Is The Supreme Court Creating Unknown And Unknowable Law? The Insubstantial Federal Question Dismissal

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Abstract

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United States Supreme Court Justices undoubtedly accept the prevailing notion that the American legal system functions as an instrument for attaining socially desired ends. And surely they would agree with Karl Llewellyn’s prescription that judges in resolving justiciable controversies ought to “see and weigh first the relevant problem-situation as a type, holding meanwhile so far as may be in suspense [their] reactions to the fireside equities or to other possibly unique attributes of the case in hand.”

Llewellyn’s approach seeks to reach a just decision, reflected in an opinion articulating a rule of “singing reason.” Stated another way, a decision should represent “both a right situation-reason and a clear scope-criterion on its face [yielding] . . . regularity, reckonability and justice.”

The United States Supreme Court’s memorandum opinion practice fails to satisfy these ideals. To the contrary, it appears as though the Court, when summarily affirming or dismissing an appeal, follows the advice once given by Lord Mansfield to an army officer. The officer, just appointed governor of a West India island, was concerned about

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1. This is, of course, nothing new. Justice Cardozo in 1921 observed that “[f]ew rules in our time are so well established that they may not be called upon any day to justify their existence as a means adapted to an end.” B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98 (1921). See also Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).


3. Id. at 183.

4. Id.
his ability to sit as a chancellor and to decide cases. Lord Mansfield soothed the new governor's fears with this counsel:

Be of good cheer—take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently—then consider what you think justice requires, and decide accordingly. But never give your reasons;—for your judgment will probably be right, but your reasons will certainly be wrong.6

But justification and elaboration are expected in a mature legal system.6 An opinion must explicate the ratio decidendi to provide—if not a rule of "singing reason"—at least some rule to ensure that the Court has acted on principle rather than "fireside equities." When the Court provides opinions demonstrating that the resolution of an issue is at least partially the product of principled7 and reasoned8 decision making, we are reassured that rules of law do play a role in the judicial process.

By writing opinions demonstrating that the judgment is the result of principled and reasoned decisionmaking—not a mental toss of dice—judges retain and exhibit their objectivity, enhancing the prestige of the legal process and reenforcing the consensus of legitimacy, the main source of power for courts in a strong legal system, i.e., a legal system that is "the product of a . . . substantial consensus and . . . will-

5. 3 J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 481 (3d ed. 1874).
7. "Briefly put, the requirements for principled decision are: (1) that a reason for the disposition of the case be given; and (2) that the case be so decided because it is held to be proper to decide cases of its type in this way." Golding, Principled Decision-Making and the Supreme Court, 63 COLUM. L. REV. 35, 41 (1963).
8. "Reasoned" decision is more inclusive than decision "on principle" and has more meaning in administrative context. We forget sometimes that "arbitrary" action can be either an unjustified departure from general policy or an undiscriminating and unjust application of general policy to a concrete situation within its letter but not within its spirit.

ing obedience' rather than the product of coerced submission.\textsuperscript{9}

Obviously, if promulgation of a rule does not occur, then law "as a guide to conduct is reduced to the level of mere futility [because] it is unknown and unknowable."\textsuperscript{10}

The thesis advanced in this article is that the federal question memorandum opinion practice of the Court comes close to creating unknowable law.

A species of memorandum opinions exists that ostensibly complies with the minimum requirements of reasoned elaboration. These decisions affirm or reverse a case by merely citing a prior controlling precedent.\textsuperscript{11} The Court has indicated that these determinations are on the merits, unlike denials of certiorari, and thus binding on lower courts.\textsuperscript{12} In fact, the Court itself sometimes cites these summary dispositions as authority.\textsuperscript{13} More often, however, such decisions simply are ignored. The Court's summary affirmance in \textit{Adams Newark Theater Co. v. City of Newark}\textsuperscript{14} illustrates the lack of respect accorded to such memorandum opinions.

\textit{Adams} involved an appeal from a conviction for violation of an


\textsuperscript{10} B. Cardozo, \textit{The Growth of the Law} 3 (1924).

\textsuperscript{11} The potential for disagreement as to whether a prior decision is controlling was most evident in the opinions in Eaton v. Price, 360 U.S. 246 (1959) and Ohio v. Price, 364 U.S. 263 (1960). For the denouement, see Camara v. Municipal Court, 387 U.S. 523 (1967). \textit{But see} Wyman v. James, 400 U.S. 309 (1971).


ordinance of Newark, New Jersey, which, inter alia, prohibited lewd dancing. The Supreme Court of New Jersey affirmed the conviction, even though it found that theatrical performances, including the burlesque show involved, fell within the protective ambit of the first amendment.

When the Supreme Court subsequently dealt with other cases involving ordinances proscribing topless dancing (California v. LaRue and Doran v. Salem Inn, Inc.), it never mentioned Adams, although a California decision cited in LaRue had cited in its opinion the New Jersey Supreme Court Adams opinion.

The lack of attention given to the Court's memorandum opinions becomes clearer when one discovers that the California court that had cited the New Jersey Supreme Court opinion failed to note by citation or otherwise that Adams was affirmed by the United States Supreme Court.

The slighting of Adams does not illustrate an isolated instance. In at least nine other state and federal opinions, the New Jersey Supreme Court decision is cited with no reference to the Court's affirmance.


Accordingly, the summary disposition in *Adams*, in its most favorable light, could be described as a judicial derelict on the legal seas.\(^{22}\)

Even if other courts took cognizance of the *Adams* memorandum affirmance, would reference to a prior Court decision provide more than a judicial Rorschach? Every jurist knows how difficult it is to ascertain the holding of a case.\(^{23}\)

Julius Stone suggests that use of prior precedents is a complex process in which judges,

by linking instant cases with precedents, and elaborating, by resort to rhetorical arguments, [generate] fresh solutions in single cases. In these parts the legal system is ‘open,’ in the sense that it does not offer mechanical keys to determinate solutions. This . . . does not mean that choice is at large, or that decisions may not command some degree of conviction springing from their anchorage in the *topoi*, the truths taken as common grounds for the time being.\(^{24}\)

Thus, it is not surprising to find that even when courts attempt to

\(^{22}\) The metaphor was suggested by Justice Frankfurter’s comment concerning the status of Minneapolis & St. Louis Ry. Co. v. Bombolis, 241 U.S. 211 (1916), given the Court’s decision in Dice v. Akron, Canton & Youngstown Ry. Co., 342 U.S. 359 (1952). Justice Frankfurter wrote: “the *Bombolis* case should be overruled explicitly instead of left as a derelict bound to occasion collisions on the waters of the law.” 342 U.S. at 368-69 (Frankfurter, J., concurring in *Dice*).


\(^{24}\) J. Stone, *Reasons and Reasoning in Judicial and Juristic Argument*, 18 Rutgers L. Rev. 757, 775 (1964). It also is interesting that T. Kuhn has analogized conceptual innovations in science to the judicial process: “In a science . . . a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions.” T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION 23 (1962). This parallel is discussed at length in Lewis, *Systems Theory and Judicial Behavioralism*, 21 Case W. Res. L. Rev. 361, 415-42 (1970).
apply prior precedents cited by the Court in summary decisions, little
guidance is available. One particular circumstance demonstrates vividly how the Court's memorandum practice fails to communicate effectively the ratio decidendi of a case.

When the Court reverses and remands a case, merely citing an earlier decision as controlling, a lower court may, instead of following the Supreme Court's actual message, simply distinguish the case. This misreading forces the Court to again reverse summarily. The lack of communication in this situation is evident. *McLeod v. Ohio* illustrates well this Sisyphean process.

In *McLeod*, the record showed the appellant/accused had made incriminating statements while voluntarily helping the police to secure relevant evidence. Although then indicted, he had not been arraigned and had not requested nor retained counsel. Nor were the incriminating statements the product of trickery.

25. A clear illustration is provided by the memorandum opinion in United States v. Ohio, 385 U.S. 9 (1966). In that case, the doctrine of Wickard v. Filburn, 317 U.S. 111 (1942), was apparently extended to situations with no substantial impact on interstate commerce. Although the lower court did an excellent job of distinguishing *Wickard* (see 354 F.2d at 555-56), the Court, in reversing, merely cited *Wickard*. United States v. Ohio is probably overruled *sub silentio* by National League of Cities v. Usery, 426 U.S. 833 (1976). But who really knows? And how many have even considered the question, given the obscure status of such summary affirmances? The issue explicitly left unanswered in *Usery*—whether state sovereignty acts as a limitation on federal spending power (see National League of Cities v. Usery, 426 U.S. 833, 854 n.17 (1976)—was resolved by the Court in North Carolina *ex rel. Morrow v. Califano*, 435 U.S. 962 (1978), in what Professor Tribe describes as an "unceremonious summary affirmation." L. Tribe, 1979 Supplement to American Constitutional Law 18 (1979). The Court dealt indecisively with the same issue relative to the federal taxing power in *Massachusetts v. United States*, 435 U.S. 444 (1978).


These factors distinguish McLeod's situation sharply from that involved in *Massiah v. United States*.28 In that case, the incriminating admissions of the accused were elicited by trickery and subsequent to both indictment and arraignment for the federal crime involved and after counsel had been retained. Indeed, the Court in *Massiah* appeared to limit its decision to its facts by stating that “[a]ll that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his [federal] trial.”29

The curious concatenation of affirmances and reversals occurred as follows: The Ohio Supreme Court affirmed McLeod's conviction,30 and the Court reversed and remanded to the Ohio court “for consideration in light of *Massiah v. United States* . . .”31 The Ohio Supreme Court affirmed McLeod's conviction again, finding that “the ‘circumstances’ under which his incriminating statements were given were wholly different from those in *Massiah*.”32 Finally, the United States Supreme Court reversed with the unilluminating statement: “The judgment is reversed. *Massiah v. United States*. . . .”33 This is perhaps another demonstration of the extraordinary facility with which a legal mind can think of something else without thinking of that to which it is connected.34

If memorandum opinions such as *McLeod* constitute judicial Ror-

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29. *Id.* at 207 (emphasis deleted).
30. 173 Ohio St. 520, 184 N.E.2d 101 (1962). Actually, the conviction was affirmed when the appeal was dismissed “for the reason that no debatable constitutional question is involved.” *Id.* at 520, 184 N.E.2d at 101. Apparently, the Ohio Supreme Court has learned something from the United States Supreme Court.
31. 378 U.S. 582 (1964) (citations omitted).
32. 1 Ohio St. 60, 62-63, 203 N.E.2d 349, 351 (1964).
33. 381 U.S. 356 (1965) (citation omitted).
34. See Auerbach, *A Plague of Lawyers*, Harpers Magazine 37, 42 (Oct. 1976). See also Von Jhering, *Im Juristischen Begriffshimmel*, Readings in Jurisprudence and Legal Philosophy 678, 681 (M. Cohen & F. Cohen eds. 1951), in which Von Jhering made the judicial application when he posited a test for admission to the heaven of juristic concepts that required the applicant to display “ability to construe a legal institution without regard to its real practical significance, but purely on the basis of the concept itself or its original sources.”
schachs, then memorandum opinions dismissing appeals for lack of a substantial federal question are the pages sans blot because these opinions set forth no precedent. However, the difference is not merely one of degree, but of kind. At least in summary affirmances and reversals, the Court finds that there is sufficient disagreement about the merits of the federal question presented to require citation to an applicable case. But this is not so where the question is deemed insubstantial.

If a plaintiff attempts to invoke federal jurisdiction in a district court but his claim is deemed insubstantial, no case or controversy exists and the case is necessarily dismissed—obviously a decision not on the merits and without precedential effect. As the high Court has instructed lower courts:

Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit" . . . ; "wholly insubstantial" . . . ; "obviously frivolous" . . . ; "plainly unsubstantial" . . . ; or "no longer open to discussion" . . . . One of the principal decisions on the subject, Ex parte Poresky . . . held, first, that "[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question be presented. . . ."

We can readily perceive how the Court could conclude that frivolous claims fail to present the type of federal questions required to satisfy the case or controversy article III jurisdictional requisite.\textsuperscript{35}


36. United States ex rel Mayo v. Satan, 54 F.R.D. 282 (W.D. Pa. 1971), provides an amusing illustration of a frivolous action. There the plaintiff instituted a civil rights action against Satan for causing the plaintiff misery and placing deliberate obstacles in his path which led to his downfall. The court dismissed for lack of jurisdiction over the person of Satan. The Supreme Court has frequently indicated that frivolous claims will not support federal jurisdiction. Early cases to that effect include: Wynn v. Morris, 61 U.S. (20 How.) 3 (1857); Millinger v. Hartupee, 73 U.S. (6 Wall.) 258, 261 (1867); New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891); Hamblin v. Western Land Co., 147 U.S. 531, 532 (1893); Wilson v. North Carolina, 169 U.S. 586, 595 (1898); Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308, 311 (1902). In Millingar v. Hartupee, the language the Court used was particularly revealing. It dismissed a suit for lack of jurisdiction because "[s]omething more than a bare assertion of [the federal question] . . . seems essential to the jurisdiction of this Court." Id. at 261. See discussion in Ulman & Spears, Dismissed for Want
The issue is more complex where the federal question supporting jurisdiction is arguably insubstantial because it is not open to discussion, i.e., its resolution is a Hobson's choice. The Heraclitean assumption that the only constancy is change appears to hold with considerable vigor in judicial decision making. Is any resolution by the Court totally foreclosed from review? The Court has frequently observed that stare decisis has less force where constitutional interpretation is required; after all the Court "must never forget, that it is a constitution...[it is] expounding." A striking example was provided when the Court, after deciding and publishing its opinion involving court martial jurisdiction over civilians, reversed itself and published a new opinion on rehearing the following term.

37. The early cases dealing with insubstantiality by virtue of the certainty of the relevant rule are cited under the "Rule of Precedents" in 2 Encyclopedia of United States Supreme Court Reports 309 n.42 (1908).


Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

39. See Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956), on rehearing, 354 U.S. 1 (1957). Of course, a change in the Court's personnel had occurred, not an unanticipated recurring event. Individual justices do, of course, reverse themselves. Consider, for example, Justice Black's change of position in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), from his earlier stance in

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*of a Substantial Federal Question, 20 B.L. Rev. 501 (1940). The authors note that "[l]ater cases point to this remark as the first statement of the doctrine that a substantial federal question is a prerequisite of Supreme Court jurisdiction in appeals from state courts." Id. at 507. There are cases in which the Court did summarily affirm, but the applicable prior precedents are discussed. See, e.g., Penna Co. v. Donat, 239 U.S. 50, 51-52 (1915).
Accepting the Court’s conclusion that there are federal questions so settled as properly characterized, along with frivolous claims, as too insubstantial to support jurisdiction in a district court, then it follows that the same doctrine should apply to cases where appellate jurisdiction is invoked on the basis of a federal question properly raised. At least since *Marbury v. Madison*, 40 the Court has considered itself as constrained as other federal article III courts by the article III case or controversy strictures. Thus, if the party attempting to invoke the appellate jurisdiction of an article III court presents as the basis for jurisdiction only an insubstantial federal question, the appeal should be dismissed for lack of jurisdiction—a decision clearly not reaching the merits. Until *Hicks v. Miranda*, 41 however, the precedential effect of a Supreme Court’s dismissal of an appeal for lack of a substantial federal question was uncertain. In fact, such dismissals were often ignored.

For example, in *Rosenblatt v. American Cyanamid Co.*, 42 the Court dismissed an appeal for insubstantiality, thereby apparently upholding the validity of the New York “long-arm” statute. 43 Yet when the case is cited in Hart and Wechsler’s *The Federal Courts and the Federal System*, one of the most comprehensive casebooks ever published, the reference is to Justice Goldberg’s denial of a stay, with no reference to the Court’s opinion dismissing the appeal. 44 Clearly the

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40. 5 U.S. (1 Cranch) 137 (1803).
41. 422 U.S. 332 (1975).
43. N.Y. CIv. PRAC. § 302(a)(2) (McKinney 1963) provided, *inter alia*, that
   A Court may exercise jurisdiction over any non-domiciliary . . . as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

   (2) commits a tortious act within the state. . .

The Supreme Court had not previously dealt specifically with this question, although some state courts had spoken. *See, e.g.*, Gray *v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); F. James, Jr., *Civil Procedure* 644-53 (1965). The relevant decisions of the Court are discussed in Mr. Justice Goldberg’s order denying a stay in the case. *See Rosenblatt v. American Cyanamid Co.*, 382 U.S. 1002 (1965).

authors did not believe such a dismissal was of precedential weight. Former Justices Goldberg and Clark have indicated that they never viewed these dismissals as dispositions on the merits.\footnote{Mr. Justice Goldberg mentioned this to the author during a conversation. Mr. Justice Clark's view is set forth in his concurring opinion in Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975): "During [the eighteen terms in which I sat] . . . [such dismissals] received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight." Some political scientists even after Hicks still believe such a dismissal is to be given the same weight as a denial of certiorari. \textit{See} \textit{R. FUNSTON, A VITAL NATIONAL SEMINAR} 26 (1978).}

The Court ostensibly provided an answer to the question of the precedential value of dismissals for insubstantiality on appeal in \textit{Hicks v. Miranda}.\footnote{422 U.S. 332 (1975).} In \textit{Hicks}, the Court stated that cases dismissed for lack of a substantial federal question constitute dispositions on the merits.\footnote{432 U.S. 173 (1977).} It also noted in a disingenuous understatement that "[a]scertaining the reach and content of summary actions may itself present issues of real substance."\footnote{422 U.S. at 344.} The Court had further opportunity to clarify the impact of a dismissal in \textit{Mandel v. Bradley}.\footnote{422 U.S. 332 (1975).} In \textit{Mandel}, the Court wrote:

\begin{quote}
\textit{PROCEDURE: CASES AND MATERIALS} 122-23 (1968). The second edition of F. JAMES, JR. & G. HAZARD, \textit{CIVIL PROCEDURE} 630-34 (2d ed. 1977), makes no reference to \textit{Rosenblatt} even though the validity of "long arm" statutes is discussed.

45. Mr. Justice Goldberg mentioned this to the author during a conversation. Mr. Justice Clark's view is set forth in his concurring opinion in Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975): "During [the eighteen terms in which I sat] . . . [such dismissals] received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight." Some political scientists even after \textit{Hicks} still believe such a dismissal is to be given the same weight as a denial of certiorari. \textit{See} \textit{R. FUNSTON, A VITAL NATIONAL SEMINAR} 26 (1978).

46. 422 U.S. 332 (1975).


48. 422 U.S. at 344.

\end{quote}
Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.60

Despite the ostensibly clear principle enunciated in Mandel, the significance of such dismissals remains an enigma. For example, in Jones v. Louisiana,51 the Court’s rationale for the dismissal is a tenebrific Zuckerkandlite.52 Jones followed Duncan v. Louisiana,68 which held the sixth amendment’s guarantee of jury trial applicable to a state trial where the offense carried a maximum two-year sentence. But Jones came before De Stefano v. Woods,64 which determined that the Duncan doctrine was hybrid prospective. From the Court’s decision to hear De Stefano, it would seem the Court in Jones was applying a principle relevant to the type of offense to which the sixth amendment right to jury trial attaches and not a prospectivity issue. But because Jones involved offenses, one of which resulted in a one-year sentence, and the Court shortly thereafter applied the jury trial provision to offenses carrying sentences of more than six months in Baldwin v. New York,55 certainly the federal question concerning that issue was substantial at the time of Jones.

Curiously enough, the Court in Baldwin not only fails to mention Jones, but also states: “In this case, we decide only that a potential

50. Id. at 176. The Court continues to place emphasis on the jurisdictional statement. See McKeesport Area School Dist. v. Pennsylvania Dep’t of Educ., ___ U.S. ___, 100 S. Ct. 2953 (1980). Because the jurisdictional statement is prepared by counsel seeking review, the statement could tend to overstate the issues presented.


52. Dr. Zuckerkandl, a creation of Robert Hutchins, had as his chief goal reducing communication to a minimum. A typical Zuckerkandlite was provided by President Eisenhower’s response to a question about integration in Southern schools: “However, when the Federal Court gets into the thing, you have got a judicial thing, or I mean a legal thing, that I have gone as far as I know the answer.” Hutchins, Living Without Guilt, 18 CENTER DIARY 37, 38 (May/June 1967).


sentence in excess of six month's imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.' None of our decisions involving this issue have ever held such an offense 'petty.'”56

The Supreme Court of Louisiana also did not find precedent from the high Court to aid it in arriving at a decision.57

Trying to apply the Mandel test to the Duncan, Jones, and Baldwin trilogy highlights the cacophony of the Court's statement. The jurisdictional statement in Jones sets forth the following question presented: “Do state statutes that deny the right to trial by jury in a prosecution for Possession of Burglar Tools, where a one year prison term may be and is actually imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?”58 If the Court, in its dismissal of Jones, held no right to a jury trial exists where a sentence of one year is imposed, how, then, did Baldwin, a case involving the imposition of six month's imprisonment, warrant an extensive opinion? Was the Baldwin issue not already decided by the dismissal of Jones?

The question naturally arises whether the Court really meant that dismissals for want of a substantial federal question necessarily “without doubt reject the specific challenges presented in the statement of jurisdiction.”59 Can the Supreme Court possibly mean what it says when it dismisses a case presenting truly fundamental issues? Potts v. Kentucky60 illustrates the difficulty of taking the Court's words literally.

Potts was dismissed for want of a substantial federal question. The Court cites the reader to the lower court's decision in Potts v. Kentucky for the facts and opinion. At the designated page appears a table indicating that the Kentucky opinion in Potts is unreported.61 The jurisdic-

56. 399 U.S. at 69 n.6 (emphasis supplied).
61. The relevant portion of the unreported decision of the Court of Appeals of Kentucky reads: “The issue of ineffective assistance of counsel has not been presented to the trial court and cannot be raised for the first time in this court.” Potts v. Commonwealth of Kentucky, No. 76-257 (Ky. Ct. App. July 8, 1977). It is not unusual to find significant Court opinions involving unpublished lower court opinions. See, e.g.,

The increase in unpublished opinions is not nearly as disturbing as the emergence of no citation rules. See Ky. R. Civ. P. 76.28(4)(c) (1977). The United States Court of Appeals for the Sixth Circuit Local Rule 11 provides:

"Decisions of this court designated as not for publication should never be cited to this court or in any material prepared for this court. No such decision should be published unless this rule is quoted at a prominent place on the first page of the decision so published."

Justice Stevens comments on this development:

A rule limiting the number of opinions to be published in the official reports is justifiable and desirable as long as the opinions are available to the Bar and to the public. For I am well aware of the fact that appellate judges—including myself—write more than is necessary. But censorship in the form of a no-citation rule is fundamentally different from a decision not to publish certain opinions generally.


The no-citation rules have raised interesting challenges. In Carter v. United States, 590 F.2d 138 (6th Cir. 1979), cert. denied, 431 U.S. 965 (1977), rehearing denied, 434 U.S. 882 (1977), the petition for rehearing raised the question:

Whether the existence and application to Petitioner's case of the United States Court of Appeals for the Sixth Circuit's Local Rule 11 (rendering the Appellate Court's decision in Petitioner's case of no precedential value whatsoever) denied Petitioner his right to an appeal in accordance with the Federal Statutes and the Constitution of the United States since: (1) Local Rule 11 is substantive and therefore not authorized by the Federal Rules of Appellate Procedure or 28 U.S.C., Section 2071; (2) Local Rule 11 operates to produce non-justiciable decisions inconsistent with the case or controversy requirement of Art. III of the Constitution of the United States; (3) Local Rule 11 on its face and as applied in Petitioner's case, constitutes invidious discrimination in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution; and (4) Local Rule 11 unconstitutionally infringes the rights of expression and press guaranteed by the First Amendment of the Constitution of the United States.


62. The jurisdictional statement indicates that the specific challenge raised was: Do Kentucky Rules of Criminal Procedure 10.06 and 12.54 and their application
The facts presented in the jurisdictional statement reflect a shocking lack of effective assistance of counsel at trial. The defense attorney committed innumerable blunders at the defendant's trial for rape. Among other errors, the trial lawyer failed to interview witnesses, failed to introduce discovery motions, failed to introduce jury instructions and failed to use damaging statements made by the alleged rape victim to impeach her credibility.63

The court of appeal refused to listen to appellant's arguments because the issue of ineffective legal assistance was not raised in the trial court. Discretionary review sought on the basis of a due process violation was denied by the Kentucky Supreme Court. A strict application of the rule established in Mandel leads to the conclusion that the challenges made in Potts, i.e., violations of procedural fairness, were rejected by the high Court.64 Does this dismissal, as Mandel explicitly states, prevent lower courts from arriving at a different result when the next similar factual situation arises? If the answer is yes, then the Court displays a callous disregard for the fair trial rights of a defendant.

If jurisdictional statements are the guide to determining the meaning of these dismissals, the general inaccessibility of these jurisdictional statements is of considerable concern. Mutatis mutandis, we can apply Justice Jackson's sage advice concerning the interpretation of the Miller-Tydings Act in Schwegmann Bros. v. Calvert Distillers Corp.65

by the Kentucky Court of Appeals and the Supreme Court of Kentucky, as stated in the case of Caslin v. Commonwealth of Kentucky, 491 S.W.2d 832 (1973), wherein the courts held that any appellant may not raise the question of ineffective assistance of counsel unless the counsel who is being alleged ineffective raises the question of his own ineffectiveness, or else the question will be forever barred, violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and therefore vitiate the conviction of the appellant.

Appellant's Jurisdictional Statement at 4, Potts v. Kentucky, 435 U.S. 919 (1978). The status of the Potts dismissal is apparently understood by the Kentucky Supreme Court (see Hamilton v. Commonwealth, 580 S.W.2d 208, 211 (Ky. 1979)), but not by some commentators. See Collier, Criminal Procedure, 68 Ky. L.J. 655, 678 n.120 (1980).

64. See note 61 supra.
There are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country. 66

Frequently the Court and lower courts appear oblivious to the insubstantial question dismissals. Fairly representative is the striking omission in the Supreme Court of Ohio's opinion in Primes v. Tyler, 67 which held that the Ohio guest statute violated the fourteenth amendment's equal protection clause. The opinion rested on both state and federal provisions. Certainly as to the federal provision, the overriding authoritative law comes from the Court.

Prior to writing the opinion in Primes, the justices of the Supreme Court of Ohio should have been aware of Cannon v. Oviatt 68 a case dismissed by the Court for lack of a substantial federal question. The jurisdictional statement in Oviatt indicated that the question presented was:

Whether the Utah guest statute, section 41-9-1, Utah Code Annotated (1953) is unconstitutional in that it violates the equal protection guarantee of the Fourteenth Amendment of the United States Constitution in creating classifications among those permitted and those denied recovery for negligently inflicted injuries that bear no fair, substantial or rational relation to the purposes of the legislation.69

The Ohio court did cite the Utah Supreme Court's opinion in Can-

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67. 43 Ohio St. 195, 331 N.E.2d 723 (1975).
non v. Oviatt," but completely ignored the affirmance through dismissal by the Court, even though a later Court decision is cited.71

The Court itself generally acts as though the dismissals are nonexistent, but often enough relies on them to require lawyers and courts to become knowledgeable about their potential import.72 Justice White’s opinion, in Patterson v. New York,73 provides a striking example of the significance of a dismissal. In Patterson, New York law required a defendant in a prosecution for second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the charge to manslaughter. The constitutional question presented was whether the New York rule was consistent with the doctrine enunciated in Mullaney v. Wilbur,74 which established that the state must prove all elements of a criminal offense beyond a reasonable doubt. Justice White, in rejecting the defendant’s Mullaney argument, reasoned:

Subsequently [after Mullaney], the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of Leland v. Oregon. This occurred in Rivera v. Delaware, an appeal from a Delaware conviction which, in reliance on Leland, had been affirmed by the Delaware Supreme Court over the claim that the Delaware statute was unconstitutional because it burdened the defendant with proving his affirmative defense of insanity by a preponderance of the evidence. The

70. 43 Ohio St. at 203, 331 N.E.2d at 728 (1975).
72. In Hicks the Court was quite emphatic: “The three-judge court was not free to disregard [an earlier dismissal for insubstantiality].” 422 U.S. at 344. The Court has vacillated considerably on how much deference is due. It appears the Court views itself not as constrained as it would be by a plenary opinion: “our decision not to review fully the questions presented in Orsini v. Blasi [423 U.S. 1042 (1976), dismissing for lack of substantiality] is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. . . .Insofar as our decision is inconsistent with our dismissal in Orsini, we overrule our prior decision.” Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979). To the same effect, see Elections Bd. v. Socialist Workers Party, 400 U.S. 173, 180-81 (1979). For an earlier case dealing with the precedential weight accorded summary affirmances, see Edelman v. Jordan, 415 U.S. 651, 670-71 (1974).
claim in this Court was that *Leland* had been overruled by *Winship* and *Mullaney*. We dismissed the appeal as not presenting a substantial federal question. *Cf. Hicks v. Miranda.* . . . 76

With considerable prescience, Justice Brennan earlier observed, in dissenting from the dismissal in *Rivera v. Delaware*, 76 that

The Court's summary disposition of this case is especially inappropriate since *Hicks v. Miranda* accords that disposition precedential weight. See also *Colorado Springs Amusements v. Rizzo*. Given the transparent erosion of *Leland* by *Winship* and *Mullaney*, the question whether *Leland* has continuing validity surely merits full briefing and oral argument. 77

It is not unusual for the Court to base all or part of its decisions in cases given plenary consideration on prior memorandum dismissals for the lack of substantiality. 78 Once counsel and lower courts become more knowledgeable about the Court's use of these dismissals, we can anticipate more frequent incorporation of these precedents into briefs and lower court opinions.

**Conclusion**

The Court's extensive use of dismissals for lack of a substantial federal question (in the post-*Hicks v. Miranda* era) 79 constitutes a seri-

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75. 432 U.S. at 205 (citations omitted).
76. 429 U.S. 877 (1976).
77. 429 U.S. at 880 (citations omitted).
79. During the 1974-1978 terms, the Court dismissed 357 appeals for lack of substantial federal question, an average of approximately 71 cases per term. There were 85 dismissals during the 1979 term.

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<td>1974</td>
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ous intrusion into the Rule of Law. A brief survey of this practice reveals that the Court uses this technique in a significant number of cases to generate "law" that is generally unknown—if not unknowable—but that is binding precedent for all except Supreme Court Justices who can selectively overrule, ignore, or cite these dismissals at their discretion. Indeed, just the description of the practice sounds like the antithesis of a Rule of Law. The cost, then, must be counted as high for the Court as an institution that depends so much for its power and effectiveness on continued perception by the legal profession and the public that its decision making involves a process of reasoned elaboration in which cases are resolved according to neutral principles.

To revert to the earlier pre-Hicks position that such dismissals, like denials of certiorari, are not of precedential weight would cost the Court nothing in terms of consistency or guidance to the litigants and public.

This position would also appear to be more consistent with its jurisprudence concerning article III jurisdiction. Why the Court continues like Caligula to adhere to this pernicious practice defies explanation. Case dismissed FOR LACK OF A SUBSTANTIAL QUESTION.