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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 States*<sup>1</sup> that the practice of issuing nonprecedential<sup>2</sup> 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.<sup>3</sup>

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 Professor William Richman and his frequent collaborator Professor William Reynolds had already critiqued nonprecedential opinions in their seminal 1978 article in the *Columbia Law Review*, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*.<sup>4</sup> In that article, they

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I am honored to contribute an essay to this symposium celebrating Professor William Richman's scholarship. I first read his scholarship in 1998 when I began teaching Appellate Practice. Ten years later, we became acquainted when he served as an outside reviewer of my scholarship in conjunction with my promotion to Professor of Law. Since then, he has given me generous feedback on my work, and I greatly value his support and guidance.

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 I use the term "nonprecedential" to describe opinions that the federal appellate courts issue but do not consider binding precedent. These opinions were previously called "unpublished" opinions because they were not published in West's *Federal Reporter*.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opinions are published either electronically, in West's *Federal Appendix* reporter, or both, rendering the term "unpublished" a misnomer.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 For a sampling of scholarship generated by the *Anastasoff* opinion, see, e.g., Symposium, *Anastasoff, Unpublished Opinions, and "No Citation" Rules*, 3 J. APP.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 A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions*, 62 WASH.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).

4. See generally William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) [hereinafter Reynolds & Richman, *The Non-Precedential Precedent*]. They wrote more on this topic just a year later. William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807.

explained many of the problems that nonprecedential opinions create.<sup>5</sup> They are unworkable because differentiating in advance opinions that merit precedential status from those that do not is impossible.<sup>6</sup> Designating some opinions as nonprecedential ignores the value of accumulating decisions in an area of the law.<sup>7</sup> 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.<sup>8</sup> Publication serves the public interest in “openness and visibility of decision making.”<sup>9</sup> Judges cannot accurately distinguish between important (lawmaking) and unimportant or routine (dispute-settling) cases at the time they compose opinions.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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;<sup>14</sup> and violate due process,<sup>15</sup> equal protection,<sup>16</sup> and duties created by Article III.<sup>17</sup> They analyze no-citation

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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.

12. *See, e.g.*, Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 788-91 (2003); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1251 (2004).

13. *See, e.g.*, Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 428 (2002); Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 726-32 (2006); Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 690-91 (2006); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 732 (2004).

14. *See, e.g.*, Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1504-14 (2004).

15. *Id.* at 1450.

16. *See, e.g.*, Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 574-91 (2005); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS 175, 195-96 (2001).

rules<sup>18</sup> and argue for different ways of treating nonprecedential opinions to avoid these problems.<sup>19</sup> They identify new shortcuts the federal appellate courts have adopted to manage their caseloads.<sup>20</sup> 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.<sup>21</sup> Other areas he critiqued include excessive reliance on clerks and court staff to draft opinions<sup>22</sup> 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.<sup>23</sup>

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,<sup>24</sup> and as he predicted, technology has completely altered

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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).

18. See generally Patrick J. Schiltz, Response, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23 (2005); Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005); Sarah E. Ricks, *A Modest Proposal for Regulating Unpublished, Non-Precedential Federal Appellate Opinions While Courts and Litigants Adapt to Federal Rule of Appellate Procedure 32.1*, 9 J. APP. PRAC. & PROCESS 17 (2007) (analyzing Federal Rule of Appellate Procedure 32.1).

19. See, e.g., Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 22-24 (2002); Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 927-51 (2008). See also Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185 (2006-2007) (describing research problems that nonprecedential opinions create).

20. See, e.g., Amy E. Sloan, *The Dog that Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 714 (2009).

21. William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1723 (2005); William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37 (1999).

22. William M. Richman & William L. Reynolds, *Appellate Justice, Bureaucracy and Scholarship*, 21 MICH. J.L. REFORM 623, 627-28 (1988).

23. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 277 (1996); William L. Reynolds & William M. Richman, *Justice and More Judges*, 15 J.L. & POL. 559, 563-64 (1999).

24. FED. R. APP. P. 32.1.

the way legal research is conducted.<sup>25</sup> But the federal appellate courts issue the vast majority of their opinions—over 80%—as nonprecedential.<sup>26</sup> Judges increasingly rely on law clerks and staff attorneys to work on “routine” cases.<sup>27</sup> 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.<sup>28</sup>

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.

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

26. For the 12-month period ending September 30, 2012, 81.4% of all federal appellate opinions were issued as nonprecedential opinions. *U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2012*, U.S. COURTS OF APPEALS, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S03Sep12.pdf>.

27. See, e.g., Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 13 (2007).

28. The controversy arose in conjunction with stalled nominations to the D.C. Circuit and culminated in changes to the Senate’s filibuster rules. Those supporting the President’s nominees denounced what they saw as obstructionist tactics to keep them off the bench. Those opposed to the President’s nominees did not object to the nominees’ qualifications but argued that the court’s case load did not justify appointment of a full complement of judges. Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction*, BROOKINGS INST. (Dec. 30, 2013, 10:33 AM), <http://www.brookings.edu/blogs/fixgov/posts/2013/12/30-staffing-federal-judiciary-2013-no-breakthrough-year#>; Jeremy W. Peters, *Republicans Again Reject Obama Pick for Judiciary*, N.Y. TIMES, Nov. 12, 2013, at A16, available at [http://www.nytimes.com/2013/11/13/us/politics/senate-blocks-judicial-nominee-with-filibuster.html?\\_r=0](http://www.nytimes.com/2013/11/13/us/politics/senate-blocks-judicial-nominee-with-filibuster.html?_r=0). See also Glenn Kessler, *The Fact Checker: Is the D.C. Circuit Last in ‘Almost Every Category’?*, WASH. POST (June 6, 2013, 6:00 AM ET), [http://www.washingtonpost.com/blogs/fact-checker/post/is-the-dc-circuit-last-in-almost-every-category/2013/06/05/a589b186-ce22-11e2-8f6b-67f40e176f03\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/is-the-dc-circuit-last-in-almost-every-category/2013/06/05/a589b186-ce22-11e2-8f6b-67f40e176f03_blog.html).