Invisible Executions: Non-published Opinions In Capital Cases

By David Dow and Bridget McNeese

Introduction

Executions in America are typically invisible. [1] High profile executions are the exceptions that demonstrate the rule. When a particularly infamous murderer is put to death, such as Timothy McVeigh or Ted Bundy, the execution receives significant attention. Yet, in nearly all other cases, executions are banal. For example, just two days after the media circus that was McVeigh's execution, John Wheat was executed in Texas. [2] A day after that, Jay Scott was executed in Ohio. [3] Yet no one paid attention to Wheat or Scott. Occasionally a reporter from the local paper where the murderer or murder victim grew up might file a story, but the story is minor and the coverage local. Infamous murderers and milestone executions (like the three-hundredth execution in Texas) garner coverage. All others occur in darkness.

The haphazard coverage given to executions by the national media caused us to wonder whether the treatment of death penalty cases by state and federal appellate courts has been similarly haphazard. We decided to explore this question by examining the various stages of a death penalty case to ascertain whether state and federal courts dispose of the cases with published (public) or unpublished (hidden) decisions. Death penalty cases typically involve three appeals: the direct appeal, the state habeas proceeding, and the federal habeas appeal. We chose to examine these three stages of appeals in California, Florida, Georgia, Oklahoma, Texas, and Virginia, because they either have significant death row populations, carry out a significant number of executions, or both. Our methodology consisted of analyzing the frequency of publication in direct appeal opinions, state habeas opinions, and federal habeas appeals at the appellate level. [4]

The impact of non-published opinions

We were interested in examining publication rates for two different reasons. First, much as Rousseau loved mankind while hating man, the current media interest in the death penalty has focused on general themes while ignoring individual cases. Death penalty opinions, however, necessarily pertain to a particular case. Accordingly, a high number of unpublished opinions would be consistent with a general lack of interest in particular cases.

Second, and more important, the issuance of unpublished death penalty opinions has an impact on death penalty litigation. Opinions that are unpublished, especially state court opinions, are at times difficult to locate. Furthermore, even when unpublished opinions are available electronically, death penalty lawyers are required to finesse Byzantine and inconsistent rules concerning the permissibility of citing these unpublished cases. In some jurisdictions, unpublished opinions may be cited and are authoritative; elsewhere, unpublished opinions may be cited, but are not authoritative; in still other circuits, unpublished opinions may not be cited and lawyers who violate this "no citation" rule are subject to sanction. [See, State Citation Rules in this *JD* issue.]

Where lawyers are literally unaware of the existence of unpublished opinions, or where they are cognizant that certain opinions exist but are restrained from citing them, arbitrary injustice may result. If an unpublished opinion is favorable to a death row inmate, a lawyer who does not have access to the appellate court's reasoning, or who is precluded from citing to it, may be unable to press a similar argument in the case of his or her client. If the lawyer's client does not prevail on habeas under facts that are arguably indistinguishable from the favorable case that went unpublished, then arbitrariness results.

There has been an ongoing debate over unpublished opinions precisely because a significant percentage of state and federal appellate decisions are not published. [See, Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?, in this *JD* issue.] In the federal courts of appeal about eighty percent are unpublished. [5] Unpublished opinions appear in two forms: those that are denominated "not for publication" but are nevertheless distributed to companies that publish them electronically (like Westlaw or Lexis) and are possibly made available on the court's website; and those that are not published at all, either electronically or in official reporters.

Whatever the merits of unpublished opinions in the typical civil or criminal case, death penalty cases are different. In contexts other than the death penalty, if they choose to do so, the party most affected by the litigation can widely disseminate the opinion.

For example, an insurance company aggrieved or gladdened by an unpublished opinion can call attention to it in communications with others of similar interest. When in 1992 the Fourth Circuit held in an unpublished opinion that a hotel that had been damaged by Hurricane Hugo could not recover projected lost earnings from its insurer, [6] the insurance company alerted other insurers to the opinion by publishing it in a trade journal. [7] Other companies then used the decision as a basis to deny similar claims following a subsequent hurricane. [8] In contrast, in a capital case the person aggrieved by an unpublished opinion has been executed. To be sure, the condemned's lawyer or family members may call attention to the opinion denying relief, but the person with the most direct incentive to do so is dead. Judges can feel comfortable issuing tendentious, sloppy opinions because there is no one left alive with an interest in holding them up to shame.

Methodology

To date, no study has specifically examined the use of unpublished opinions in death penalty cases. However, publication rates in general are known. We therefore identified the three states with the largest death row population, Florida, California, and Texas, as well as three other states that have carried out a significant number of executions, Georgia, Oklahoma, and Virginia. We began by identifying the most recent executions in each of these jurisdictions. Several of the states maintain web sites that provide this information, and the Death Penalty Information

Post-AEDPA and Pre-AEDPA Data from Six Jurisdictions in Death Penalty Cases [10 & 13]

State	**Post-AEDPA Cases**	Direct Appeal Published	State Habeas Published	Federal Habeas Published	**Pre-AEDPA Cases**	Direct Appeal Published	State Habeas Published	Federal Habeas Published
California	10	10	3	10	3	3	0	2
Florida	10	10	6	8	5	5	4	4
Georgia	7	7	3	7	5	5	2	5
Oklahoma	10	10	9	7	5	5	3	3
Texas	20	10	2	3	5	5	0 [14]	3 [15]
Virginia	10	10	0 [16]	8	5	5	0	3
Total	67	57	23	43	28	28	9	20

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Center maintains a site that includes information for each of the states. [9]

We had some concern that enactment of the Anti-terrorism and Effective Death Penalty Act (AEDPA) in 1996 may have altered publication rates. Consequently, we supplemented the most recent executions by augmenting the list of cases with up to five executions in each state, selected at random that occurred between 1990 and 1995, prior to the enactment of the AEDPA.

Observations

An appellate court's decision as to whether to publish an opinion reveals something about how important the court believes that opinion to be. Several general conclusions are apparent from the publication data we studied:

- Either the direct appeal opinion or the state habeas opinion was published in one hundred percent of the cases in every jurisdiction other than Texas.
- With the exception of the Fifth Circuit (that includes Texas), every other court of appeal publishes a significantly higher percentage of its death penalty opinions than of its opinions generally. Federal circuit courts as a whole published about 65% of the capital habeas opinions, compared with an average of 20% for all federal opinions.
- The average word count of published opinions is significantly more than unpublished opinions. [14]

We began with two assumptions: that death penalty opinions would be as invisible in courts of appeal as they are in the media, and that they would be equally invisible irrespective of jurisdiction. Those assumptions proved false. Texas, as it happens, is unique. In Texas, state courts publish fewer opinions than the state courts in other jurisdictions that impose or carry out a significant number of death sentences. In addition, the Fifth Circuit has the lowest publication rate of any federal court of appeal in death penalty cases.

The root of the word "publication" is public, and the etymology of the word indicates precisely the reason why judicial opinions should be published. Publication ensures that the American judicial system remains a public institution and what passes for justice in a given case does not occur in secrecy.

Although the practice of not publishing a decision may be indefensible following this logic, it is understandable. Judges hide what they are not proud of. Indeed, in defending the practice of prohibiting citation to unpublished opinions, Ninth Circuit Judge Alex Kozinski argued that were the rule otherwise, "judges would have to pay much closer attention to the way they word their unpublished rulings." [15] In other words, if judicial sloppiness could be brought to the attention of the sloppy judges, not to mention the public generally, the sloppy judges would be forced to clean up their acts. [16]

We would hope that Judge Kozinski is correct in his assessment of what would happen if unpublished opinions were to have the light of day shone upon them, but it is not obvious how that is a negative. It seems apparent that judges write inferior opinions when they do not intend to publish them. In all contexts, but particularly where the state is taking a life, the argument that judges would have to work harder were their opinions to be subject to public scrutiny is, in a word, laughable.

Conclusion

One consequence of denying publication is dramatically illustrated by a Fifth Circuit fiasco in 1999. Two inmates were set to be executed on consecutive days: Danny Barber was set to die on a Tuesday, and Stan Faulder on Wednesday. Faulder's lawyers persuaded a federal judge in Austin that the State's clemency proceedings are constitutionally defective, and the judge therefore granted Faulder a stay. [17] Faulder's lawyers contacted Barber's lawyers and Barber authorized the identical issue to be raised in his case. He too received a stay from the same federal judge. [18] The State appealed both cases. On Tuesday afternoon the Fifth Circuit refused to disturb the stay in Barber's case. Yet the next day in an unpublished decision, a different panel dissolved the stay in the Faulder case. Both inmates had raised the identical legal claim; indeed, the exact same pleadings were used by both sets of lawyers. All that differed was the name of the party seeking relief. The panel in Faulder's case added a footnote to its opinion acknowledging it was aware a different group of judges had, on the previous day, approved the halting of Barber's execution on the same grounds. The Faulder panel did not explain why it was pursuing a different course. [19]

The difference between the Fifth Circuit and every other federal court of appeal that decides a significant number of death penalty cases is not that the Fifth Circuit is significantly more hostile to claims coming from death row. The difference is that the Fifth Circuit's hostility is more secretive and buried. Only one other court that we examined goes to comparable lengths to hide its death penalty opinions from public view: the Texas Court of Criminal Appeals. The combination of the refusal of these two courts to routinely announce their decisions in published opinions, coupled with the pace of executions in Texas, means that the majority of cases in the state that carries out the most executions go unnoticed.

Publishing their opinions may cause embarrassment to judges: But perhaps they ought to be embarrassed. It seems not too draconian to suggest that when the state is going to execute one of its citizens, who may in fact be actually innocent, that the judges who authorize or permit that act of violence must not be permitted to hide their reasons for doing so.

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The unedited version of *Invisible Executions* is available for reading and downloading at, http://www.nonpublication.com

Endnotes:

1 This article is and edited version of, David R. Dow and Bridget T. McNeese, Invisible Executions: A Preliminary Analysis of Publication Rates In Death Penalty Cases In Selected Jurisdictions, Texas Journal On Civil Liberties & Civil Rights, Vol, 8:2 (2004).

2 Death Penalty Information Center, Executions in the U.S. in 2001, at http://www .deathpenaltyinfo.org

3 *Id.*

4 We have not examined publication rates at the district court level in federal habeas proceedings, largely because the publication rate is exceedingly low in all jurisdictions.

5 This percentage was calculated from information found at www.uscourts.gov/courtsofappeals.html (last visited Sept. 8, 2003). JD Note: The percentage was about the same in 2005.

6 See *Prudential LMI Commercial Ins. Co. v. Colleton Enters., Inc.*, No. 91-1757, 1992 U.S. App. LEXIS 25719 (4th Cir. Oct. 5, 1992).

7 See Eron Berg, Unpublished Decisions: Routine Cases or Shadow Precedents?, Wash. State Bar News, Dec. 2000.

8 *Id.*

9 Death Penalty Information Center, State by State Death Penalty Information, at http://www .deathpenaltyinfo.org/article.php?did= 121 &scid= 11 (last visited Sept. 8, 2003).

10 This table is based on Tables 1 through 32 in the author's article cited in note 1.

11 One appeal waived.

12 One appeal waived.

13 Three defendants didn't file a state habeas, and a fourth defendant's habeas was dismissed as untimely.

14 This same finding was reported in another study related to unpublished opinions: Tim Reagan, Citations to Unpublished Opinions in the Federal Courts of Appeals, Federal Judicial Center, June 1, 2005.

15 *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001).

16 The policy of "publishing" opinions electronically while forbidding citation to them is a policy that is at odds with the very idea of law. As Johana Schiavoni has argued:

> That judges render binding precedential decisions is the basic precept of our common-law judicial system.... In choosing a common-law system over that of a civil-code system, the Founders expressed their preference for giving judges the power to make decisions that were

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Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?

By Kenneth J. Schmier and Michael K. Schmier

Stare decisis is fundamental to our judicial system, and our judicial system is part of the foundation of our democracy.

Stare decisis (Latin for "let the decision stand") is legal shorthand for considerations judges must give when both following and making legal precedent. *Stare decisis* controls not just how cases are to be decided in light of existing cases, but also controls the caprice of judges by requiring them to suppose that all similar future cases will be decided according to their instant decision. This accountability is not only sobering, but also encourages the examination of decisions from all perspectives, ensuring a result consistent with legal principles. *Stare decisis* is a bureaucracy buster, since it does not allow issues to be swept under carpets.

The constraints of *stare decisis* are fundamental to the judicial process. The late Judge Arnold of the United States Court of Appeals for the Eighth Circuit (hereinafter 8th Circuit) recognized this when he wrote that "principles of ... decision[s] are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence." [1]

Are you aware of what the judiciary has done to *sare decisis*?

You might not know that 93% of California appellate court opinions are illegal to mention in California courts. Pursuant to a California court rule, "[a]n opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party." [2] This practice is not confined just to California. The United States Court of Appeals for the Ninth Circuit [hereinafter 9th Circuit] has a similar rule, Rule 36-3(b), which provides that "[u]npublished dispositions and orders of this court may not be cited to or by the courts of this circuit, [except under certain circumstances]." [3] In the 9th Circuit, 87.2% of decisions are unpublished, and therefore illegal to mention. You may have thought that lawyers are free to select pertinent authorities from all past appellate court decisions, but this is no longer true. In fact, the vast majority of appellate decisions are no longer precedents, or even academic opinions of the content of our law, but rather mere legal nullities.

Stare decisis, which "serves to take the capricious element out of law and to give stability to a society," [4] is rendered completely ineffective and "cannot operate as a 'workable doctrine' as long as courts . . . are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of publishing one set of results but not the other." [5]

You are not alone if you were not aware of this. No-citation rules are largely unknown by politicians, journalists, attorneys general, and even most lawyers, not to mention the general public. We will explain and illustrate how the *stare decisis* doctrine is affected by no-citation rules, lay out a brief history of no-citation rules, provide some of their claimed justifications, and argue that no-citation rules undermine vital democratic processes to an extent that compels their abolition.

An example of s*tare decisis* abandonment

Ninth Circuit Court Judge Kozinski appears to be the leading apologist for no-citation rules and is one of the few judges to defend no-citation rules in writing. In *Sorchini v. City of Covina*, 250 F.3d 706, 708-09 (9th Cir. 2001), he held counsel for the City of Covina's cite of a prior unpublished 9th Circuit opinion to be a violation of Rule 36-3(b) that warranted punishment. Counsel for the City of Covina had attempted to cite *Kish v. City of Santa Monica*, No. 98-56297 (9th Cir. Apr. 13, 2000) (unpublished disposition), a case which directly relieved the City of Covina of liability for a dog bite where police did not announce the release of a dog during the chase of a hidden suspect. Counsel advised the court that *Kish* was unpublished. *Kish* was the only prior decision of the 9th Circuit squarely on point. Judge Kozinski explained in the citable portion of *Sorchini* that:

> [b]ecause *Kish* is not precedent, neither *Kish's* holding, nor *Kish's* observations about the state of the law, have any bearing on this inquiry. The only way *Kish* could help counsel's argument is prohibited by ... Rule 36-3—by persuading us to rule in the City's favor because an earlier panel of our court had ruled the same way." *Sorchini*, 250 F.3d at 708-09

Curiously, despite appellate resolutions of the "unannounced police dog biting arrestee" issue in both *Kish* and the unpublished portion of *Sorchini*, the existence of Rule 36-3 has allowed the legal issue to remain unresolved. While the appellate court cries loudly about the volume of litigation, it has left future litigation, which should be made unnecessary by these decisions, all but inevitable.

Does *Sorchini* mark the end of Common Law as we know it?

Lawyers are supposed to cite cases showing the court what it has done with similar facts in the past. In turn, courts are supposed to respect past decisions. How is it then that *Kish*, a prior holding of the court on exactly the same facts, cannot be mentioned to the Sorchini court? Judge Kozinski tells us *Kish* cannot be mentioned because Rule 36-3 makes it not precedent. But Rule 36-3 does not deny precedential value to *Kish*; it only prohibits citation of unpublished cases. It is circular for Judge Kozinski to say *Kish* is not precedent solely because it is not citable and that it is not citable solely because it is not precedent. Missing from Judge Kozinski's rationale is some reason *Kish* is not precedent, and no reason is stated.

Precedents, by definition, are the prior holdings of the courts regarding similar fact patterns. To say that *Kish* is not precedent for *Sorchini* is to say *Sorchini* is unprecedented. The court, however, already decided in *Kish* the issue presented in *Sorchini*, so by logic *Sorchini* is precedented. Only by redefining the meaning of precedent can Judge Kozinski make *Sorchini* unprecedented and *Kish* not precedent.

Something is obviously amiss here. Denying opinions of appellate courts prospective application without compelling reasons should raise some suspicion. Selective prospectivity, or limiting the prospective application of an opin-

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> prospectively binding.... The Framers consciously continued the common-law judicial system, placing their faith in the rule of law and in judges to follow their interpretations of the law in later cases.

Johanna S. Schiavoni, Comment, Who's Afraid of Precedents?, 49 UCLA L. Rev. 1859, 1877 (2002) (citations omitted).

17 See *Faulder v. Tx. Bd. of Pardons & Parole*, 178 F.3d 344 (5th Cir. 1999), cert. denied, 527 U.S. 1017 (1999) (recounting procedural history).

18 Neither of the opinions relating to the clemency issue in the *Barber* litigation has been published. The Supreme Court's denial of relief is located at 525 U.S. 1132 (1999). I have previously criticized the refusal of the courts - both state and federal - to publish their opinions in death penalty cases. See David Dow, The State, the Death Penalty, and Carl Johnson, 37 B.C. L. Rev. 691 (1996). The details in the text are based on my first-hand knowledge of the cases.

19 The opinion is unpublished. The Supreme Court did eventually stay Faulder's execution, though the legal basis for that decision remains unclear. *Faulder* was subsequently executed, as was Barber.