The Disappearing Precedent

When courts "de-publish" rulings to limit their impact.

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The California Supreme Court Wednesday refused to intercede in a dispute between lower court judges and prosecutors over the constitutionality of a dubious confession given by a juvenile defendant. But the dispute wasn't over the merits of the confession or the appropriateness of the order that suppressed its use. The issue was instead whether the decision itself should be "de-published" from the official record so that it could not be used as a precedent in other cases.

Judges in courts all over the nation routinely choose not to publish their opinions, a tradition formalized half a century ago by the Judicial Conference of the United States, the judicial authority that sets policy for the federal judiciary. In fact, more federal decisions are left unpublished than are published. Some circuits allow unpublished decisions to be cited as precedent anyway. Some do not. Those who endorse the policy of keeping decisions unpublished see it as a necessary way to winnow down case law so that only the most important cases are available to be cited. Those who oppose unpublishing see it as a way for judges (or advocates) to manipulate common law itself by precluding some decisions from being cited in future cases.

Nowhere is the fight over publication more intense than California. There are rules that govern publishing, and de-publishing, and millions of words have been written about how these rules ought to apply. Take this new case of a minor we know only as "Elias V." On June 9th, an intermediate California appeals court overturned a trial judge's finding that incriminating statements made by "Elias V" in a case involving allegations of "lewd and lascivious" conduct could be used against the young man. The so-called "confession," the appellate judges ruled, was involuntary for several different reasons. The opinion, which you can read here, was comprehensive, detailed, and replete with references to some of the most modern scholarly work on the fallibility of juvenile confessions.

The decision, to suppress the confession in a case of one juvenile accused of inappropriately touching another juvenile, was immediately controversial. But it was not necessarily wrong. It was immediately published so that lawyers in California could cite it as precedential authority and lawyers in other states could read it for clues and rationales that might apply in other cases. The California Attorney General's office, which has the immediate authority to appeal such rulings to the California Supreme Court, chose not to do so. As far as California goes, the *Elias V* ruling was good law.

That did not end the dispute, however. In California, once the attorney general decides not to pursue an appeal, a slim window opens allowing prosecutors (or defense attorneys or anyone else) to seek to otherwise limit the scope of a decision with which they disagree. They can achieve this by convincing the California Supreme Court to "de-publish" an opinion, to rid it of any precedential value. Prosecutors do this when, as in the "Elias V." case, they get a ruling they fear will result in the suppression of incriminating evidence in other cases. Defense attorneys do this when they fear a pro-police ruling will encourage other trial judges to tip the scales toward prosecutors.

What happened next in the *Elias V.* case was extraordinary, according to lawyers who try to keep track of these things. Two months after the June decision, prosecutors in two *other* California counties, wholly unrelated to the case, wrote letters to the California Supreme Court asking the justices to "de-publish" the *Elias V.* decision. They argued that it would "cause confusion both in juvenile and adult criminal courts." One prosecutor listed as a reason to de-publish the fact that "the new rules… are based on social science rather than firmly established legal principles."

What happened after that was even more extraordinary. The appellate judges who had issued the controversial *Elias V.* ruling then responded to the prosecutors with a long letter of their own to the California Supreme Court. De-publication of their ruling, they wrote, would have the effect of "shielding from public attention" the social science research they had included in their opinion. The request to de-publish had forced the judges who issued the ruling to defend themselves to their superiors in a highly unusual act of judicial insecurity. They didn't just let their ruling speak for itself. They chose to explain and justify it.

So heated was the battle between the lower court and the prosecutors that the justices on the California Supreme Court pondered for six weeks not just whether to depublish, but whether to review the merits of the case itself, even though the state's attorney general, remember, chose not to appeal the case. In effect, the issue of de-publishing gave prosecutors a backdoor opportunity to have their whole losing case considered by the highest state in the court.

Supporters of this gambit see it as a safety valve—a way to make sure the California Supreme Court becomes aware of bad decisions that, for one reason or another, the state attorney general's office doesn't want to appeal. Detractors see it as a subversion of our basic concepts of appellate review -- a chance for prosecutors (or defenders) to get an extra turn at bat.

In the end,the California Supreme Court, which has recently been unfriendly to de-publishing anyway, ruled against the prosecutors. The Elias V. case, and the decision that emanated from it, are still officially part of the body of law that shapes California's criminal justice system. The trial of the accused young man presumably will have to proceed without the dubious confession. And the legal reasoning behind the decision to suppress that confession will be woven into the fabric of the law that governs juvenile interrogations. That's bad news for prosecutors in California and good news for juveniles interrogated by the police.

The Marshall Project
156 West 56th Street, Suite 701
New York, NY 10019
212-803-5200