# Non-published And Non-precedential Opinions Stealthily Harm The Innocent

Non-published and non-precedential opinions were unknown 45 years ago, and they have only come into widespread use in the last 30 years. Yet in that short period of time they have stealthily become an integral and dominating feature of this country's legal system.

The reliance of appeals court judges on a non-published opinion to resolve a case has grown to the point that in 2005 they were used in about 80% of federal Circuit Court cases, and in 93% of the Court of Appeals cases in California, the country's most litigious state.

Use of non-published opinions, which with very rare exceptions are non-precedential, has reached the point that they are a significant factor affecting the handling and outcome of state and federal civil and criminal cases.

The innocent are one class of litigants affected by the surreptitious and pervasive use of non-published opinions. They are likely affected more profoundly than any other identifiable group, because non-published opinions are being used by judges (and prosecutors) as a tool to deny under the cover of darkness the very thing the courts are not just touted as offering, but which is their very reason for existing — to offer litigants the opportunity for "justice."

Justice is not an ephemeral concept ... it is the sole reason for courts in this country to have any legitimacy. Any institutional procedure that undermines the likelihood that a person will be fairly and impartially treated is unacceptable in a society committed to observing "justice" as a real and vibrant guidepost, and not just a meaningless catchphrase intended to placate the masses of people who will never find out how illusory of a concept it can be within the four corners of a courtroom.

When state and federal policies were adopted allowing the resolution of a case with a non-published and non-precedential opinion, there was no serious public debate about the consequences that would result. The following four articles express concerns about the use of non-published and non-precedential opinions from varying perspectives. Looked at as a whole, however, they can be interpreted to make one thing crystal clear: since non-published opinions undermine the historical underpinning of this country's legal system, the debate today ought to be about whether they should be used in any circumstance — or relegated to the dustbin of history as a menace to "Justice," and the innocent.

## Commitment To Justice Requires All Appellate Opinions Must Be Published and Precedential

By Hans Sherrer

The judgment of every state and federal judge in the United States is subject to being colored by varying shades of a pro-prosecution bias. This is to be expected because of the politically laden processes that are used to elect or select both state and federal judges and prosecutors. The country recently witnessed the prevalence of judicial bias by the confirmation of two judges to the U.S. Supreme Court with a track record of being overly solicitous to executive power. Deference of judges to executive authority can manifest itself subtly and not-so-subtly in rulings, body language, verbal queues, and courtroom treatment of prosecutors and their witnesses, as well as in numerous other ways from the time of a defendant's arraignment through resolution of his or her final habeas appeal. This judicial attitude only occasionally appears to weaken in a case that may involve particularly egregious conduct by police or prosecutors.

In this country there are two checks on conscious displays of judicial bias.

One is the conducting of proceedings in public, and the consequent availability of a case's documents and transcripts. The rare instance of when a judge is admonished for ethical misconduct occurs only because a case is public. The Fifth Amendment wisely requires the process of a "public" trial, which arguably isn't concluded until after a convicted defendant's judgment and sentence are finalized when his or her direct appeal is exhausted.

The second check is *stare decisis*, which is expressed in the common law as the 'doctrine of fairness.' [1] Stated simply, that means fairness requires that similarly situated litigants should be treated equally regardless of the judge(s) involved. If defendant Jones' case was dismissed because of a particular police impropriety, then *stare decisis* dictates that defendant Smith's identical case under a different judge needs to likewise be dismissed.

That all decisions of a court have precedential value was a given for the first 175 years of the United States' history, and it is integral to the common law upon which this country's legal heritage rests. It is also integral to the common law that whatever aspect of a particular decision is precedential can only be determined by a court in the future confronted with similar circumstances – not by the court issuing the opinion. [2]

### Two Tier System of Opinions Created

A revolutionary assault on precedent, a critical component of this country's legal system, was launched in 1964 when the Judicial Conference of the United States issued a report that recommended, "that the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct." [3] The impetus behind the Conference's recommendation was to limit the growth in the number of legal volumes necessary to store opinions – by creating a heretofore unknown class of non-precedential decisions that were not published as an opinion of the court. The idea was based on the assumption that most cases involve factual situations resolvable by established legal rules, and consequently it would be duplicative to publish any case that followed the precedent setting case. The time and energy of judges spent thinking about and writing decisions would thus be saved for "important" first-tier cases involving new legal issues, while all others would be relegated to second-tier non-published status.

In 1971 the First Circuit Court of Appeal became the first federal court to authorize the judges deciding a case to issue an unpublished opinion that would be barred from citation as precedent. Within the next few years all the federal circuit courts adopted rules that to varying degrees restricted publishing and citation of selected opinions. A majority of state appellate courts did likewise. Thus the creation was begun in this country of an underworld of what Supreme Court Justice John Paul Stevens described in 1985 as "a body of secret law," that only applies to the litigants of the particular case under review. [4]

For three decades the revolutionary new system of appellate courts routinely issuing decisions that were neither published nor allowed to be considered precedential was implemented with little fanfare. Members of the general public, and even some lawyers, only became aware of it if they happened to be involved in a civil or criminal case secretly disposed of with an order or memorandum stamped Do Not Publish or Not For Publication. The practice expanded to the point that in 2005 about 80% of federal circuit court decisions were non-pub-

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