee, and about 90% of the 500+ comments received were opposed.⁹ That parade of horrors included the predictions (i) that judges will be misled by illegitimate citation of unpublished opinions; (ii) that judges would be overwhelmed by the duty to write better unpublished opinions, and consequently have less time to write published opinions, thereby rendering the (*actual!*) law less clear, thus leading to more litigation *and* even greater demands on judges’ time, all of which will result in more one-line dispositions; (iii) the body of case law would be (somewhat contradictorily, given the previous

⁶ *See id.* at 46-58.

⁷ For those readers unfamiliar with this (Southern) cultural reference, Jeff Foxworthy, star of the current television show “Blue Collar TV” (Warner Bros.), became famous in the 1990’s with his “You might be a redneck...” routine. *See, e.g., The Best of Jeff Foxworthy: Double Wide, Single Minded* (CD released Sept. 2, 2003, Warner Bros. Records, Nashville) (“If you’ve ever cut your grass and found a *car*, you might be a redneck”).

⁸ *See Barnett, supra* note 3, at ____, quoting Judge Levi, Chair of the Standing Committee on Rules, Transcript at Hearing, April 13, 2004, p. 121 (“It’s quite typical in these rules matters that the overwhelming letters, particularly on a controversial matter, will be opposed. There’s almost a tradition of that.”).

⁹ *See Memorandum, supra* note 5, at 2.

prediction) vastly increased, imposing a hardship on attorneys; and (iv) parties will have to wait longer for judicial resolution, which costs money and discriminates against the poor.¹⁰

In the broader debate over publication practices generally, the parades of horrors offered by defenders and critics overlap somewhat with the two Rule 32.1 parades. Defenders point to the crises that led to current practices, including overwhelming precedent, technological and storage problems and inefficiencies, and increasing judicial workload; critics highlight the sacrifice of principled decisionmaking, the loss of judicial legitimacy, compromises of transparency and accountability, an increased inconsistency or lack of uniformity, the advantaging of repeat-players and corresponding subordination of the poor and marginalized.¹¹

A fifth and final parade of horrors, however, arises from these debates almost in reverse or by accident—I refer here to the response by Judge Kozinski to criticism of the no-citation rule, which response also defends the practice of unpublication as a necessity.¹² Judge Kozinski’s

¹⁰ See Memorandum, *supra* note 5, at 34-46. For an argument that this parade of horrors is exaggerated, see Stephen R. Barnett, “In Support of Proposed Federal Rule of Procedure 32.1: A reply to Judge Kozinsky”, *THE FED. LAWYER*, Nov/Dec 2004, at 32-37.

¹¹ See Martin, *supra* note 4, at 180 (prior to defending the necessity of unpublication practices, Judge Martin catalogues some of the criticisms to which he responds: “loss of precedent...; sloppy decisions...; lack of uniformity...; difficulty of higher court review...; unfairness to litigants [who] deserve published opinions; less judicial accountability...; less predictability...”); see also Pether, *supra* note 4, at 1439-41:

[T]he three main practices of private judging developed in the U.S. Courts—contemporary unpublication, depublishing, and stipulated withdrawal—...sacrifice principled decisionmaking [and] imperil the legitimacy of the judicial system and thus the rule of law.... [T]here is credible evidence of the tendency for the practices of private judging to corrupt the operation of the courts and the administration of justice....

¹² See Jan. 16, 2004 letter to Hon. Samuel A. Alito, Chair of the Advisory Committee on Appellate Rules, regarding Proposed Federal Rule of Appellate Procedure 32.1.

famous January 16, 2004 letter to Judge Alito, Chair of the Rules Committee, was intended to comfort the offended by offering a reality-check, an insider's view of why designating some opinions as unpublished was not a horror to be feared. In the process of his explanation, however, Judge Kozinski horrified many readers. Unpublished opinions are simply "not safe as precedent" given "the press of our cases"; many such "cases are badly briefed," and quite "often, there is a severe disparity in the quality of the lawyering between the parties"; and "unpublished dispositions—unlike opinions—are often drafted entirely by law clerks and staff attorneys"¹³—cold comfort, one might say, and hardly a picture of reassurance to litigants that the status quo needs no serious reform.

In his similar testimony before the House, according to one scholar, Judge Kozinski heretically argued that if unpublished

opinions were citable, the judges...might have "to pay much closer attention to their precise wording," [or] "agree on the precise reasoning," while the judges who dissent might have to make that fact known [and] might "have to pay much closer attention" to the decisions written by their colleagues.... Judge Kozinski's rationalizations...are not only outrageous, but in my view violate the fundamental principles of the...Code of Judicial conduct.¹⁴

Moreover, the very notion that unpublished opinions are written quickly by court staff or law clerks is (if you put yourself in the position of an anxious litigant on appeal) scandalous...or not, depending on your position in the publication controversy, and on which parades of horrors

¹³ *See id.* at 4-6.

¹⁴ Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV.1215, 1222 (quoting Judge Kozinski's testimony, Hearing on Unpublished Judicial Opinions Before the House Subcommittee on Courts, the Internet, and Intellectual Property, June 27, 2002, 107th Cong., available at: www.house.gov/judiciary/kozinski062702.htm).

you think are exaggerated.

The purpose of this article is to explore some of the ethical dimensions of the publication controversy. As I will show, there are different types of ethical challenges or dilemmas for lawyers and judges in each of the several “levels” of the controversy. In terms of Dante’s *Inferno*, lawyers and judges are condemned to different fates depending on the “circle of hell” in which they find themselves. Recall that in the structure of Dante’s hell, occupants of different levels suffer differently, with relatively little suffering in the first circle of hell, but significantly more suffering in the lower circles; indeed, the suffering increases at each level in proportion to the seriousness of the sin being punished. In my first circle of hell, I identify ethical problems created by no-citation rules; in the second circle of hell, I identify ethical problems that arise from the current context of publication practices generally; the third circle of hell represents what has been called the trend toward privatization of law, or “the end of law” as we know it, wherein a different set of ethical dimensions can be identified. It is my hope that this taxonomy helps explain why the heated controversy over Rule 32.1—which appears to some to be a tempest in a teapot or “Much Ado About Little”¹⁵—is so polarizing and important. In short, the Rule 32.1 debate represents or signifies a much deeper problem.

II. THE RULE AGAINST CITATION: THE FIRST CIRCLE OF HELL

Anyone who states that lawyers and judges have a common understanding of how to handle unpublished opinions is either

¹⁵ See Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm und Drang Over the Citation of Unpublished Opinions*, in this symposium, _____ WASH. & LEE L. REV. _____ (2005).

misinformed or less than candid.¹⁶

Comparatively speaking, the first circle of hell (Limbo) in Dante's *Inferno* is not that bad. For those virtuous unbelievers at this level who died unbaptized or otherwise preceded Christ, there is no physical suffering, but there is mental anguish in the knowledge that one will never see Him.¹⁷ Homer and Ovid, Socrates and Plato, Democritus and Euclid, among others, are suspended in Limbo, many of whom live in a "noble castle" surrounded "by a lovely stream."¹⁸

Likewise, the ethical dilemmas faced by attorneys because of no-citation rules are indirect and somewhat speculative. For example, the variation across circuits as to citation of unpublished opinions "means that petitioners face sanctions if they cite unpublished cases in certain circuits, yet risk negligence if they fail to do so in others."¹⁹ That risk exists throughout

¹⁶ Public Comment 03-AP-432, Proposed Rule 32.1 of the Federal Rules of Appellate Procedure, quoted in memorandum from Patrick Schiltz to Advisory Committee on Appellate Rules, *supra* note 2, at 94.

¹⁷ See *INFERNO*, *supra* note 1, at 72 (Canto IV: 31-43):

My good master [Virgil] said to me: "You do not ask what spirits you see? Now I wish you to know, before you walk further,

that they did not sin; and if they have merits, it is not enough, because they did not receive baptism, which is the gateway to the faith that you believe.

And if they lived before Christianity, they did not adore God as was needful: and of this kind am I myself.

Because of such defects, not for any other wickedness, we are lost, and only so far harmed that without hope we live in desire."

¹⁸ See *id.* at 75-77. "We came to the foot of a noble castle, seven times encircled by high walls, defended all around by a lovely stream." *Id.* at 75 (Canto IV: 106-108).

¹⁹ See David S. Law, "Strategic Judicial Lawmaking: An Empirical Investigation of Ideology and Publication on the U.S. Court of Appeals for the Ninth Circuit," mss. at 3, forthcoming in *CINCINNATI L. REV.*

the law, and therefore seems minimal. Indeed, Judge Kozinski remarks that the “argument that lawyers have difficulty figuring out the applicable rule doesn’t pass the straight-face test.”²⁰ A competent attorney will follow the applicable rules. As if that aphorism needed clarification, the A.B.A. in 1994 issued a formal ethics opinion concerning the ethical propriety of citing an unpublished opinion in a no-citation jurisdiction. Model Rule 3.4(c) would be violated, for “knowingly disobey[ing] an obligation under the rules of a tribunal,” and creative attempts to circumvent the prohibition—by calling the court’s attention to a prior decision for whatever use the court might make of it—were condemned as well.²¹

A more significant risk, perhaps, is created by the choice attorneys face, with respect to unpublished opinions, as to what constitutes competent research. Attorney rules of professional conduct require competence, diligence, good faith claims, and candor to the tribunal.²² If non-citable opinions are not precedential, but nevertheless represent prior decisions of a court, how are they to be used?

Consider a lawyer counseling a client concerning a proposed course of action. If the only legal authority is a non-citable case that permits the conduct, what advice can a lawyer properly give? Or what if the non-citable opinion forbids the conduct? Can the lawyer tell the client that he or she is safe to proceed because an adversary could not cite a case that has prohibited it? What if, during litigation, a lawyer asserts that an old precedent has never been followed? If the case has in fact been followed many times, albeit in un-citable opinions [that] merely “restate” the law, is his or her adversary expected to remain mute and deprive the court of information helpful in evaluating...the case? These scenarios

²⁰ See Jan. 16, 2004 letter, *supra* note 12, at 18.

²¹ See A.B.A. Formal Ethics Opinion 94-386R, quoting the A.B.A. Model Rules of Professional Conduct, Rule 3.4(c).

²² See A.B.A. Model Rules of Professional conduct, Rules 1.1, 1.3, 3.1 & 3.3.

present awkward ethical problems.²³

In another formulation, the president of the Los Angeles County Bar Association recently remarked:

One thing we don't know is what happens to a lawyer who misses nonpublished cases. Some disappointed client might sue for malpractice.... It's not that people don't look at unpublished opinions now; they do. The difference is the priority you have to give them.²⁴

Significantly, the problems of legal research—deciding what to read, how much weight to give to unpublished opinions, and what to use—persist regardless of no-citation rules. Both sides in the Rule 32.1 debate take the moral high ground and parade out the hardships on attorneys created by their opponent's position. Rule 32.1 supposedly increases the burdens of research, because if unpublished “opinions were published and citable, lawyers would have to search them to confirm that nothing useful was in them, thereby increasing the cost of legal research.”²⁵ Similarly, no-citation rules supposedly deprive attorneys of potentially useful insights and information from unpublished opinions—advocates are handicapped by not being able to cite a case with facts very similar to their own.²⁶ Giving the benefit of the doubt to the proponents of such arguments, these hardships tend to cancel each other out—there will be hardships under

²³ David Greenwald & Frederick A.O. Schwartz, *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1157 (2002).

²⁴ See Stephanie Francis Ward, “Giving Their Opinions: Committee Backs Rule Allowing Lawyers to Cite Unpublished Decisions,” ABA JOURNAL *e-report*, April 23, 2004.

²⁵ See J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L. J. 433, 492 (1994).

²⁶ See Memorandum, *supra* note 5, at 47-48.

either system of citation. (Of course, the proponents of Rule 32.1 view the argument of Rule 32.1 critics with suspicion—attorneys already research unpublished opinions “so as to be able to advise clients about the legality of their conduct, predict the outcome of litigation, and get ideas about how to frame and argue issues before the court”;²⁷ conversely, opponents of Rule 32.1 claim that allowing citation to an opinion that was likely written by a staff attorney (as if it represents the view of the court) “is a particularly subtle and insidious form of fraud,” made possible by Rule 32.1’s creation of “a veritable amusement park for lawyers found of playing games” (who would use some of the “zillion” unpublished opinions that are “thin on the facts, and written in loose, sloppy language”).²⁸) Attorneys have learned to deal with whatever system in which they work, and they do not seem to be forced into acting unethically—incompetently, dishonestly, or undiligently—in either system. A more serious set of problems is associated with the question of what to do with unpublished opinions—what to read, use, and value. These ethical dilemmas are a product of nonpublication practices generally, in every jurisdiction.

Professor Fox, for example, argues that “any interference with my ability to be as zealous and effective an advocate as I can be,” such as no-citation rules, is frustrating:

Here I am providing the court with all the reasons why my client should prevail, [bringing] anything to the attention of the court that I think might be persuasive.... but the one thing I cannot cite is an unpublished opinion written by real judges who sat on the very court before whom I appear that involved real litigants in a real dispute that was actually decided using the English language as a way of informing the litigants how the court reached it decision.²⁹

²⁷ *See id.* at 58.

²⁸ *See* Jan. 16, 2004 letter, *supra* note 12, at 7, 21.

²⁹ *See* Fox, *supra* note 14, at 1218; *see also* A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.3 (diligence requires taking all measures to help a client).

The problem, of course, is that the unpublished opinion may *not* have been written by real judges, and it may *not* reflect how the real judges reached a decision, because of current publication practices. And those practices, discussed in the next section, are really what Fox is “railing against.”³⁰

III. PUBLICATION PRACTICES: THE SECOND CIRCLE OF HELL

And I came to a place where no light shines.

Dante, *Inferno*, Canto IV:151³¹

In the second circle of hell, Dante first confronts those who are punished for their sins, and the scene is grim—“much weeping assails” him, “all light is silent,” and the “infernal whirlwind, which never rests, drives the spirits before its violence; turning and striking, it tortures them.”³² Dante is here supposed to learn “to despise the lustful because they blaspheme Divine Justice which has placed them there,”³³ but he fails the test and sympathizes with them (eventually fainting, overcome with pity).³⁴ Moreover, Dante alludes to a certain solidarity or companionship as the sinners in the second circle of hell weather an infernal storm—while one

³⁰ See *id.* at 1218 (Fox “rail[s] against” Rule 32.1 as an “interference” with his ability to be a “zealous and effective advocate”).

³¹ See *INFERNO*, *supra* note 1, at 79.

³² See *id.* at 88-89 (Canto V: 26-27, 28, 31-33).

³³ See *DANTE’S INFERNO: THE INDIANA CRITICAL EDITION* 52 (trans. & ed. Mark Musa, 1995) (translator’s notes to Canto V).

³⁴ See *INFERNO*, *supra* note 1, at 93 (“Francesca, your sufferings make me sad and piteous to tears,” Canto V: 116-17; “...for pity I fainted as if I were dying,” Canto V: 140).

spirit speaks, the other weeps.³⁵ They do not suffer alone.

The sense that we're-all-in-the-same-boat also characterizes the history of publication practices, which transcends the Rule 32.1 debate by implicating all judges and lawyers. A dilemma for lawyers arises because they have to guess about the potential authority and value of unpublished opinions—they *might* reflect the court's opinion, but they might not.

If in fact judges reach the same result, but for different reasons, are not the litigants—if not the entire world—absolutely entitled to know that fact? Embedded in that undisclosed difference is a real opportunity for the party who loses the appeal to seek further review. The failure to agree on the principle that supports the result—if it were disclosed...—could demonstrate how tenuous the result really is....³⁶

How is it possible to be competent, in the system we learned to predict the outcome of controversies, if the cases most like ours have an unusually indeterminate status? On the other hand, this is just an ethical *strain*, since we're all in the same boat. The competence and diligence required by the rules of professional conduct are interpreted according to the conventions and practices of most lawyers, so it would be difficult to identify a violation on the basis of a “guess” about the status of an unpublished opinion.

A different set of ethical dilemmas, however arises for the judiciary in the era of unpublished opinions.

³⁵ *See id.*, Canto V: 139.

³⁶ Fox, *supra* note 14, at 1223.

First, the Code [of Judicial Conduct] tells judges that they shall perform their duties “diligently”.... [A] lawyer who failed to perform assiduously because he was too busy would have that excuse fall on deaf ears.... [D]oesn’t that mean that judges should not facilitate underfunding of the judiciary by delivering second class justice.

Second, judges are to be “faithful to the law”.... [J]udges have no greater calling than to decide cases fairly, impartially, consistently, and with a full explanation to the parties of the basis for the decision....

Third, judges are admonished to maintain “professional competence”.... [Doesn’t] a judge who fails to write opinions with sufficient clarity of language and adequate consideration of the opinions precedential value [violate] the obligation of competence?³⁷

These arguments, made by Professor Fox in the context of his criticism of no-citation rules, apply equally to the broader practice of unpublication. Of course, the practice of issuing unpublished opinions is a judicial convention—a systematic problem not likely to lead to sanctions. Nevertheless, a judge is arguably forced, by an overwhelming workload, to compromise the ideals set forth in the Code of Judicial Conduct.

But there is an even broader problem, with ethical implications for the profession. The practice of issuing unpublished opinions is symptomatic of the end or privatization of law in some fields of practice.

IV. PRIVATIZATION: THE THIRD CIRCLE OF HELL

Gluttony...has none of the potential charm of lust. [In the third

³⁷ *Id.* at 1225; see Canon 3, A.B.A. CODE OF JUDICIAL CONDUCT, regarding diligence (“A Judge Shall Perform the Duties of Judicial Office...Diligently”); regarding competence and being faithful to the law, see Canon 3(B)(2) (“A judge shall be faithful to the law and maintain professional competence in it”).

circle,] it is punished by eternal groveling in mire and filth. Whereas lust has the possibility of companionship, here each is alone in his degradation, cold and miserable.³⁸

With respect to the end of law, we are not all in the same boat. There is no rule or nationwide practice of privatizing law, but it happens in some fields of law—so it lacks the charm of universality. For example, Professor Carr and attorney Michael Jencks highlight the privatization of dispute resolution in the field of business law. While the common law of reported decisions traditionally developed “rules for allocating risk and deciding business and commercial disputes”, that system has been weakened by alternative dispute resolution (and judicial support of such privatization), managerial judging, the bureaucratization of the judiciary, and “the increased use of vacatur, selective publication and the adoption of no-citation rules, depublication, filings under seal and confidential settlements.”³⁹

As to the ethical dimensions of privatization, Diane Karpman warns that California’s Mandatory Fee Arbitration Act and the California Arbitration Act could together create “a future without reported decisions involving legal malpractice”:

If every California lawyer included a binding arbitration clause for client claims, public decisional law regarding legal malpractice would disappear.

...Once the [fee arbitration] “experience” is over, the client is back in binding arbitration of the remaining claims. Nothing involving attorney malpractice need see the light of day.⁴⁰

³⁸ Seth Zimmerman, commentary on his translation of Dante’s *Inferno*, available at http://home.earthlink.net/~zimls/summaries.html*6

³⁹ Chris Carr & Michael Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L. J. 183, 185, 189 (2000).

⁴⁰ Diane Karpman, , “Take a close look at binding arbitration,” CALIF. B.J., June 2004, at 16.

Some “smart practitioners,” therefore, may avoid the publicity of “publicity litigated claims of negligence.”⁴¹

Professor Judith Resnik suggests that alongside the 20th century trend toward increased “access to and reliance on adjudicatory” sites, “new doctrines and norms...support several kinds of ‘alternatives’, many of which lack adjudication’s transparency. The result is diminished reliance on and support for public processes.”⁴²

With “vanishing trials” comes fewer adjudicatory moments for the public to witness.... [C]ourt-based ADR processes often involve decisions by state-empowered actors who influence outcomes through informal discussions with lawyers and litigants that are aimed at “nudging” them to settlement. Some of those settlements are “sealed,” and sometimes those agreements also put materials produced by discovery under wraps....

[The concurrent, conflicting trend toward increased access to adjudicatory sites] may also render adjudication obsolete, as its specificity becomes uncomfortable when it produces visible disparities across similarly situated individuals....⁴³

One can imagine numerous areas of law where the anonymity of alternative dispute resolution would be appreciated (by those accused) and troubling (by those wronged)—civil rights, consumer protection, employment discrimination, and so forth. For my purposes, attorney malpractice and claims of ethical violations are paradigms of these phenomena. Private

⁴¹ *See id.*

⁴² *Procedure’s Projects*, 23 CIV. JUSTICE Q. 273, 273 (2004).

⁴³ *Id.* at 302-03.

adjudication or settlement of such disputes hinders the development of norms and guidelines (through precedent), and thereby increases the risk of inconsistent outcomes and differential treatment of like parties. The law governing lawyers is thereby impoverished, an ethical “burden” of sorts. But this is only part of the larger problem of the ethical burden on lawyers who inherit an impoverished body of precedent in any area of law—they cannot predict outcomes and advise clients with confidence.

Professors Perschbacher and Bassett call this privatization trend the “end of law,” the unintended result of settlement process and their encouragement, arbitration and private judging, unpublished opinions, deferential standards of review, the “harmless error” doctrine, minimalist judicial “standards” (rather than “rules”), memorandum dispositions, fewer oral arguments, the U.S. Supreme Court’s avoidance devices, vacatur, depublication, and stipulated reversal.⁴⁴

While the “vanishing trial” is an obvious phenomenon, less obvious is that

Law in the normative sense is vanishing—veiled by procedures that hide law from view and eradicated by procedures that eliminate existing law. The result of these procedures is privatized law, distorted norms, diminished case resolution and explanation, and loss of the full landscape of law.⁴⁵

Viewing these developments, some people are astonished—but some commentators are astonished that anyone would *be* astonished—of course the trial is disappearing, and the only surprise is that anyone familiar with law would be surprised.⁴⁶

⁴⁴ See generally Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 BOSTON U.L. REV. 1 (2004).

⁴⁵ *Id.* at 62.

⁴⁶ See Resnik, *supra* note 42, at 283. Critics of adversarial adjudication

V. CONCLUSION: DISCOURSES OF ASTONISHMENT

I agree with those opponents of Rule 32.1 who ask, in essence: “What’s the big deal? What’s the problem crying and for a solution? Are no-citation rules really inflicting a lot of harm on a lot of people?”⁴⁷

Even though I clerked for a federal court of appeals, practiced law in two different states, and currently teach in a law school, I was astonished to hear how many judicial opinions are designated “not for publication.” Yet the controversy over unpublished opinions is characterized by a discourse of astonishment—most judges seem to be astonished that I would be so naive. When those in the judiciary explain their workload and situation, as Judge Kozinski did, critics are astonished by their calm admission that unpublished opinions are “written in loose, sloppy language” by law clerks.⁴⁸ Judges are, in turn “baffled by” concerns about a body of secret law, using unpublished opinions to circumvent the law, or giving some parties special treatment.⁴⁹

argue that adversary trials require extravagant investments of resources to yield flawed conclusions. At the macro-level, the complaint is that “excessive adversarial legalism” is a drain on economic productivity.

Others dislike adjudication’s formalism that, they argue, promotes unnecessarily prolonged conflicts. They propose more user-friendly, less adversarial processes.... Such commentators believe that processes such as mediation and arbitration are more justice-generative than is adjudication.

Id.

⁴⁷ See Memorandum, *supra* note 5, at 90.

⁴⁸ See Jan. 16, 2004 letter, *supra* note 12, at 4, 21.

⁴⁹ See *id.* at 7.

With respect to Rule 32.1, Patrick Schiltz seems astonished that the controversy is so intense,⁵⁰ and Steven Barnett is astonished that Schiltz recognizes the virtues of Rule 32.1 but recommends no action at this time.⁵¹ Everyone is shocked.

Contrary to those who think that the publication controversy is not worth all the time and effort spent criticizing and defending current judicial practices, this is a big deal. Ethically, it implicates the ability of lawyers and judges to do their jobs competently. While some lawyers may not consider no-citation rules a huge problem, and while they may simply learn to live with the conventions of nonpublication and privatization, the Rule 32.1 controversy represents, and reveals, the problematic aspect of all of these phenomena—we do not have a principled and transparent system of justice wherein judges are responsible for creating rules and are accountable for inconsistencies. If that sounds exaggerated, you might be an apologist for the status quo.

⁵⁰ See Memorandum, *supra* note 5, at 89 (“For the most part, the advisory committees identify technical problems and propose uncontroversial solutions.... As a result, objections to proposed rules are usually neither many nor passionate”), 90 (“Rule 32.1 is one of those rare proposals that is highly controversial”).

⁵¹ See *id.* at 95 (Professor Barnett “does not share the committee’s concern that judges who oppose Rule 32.1 will try to undermine it by imposing restrictions on the citation of unpublished opinions....”).