



2001

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Recommended Citation

Daniel B. Levin, *Fairness and Precedent*, 110 *Yale L.J.* (2001).

Available at: <http://digitalcommons.law.yale.edu/ylj/vol110/iss7/5>

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Fairness and Precedent

Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000).

In *Anastasoff v. United States*,¹ the Eighth Circuit invalidated a court rule that prevents litigants from citing unpublished opinions as precedent. More than three-quarters of cases resolved on the merits in the federal courts of appeals result in unpublished opinions² and have limited precedential effect. Although precedent plays a crucial institutional role in the judicial system, the *Anastasoff* rule, by unleashing a flood of new precedent, will disproportionately disadvantage litigants with the fewest resources. Because even important institutional concerns should give way when they impinge on individuals' rights to fair treatment, courts should not abandon the practice of limiting the precedential effect of unpublished opinions.

I

Faye Anastasoff paid income taxes on April 15, 1993. On April 13, 1996, she mailed in a refund claim for overpayment of her 1993 income taxes. The IRS received her claim on April 16, 1996, three years and one day after the original payment, and one day late. Anastasoff argued before the Eighth Circuit that the mailbox rule saved the claim. Another Eighth Circuit panel had rejected precisely the same argument in *Christie v. United States*,³ an earlier unpublished opinion. But rather than distinguish *Christie*, Anastasoff simply told the court it was not bound by the holding because, under Eighth Circuit Rule 28A(i), unpublished opinions do not count as binding precedent.⁴

In a sweeping opinion, the court declared itself bound by *Christie* and held that Rule 28A(i) unconstitutionally exceeded the boundaries of Article

1. 223 F.3d 898 (8th Cir.), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000).

2. In 1999, 78.1% of cases in the U.S. Courts of Appeals were disposed of by unpublished opinions. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR, tbl.S-3 (1999), at <http://www.uscourts.gov/judbus1999/s03sep99.pdf> [hereinafter JUDICIAL BUSINESS].

3. No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished opinion).

4. *Anastasoff*, 223 F.3d at 899.

III by allowing the court to avoid the precedential effect of its own decisions. Writing for the unanimous panel, Judge Richard Arnold explained that a declaration and interpretation of general principles of law is “inherent in every judicial decision.”⁵ This declaration is authoritative and must be applied in subsequent cases. These principles underlay the Framers’ conception of judicial power, and, according to Arnold, they limit the power delegated to the courts by Article III.⁶

Arnold briefly addressed and dismissed the practical ramifications of the ruling. First, Arnold emphasized that not all opinions need be published, but they must all carry precedential weight. Second, Arnold rejected the argument that the high volume of appeals faced by the court renders ascribing precedential effect to all decisions unrealistic. Rather, Arnold stated that the remedy should be simply “to create enough judgeships to handle the volume,” or to allow a larger backlog of cases.⁷

On December 18, 2000, the Eighth Circuit, sitting en banc, vacated the holding in *Anastasoff*.⁸ The court held that the tax issue became moot when the government decided to pay Anastasoff’s claim and declared its acquiescence to the interpretation of the tax statute announced by the Second Circuit in *Weisbert v. United States*,⁹ which was in direct conflict with *Christie*. Noting that courts decide cases, not issues, the court held that “the constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.”¹⁰

II

Although the *Anastasoff* holding was short-lived, the case raises a vital issue. Unpublished opinions are a relatively recent phenomenon in the federal courts. The Judicial Conference resolved only in 1964 to give the courts of appeals discretion whether to publish opinions.¹¹ The movement toward limited publication did not pick up until the early 1970s, when the Federal Judicial Center disseminated a set of recommended standards for publication.¹² By 1974, all the circuits had some sort of limited publication

5. 223 F.3d at 899.

6. *Id.* at 901.

7. *Id.* at 904.

8. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

9. 222 F.3d 93 (2d Cir. 2000).

10. *Anastasoff*, 235 F.3d at 1056.

11. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

12. ADVISORY COUNCIL ON APPELLATE JUSTICE, FJC RESEARCH SERIES NO. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 3 (1973).

plan.¹³ In 1999, the circuit courts disposed of 78.1% of their cases in unpublished opinions.¹⁴ Under the *Anastasoff* rule, all these cases would carry precedential weight.

Eighth Circuit Rule 28A(i) limits the precedential value of unpublished opinions by barring citation to them. Allowing citation of unpublished opinions will have a tremendous ripple effect for both litigants and judges. Because precedent is worthless without reasoning,¹⁵ judges will need to make their logic and reasoning transparent even in unpublished opinions, increasing the amount of time required to dispose of each case. Litigants with the resources to track down these opinions will have a richer body of precedent from which to draw their arguments, putting them at a systematic advantage over litigants with fewer resources.

Although the *Anastasoff* court grounded its reasoning in principles of originalism, Judge Arnold gave an earlier clue to his motivations in a piece published one year before his court handed down *Anastasoff*. In that essay, Arnold acknowledges that tremendous caseload pressure has driven the unpublished opinion movement, but he cites a number of detrimental effects of the practice.¹⁶ First, unpublished opinions may allow judges to reach decisions without bothering to justify them.¹⁷ Second, many cases “with obvious legal importance” are decided by unpublished opinions.¹⁸ Finally, the unpublished opinion rule creates a vast body of “underground law” accessible to the public at a reasonable cost,¹⁹ but the very judges who

13. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 184 (1999). Today every circuit has a rule governing the precedential value of unpublished opinions. Although the rules vary slightly from circuit to circuit, in general the rules prevent parties from citing unpublished dispositions as precedent. Most circuits bar citation to unpublished opinions or orders as precedent, but make an exception for purposes of finding res judicata and collateral estoppel, and determining the law of the case—that is, those instances where the preclusive effect of the disposition, rather than its quality as precedent, is relevant. See 1ST CIR. R. 36(b)(2)(F); 4TH CIR. R. 36(c); 5TH CIR. R. 47.5.3, 47.5.4; 6TH CIR. R. 28(g); 7TH CIR. R. 53(b)(2)(iv), 53(e); 8TH CIR. R. 28A(i); 9TH CIR. R. 36-3; 10TH CIR. R. 36.3; D.C. CIR. R. 28(c); FED. CIR. R. 47.6(b). The Second, Third, and Eleventh Circuits also limit the precedential effect of unpublished opinions, but do not make explicit exceptions for preclusive effects. See 2D CIR. R. 0.23 (prohibiting citation to dispositions in open court or by summary order); 3D CIR. R. 28.3(b) (stating that only published opinions are binding on the court); 11TH CIR. R. 36-2 (stating that unpublished opinions are not considered binding precedent but may be cited as persuasive authority if the opinion is attached to a brief).

14. JUDICIAL BUSINESS, *supra* note 2, tbl.S-3.

15. Rule 28A(i) already made an exception for res judicata, collateral estoppel, and law-of-the-case questions—that is, those questions that turn on the decision itself, not the reasoning behind the decision.

16. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221-22 (1999).

17. *Id.* at 223.

18. *Id.* at 224.

19. Many, but not all, unpublished opinions are available on commercial databases such as Lexis and Westlaw. For instance, *Christie*, the unpublished opinion that gave rise to the problem in *Anastasoff*, is available on Lexis but not Westlaw. *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished opinion).

produce the opinions then disavow them by limiting their precedential value.²⁰

III

Anastasoff would have opened the floodgates to a vast new body of precedent in federal courts. Yet the court failed to consider any principled justification for a no-precedent rule. There is more to the argument for no-precedent rules than simply judicial efficiency. While precedent protects important institutional concerns of the justice system, too much of a good thing may pose a danger. The question is not whether precedent is good, but what the optimal amount of precedent is. Abolishing noncitation rules for unpublished opinions would systematically and unfairly disadvantage individual litigants with limited resources (including pro se and public-interest litigants and public defenders) by making it harder for them to present their cases.

The *Anastasoff* court held the Eighth Circuit's noncitation rule unconstitutional. If the Constitution clearly mandates that all opinions, published or not, must carry precedential value, then there is no room for debate. But as several commentators have pointed out, responsible historical inquiry could lead to different conclusions about the Framers' intent.²¹ By emphasizing a constitutional finding, the court may have been attempting to preempt debate over the merits of the no-precedent rule. But as long as proponents of the rule (or like rules in other circuits) can advance a competing historical claim, the originalist argument will not end the debate.

Although the *Anastasoff* court based its decision in constitutional interpretation, there is clearly an independent case to be made for all opinions to carry equal precedential weight. As Judge Arnold constructs the argument, the invalidity of Rule 28A(i) flows from the principles that (1) the judicial system rests on precedent, and (2) all cases should be treated equally (that is, there should not be a body of underground law, nor should judges have even the temptation to "punt" on some cases).²² Precedent does legitimize judicial decisionmaking. But the *Anastasoff* court does not evoke any fundamental right of individual litigants that may be violated if courts limit the precedential value of some opinions. As long as litigants continue

20. Arnold, *supra* note 16, at 225.

21. Compare Recent Case, *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), 114 HARV. L. REV. 940, 943-44 (2001) (arguing that the court failed to consider the full body of historical evidence, which suggests that the Framers might not have condemned a departure from precedent), with Evan P. Schultz, *Gone Hunting: Judge Richard Arnold of the 8th Circuit Has Taken Aim at Unpublished Opinions, but Missed His Mark*, LEGAL TIMES, Sept. 11, 2000, at 78 (pointing out that English courts of equity were not formally bound by precedent).

22. *Anastasoff*, 223 F.3d at 903-05.

to have the right to cite unpublished opinions to make law-of-the-case, *res judicata*, or collateral estoppel arguments, noncitation rules will not contravene individual litigants' rights. The notion behind the attack on noncitation rules is that they lead to institutional erosion.

Before addressing the reasons to support limiting the precedential value of unpublished opinions, it is important to remember that precedent plays a vital role in the judicial system. Frederick Schauer suggests three virtues of precedent: fairness (or justice), predictability, and strengthened decisionmaking.²³ First, adhering to precedent, by treating like cases alike, makes the judicial system more fair or just. Second, if litigants know ahead of time that judges are bound to follow precedent closely, the system becomes more predictable. And third, by allowing judges to rely on earlier decisions, a precedential system leads to more efficient decisionmaking.²⁴ But it is equally important to note that a noncitation rule for unpublished opinions does not mean the abandonment of precedent. It merely says that some cases (in which the result itself should derive from sound precedent) may not themselves be cited as precedent in future cases.

Because the Supreme Court grants certiorari in few cases, the task of constraining appellate judges falls heavily on precedent. But precedent works to constrain judges in two ways: First, judges must base decisions on precedent; and second, when judges know that an opinion will serve as binding precedent in the future, they will presumably pay careful attention to the decision. In the first case, whether a decision carries precedential weight itself should have little bearing. That is, even if an appellate panel decides not to publish an opinion, thereby depriving it of precedential effect, the panel must still rely on precedent to reach its result.²⁵

Precedent plays a central role in the judicial system, but banning noncitation rules for unpublished opinions poses not just the obvious threat to efficiency of adjudication, but a threat to the right of litigants to equal concern and respect from their government.²⁶ This basic right to individual

23. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987).

24. *Id.*

25. One could argue that if the case is not citable in the future, judges will have less incentive to do a careful job and are thus more likely to get the case wrong. Surely, more time spent on a case decreases the risk of error, but most opponents of no-precedent rules for unpublished opinions do not suggest that all opinions should be as long or as carefully constructed as published opinions. Rather, they suggest that even shorter unpublished opinions should have precedential effect. See Arnold, *supra* note 16, at 223. If a court fails to follow precedent properly, the losing party may be able to appeal. But the fact that the case may be cited as precedent (and thus some future judge may take the time to point out the error) does not particularly help the losing party.

26. Ronald Dworkin argues that the most fundamental of rights is the right of individuals to equal concern and respect. Justice, understood as fairness, rests upon the assumption of the existence of this axiomatic right. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180-83 (1978). The Supreme Court has recognized individual fairness as a linchpin of the justice system. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 n.53 (1978) ("[A]n underlying

fairness trumps competing institutional claims. That is, if a principle that may promote justice in some systematic way begins to erode individuals' rights in a predictable manner, that principle should then give way to the individual rights concerns. In its application, the *Anastasoff* rule is likely, in the name of institutional utility, to violate the basic right to fairness of the poorest litigants in the justice system.

The debate is too often cast as one of grand principles of justice on the side of giving all opinions precedential effect versus base economic concerns on the other side.²⁷ This juxtaposition is a mistake. Noncitation rules for unpublished opinions not only make the judicial system more efficient, they protect the individual right of litigants, particularly the most disadvantaged litigants, to a measure of fairness in the judicial system. The *Anastasoff* rule would affect litigants at the bottom of the economic spectrum in two ways: First, it would increase delays in adjudication, delays from which the poorest litigants are likely to suffer the most, and second, it would create a less accessible class of precedents.

The literature on unpublished opinions suggests some of the efficiency concerns that motivated the federal courts to limit publication and adopt no-precedent rules for those opinions.²⁸ The high volume of cases makes the production of fully reasoned opinions enormously costly. In order for federal appellate courts to hear and decide all the cases before them, judges require some mechanism for expeditiously disposing of cases that offer no complicated or new legal question. Unpublished opinions serve this purpose.

These seemingly mundane efficiency concerns raised by defenders of noncitation rules, such as Judges Kozinski and Reinhardt,²⁹ implicate individual fairness concerns. Giving all cases precedential effect will intensify the caseload pressure on judges and increase delays in adjudication (a fact Judge Arnold is ready to accept³⁰). Clogged dockets will not affect all litigants equally. Poor litigants will be less able to weather the inevitable delays than wealthier litigants. For example, tort plaintiffs unable to pay mounting medical bills will suffer especially badly from busier dockets. This will likely push these poorer litigants into less

assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual.").

27. See, e.g., Arnold, *supra* note 16, at 221-22.

28. See, e.g., Martin, *supra* note 13, at 177-83; Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 911-16 (1986); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 477-49 (1988); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43-44.

29. Kozinski & Reinhardt, *supra* note 28, at 43-44.

30. *Anastasoff*, 223 F.3d at 904.

advantageous settlements in civil cases.³¹ In addition, prisoners bringing habeas claims who rely on the efficient adjudication of their cases will suffer particularly from clogged dockets. While all litigants may take some solace in the system-wide utility that a universal principle of precedent might offer, the costs of implementing this system, in terms of justice delayed, will be felt most strongly by those at the bottom of the economic spectrum.³²

In addition to the problems posed for the poorest litigants by clogged dockets, the *Anastasoff* rule presents a second problem for these litigants: unequal access to precedent. Limiting the precedential effect of unpublished opinions through noncitation rules ensures that litigants will have equal access to precedent, and thus a fair shot at litigating their cases.³³ Though unpublished opinions are available on commercial databases or through court clerks' offices (and, in four circuits, for free through court websites),³⁴ finding these precedents, even when they are available for free, requires time, energy, and money, and places those litigants with greater resources at an advantage over those with fewer (including pro se litigants, public defenders, and public-interest litigants).³⁵ Judge Arnold worries that litigants may be unable to invoke a previous decision of the court as precedent, even if the case is directly on point, because a previous panel has designated the opinion unpublished and therefore uncitable.³⁶ A full precedent system would avoid this situation. But even if this proverbial

31. For a discussion of the economic incentives in settlement considerations, see, for example, Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 238 (1982), which shows that the more steeply plaintiffs discount future payoffs, the greater the premium the litigant will place on settlement; and Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-18 (1973), which proposes a general economic model of settlement.

32. I do not want to argue that individual fairness never favors mandating the precedential effect of unpublished opinions. Certainly, individual litigants denied the ability to cite a case directly on point find themselves individually less happy. This will happen in a limited-citation regime (as, in fact, it did in *Anastasoff*). But there is no reason to think the burden will fall disproportionately on a certain group of litigants.

33. Lauren K. Robel argues that not publishing opinions leads to unequal access. She claims that frequent litigants are more likely to be privy to unpublished opinions and thus more likely to be able to spot trends invisible to one-shot litigants. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 946, 955 (1989). This is more of an argument for publication than for giving all opinions precedential effect. Simply allowing citation to unpublished opinions might exacerbate the frequent litigant's advantage.

34. The First, Second, Fourth, and Eighth Circuits make all opinions, whether published or not, available for free on their webpages. The Third, Sixth, Seventh, Ninth, Tenth, Eleventh, D.C., and Federal Circuits make only published or precedential opinions available on their webpages. See <http://www.uscourts.gov>. Free legal research services, such as Findlaw, do not post unpublished opinions of the circuit courts. See <http://www.findlaw.com>.

35. Needless to say, litigants with the resources to hire more experienced lawyers (or simply more lawyers) will always have an advantage, but that does not make an institutional change that further tips the balance towards these parties fair.

36. Arnold, *supra* note 16, at 221.

needle in the haystack were available to litigants, only those with the resources to search for it could benefit from it. By putting impecunious litigants at a systematic disadvantage, throwing the vast opus of unpublished opinions into the body of precedent would violate these individuals' right to equal concern and respect.³⁷

IV

Anastasoff rests on the proposition that the system would be on the whole more fair or just if all cases counted equally as precedent. The *Anastasoff* rule, however, would not only threaten the efficiency of judicial administration, it would harm the ability of individuals at the bottom of the economic spectrum to bring their cases. Making all opinions carry full precedential effect will not optimize the amount of precedent. The benefits precedent brings to the judicial system, in terms of predictability, stability, and fairness in adjudication,³⁸ are distributed among all participants in the system. Likewise, the marginal benefit of the *Anastasoff* rule would be distributed among all participants in the judicial system. But the costs of the vast increase in precedents are likely to be borne by those litigants on the lowest rungs of the economic ladder. This systematic unfairness to the poorest individuals in the justice system, impinging on their right to present their cases, should prevent courts from mandating that all unpublished opinions carry precedential weight.

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37. Judge Boggs of the Sixth Circuit and Brian P. Brooks take issue with a fairness rationale, arguing that "this 'fairness' rationale cannot mean that the courts ought to adopt *Harrison Bergeron*-like rules that level the playing field by imposing artificial impediments on lawyers smart enough to follow developments in their field of specialty." Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 21-22 (2000). The authors worry that limiting the quantity of precedent on fairness grounds is equivalent to dumbing down the system. But pointing out that increasing the body of precedent threefold might be unfair to some litigants is hardly a call to dumb down the system. Rather, it is a call to consider the ramifications carefully before deviating from the status quo.

38. See *supra* note 15 and accompanying text.