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SETTING A PRECEDENT ABOUT PRECEDENT:
WILLIAM RICHMAN ON
FEDERAL APPELLATE JUSTICE

Amy E. Sloan*

IN 2000, the Eighth Circuit held in Anastasoff v. United States1 that the practice of issuing nonprecedential2 opinions is unconstitutional. Although the decision was later vacated, it launched a wave of scholarship debating, defending, criticizing, and explaining the federal appellate courts’ practice of issuing opinions that do not count as binding precedent.3

As it turns out, we were all a little bit late to the party. Professor William Richman and his frequent collaborator Professor William Reynolds had already critiqued nonprecedential opinions in their seminal 1978 article in the Columbia Law Review, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals.4 In that article, they

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1. Anastasoff v. United States, 233 F.2d 838, 900, vacated en banc as moot, 235 F.2d 1054 (8th Cir. 2000).
2. I use the term “nonprecedential” to describe opinions that the federal appellate courts issue but do not consider binding precedent. These opinions were previously called “unpublished” opinions because they were not published in West’s Federal Reporter. Now, however, virtually all federal appellate opinions are published either electronically, in West’s Federal Appendix reporter, or both, rendering the term “unpublished” a misnomer. AMY E. SLOAN, RESEARCHING THE LAW: FINDING WHAT YOU NEED WHEN YOU NEED IT 79 (2014); AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS & STRATEGIES 96-99 (5th ed. 2012).
3. For a sampling of scholarship generated by the Anastasoff opinion, see, e.g., Symposium, Anastasoff, Unpublished Opinions, and “No Citation” Rules, 3 J. APP. PRAC. & PROCESS 175-451 (2001) (collecting eleven articles on the topic); Symposium, Have We Ceased to be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions, 62 WASH. & LEE L. REV. 1429-1758 (2005) (collecting eleven articles on the topic).
explained many of the problems that nonprecedential opinions create. They are unworkable because differentiating in advance opinions that merit precedential status from those that do not is impossible. Designating some opinions as nonprecedential ignores the value of accumulating decisions in an area of the law. Increasing the number of precedential opinions will not make research as cumbersome as proponents fear, and technology will help overcome any difficulties that increased publication creates. Publication serves the public interest in “openness and visibility of decision making.” Judges cannot accurately distinguish between important (lawmaking) and unimportant or routine (dispute-settling) cases at the time they compose opinions. Nonprecedential opinions, in conjunction with the then-prevalent no-citation rules, create two tiers of justice, undermine institutional controls on the judiciary, and are not acceptable.

The articles written in the wake of Anastasoff delved into these matters in depth and analyzed them from many angles. To give just a few examples, these articles question whether cases resolved through nonprecedential opinions truly receive full judicial consideration and argue that lack of public accountability likely results in less thorough consideration. They argue that conferring on judges the prospective ability to determine the precedential value of an opinion creates the appearance, if not the reality, of arbitrary decision making. They explain that nonprecedential opinions developed in response to increased access to the federal courts by outsider populations; remain a vehicle for institutionalizing unequal treatment of these groups; and violate due process, equal protection, and duties created by Article III. They analyze no-citation

5. Reynolds & Richman, The Non-Precedential Precedent, supra note 4, at 1199-1204.
6. Id. at 1189.
7. Id. at 1189-90.
8. Id. at 1191.
9. Id. at 1190.
10. Id. at 1192.
11. Id. at 1192-1204.
15. Id. at 1450.
rules and argue for different ways of treating nonprecedential opinions to avoid these problems. They identify new shortcuts the federal appellate courts have adopted to manage their caseloads. All add to the conversation. But whether they cite Professor Richman or not (and virtually all of them do), all owe something to The Non-Precedential Precedent. These articles develop and debate the same justifications for and concerns about nonprecedential opinions that Professors Richman and Reynolds analyzed in 1978 when they laid the groundwork for much of the work that followed.

The Non-Precedential Precedent was the first of many articles Professor Richman wrote analyzing the appellate courts’ decision-making processes. He did not focus narrowly on the problem of nonprecedential opinions. Rather, he looked at the big picture of appellate decision making to analyze how the appeals process could be improved. He continued to critique no-citation rules. Other areas he critiqued include excessive reliance on clerks and court staff to draft opinions and the failure to expand the federal judiciary to meet the needs of the public, focusing especially on judges’ own opposition to increasing their ranks to maintain their privileged position.

A few things have changed over the course of Professor Richman’s academic career, but a number of the problems he identified persist. The no-citation rules are gone, and as he predicted, technology has completely altered

17. See generally Penelope Pether, Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules are (Profoundly) Unconstitutional, 17 WM. & MARY BILL RTS. J. 955 (2009).
24. FED. R. APP. P. 32.1.
the way legal research is conducted. But the federal appellate courts issue the vast majority of their opinions—over 80%—as nonprecedential.26 Judges increasingly rely on law clerks and staff attorneys to work on “routine” cases.27 Controversy over the appropriate number of appellate judges continues and comes not only from the judiciary, but from other quarters as well. This issue arose most recently with respect to vacancies on the United States Court of Appeals for the District of Columbia Circuit.28

Although there is still much room for improvement in the federal appellate courts, Professor William Richman set a worthy precedent by challenging these courts to operate with transparency and legitimacy. His work will continue to resonate as long as those of us committed to improving the quality of federal appellate justice keep following that precedent.

25. See generally SLOAN, RESEARCHING THE LAW, supra note 2; SLOAN, BASIC LEGAL RESEARCH, supra note 2.

