

ANASTASOFF v. UNITED STATES AND THE DEBATE OVER UNPUBLISHED OPINIONS

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On August 22, 2000, the U.S. Court of Appeals for the Eighth Circuit issued an opinion in *Anastasoff v. United States*, [FN1] a seemingly unremarkable tax case. The opinion, however, lobbed an explosive charge into the machinery of judicial process. In it the court held that its local Rule 28A(i), [FN2] which provides that unpublished opinions are not precedent and should not be cited to the court, is inconsistent with the exercise of judicial power and thus unconstitutional under Article III of the U.S. Constitution. [FN3]

The opinion brings into sharp focus a debate that has gathered momentum over the last decade, as courts and the bar struggle over the meaning of the rule of law and how best to confront the demands of an ever-growing caseload. Recent years have witnessed numerous articles considering the subject, [FN4] proposed legislation aimed at elevating all judicial opinions to the level of precedent, [FN5] the formation of interest groups devoted to curtailing the use of unpublished, nonprecedential opinions, [FN6] and even a lawsuit against the Ninth Circuit seeking to force the court to publish all of its future dispositions and to acknowledge their precedential effect. [FN7]

Although the Eighth Circuit ultimately vacated *Anastasoff* on the grounds that it was moot, its demise marks not the end, but rather the beginning of a new stage, of the debate over the use and propriety of unpublished opinions. This article briefly traces the history of proposals for and the practice of using unpublished opinions. It then discusses the Eighth Circuit's opinion in *Anastasoff*, as well as the fate of the opinion, the early reactions to its rationale and prescriptions, and some of the questions that it raised but did not answer. The article then addresses recent empirical studies that validate certain concerns regarding the widespread use of unpublished opinions.

I. THE HISTORY OF UNPUBLISHED OPINIONS

Although the issuance of unpublished opinions only recently has become common in the United States, [FN8] the view that courts ought not to publish opinions in every case that they decide has a long history. In a 1949 article on the topic, Judge O'Connell of the Third Circuit referred to the matter as a "perennial question" and traced its history on this side of the Atlantic back at least as far as Justice Story's 1831 complaint concerning the proliferation of law books. [FN9] In 1894, the American Bar Association formed a committee "to study and report upon means of curbing the accumulation of law books." [FN10] In 1915, the Chief Justice of the Wisconsin Supreme Court argued that "[i]n cases of affirmance generally no opinion should be written unless in the judgment of the court the question is of such exceptional importance as to demand treatment in an opinion." [FN11] Twenty-five years later, Roscoe Pound lamented that "[m]uch time and energy are spent in writing opinions in cases which involve no new questions or new phases of old questions. This is a prime source of waste of judicial power in our courts." [FN12]

Despite the apparent timelessness of the perceived problem, courts have actively limited their published output only in the last three decades. The first step came in 1964 when the Judicial Conference of the United States resolved "[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct." [FN13] Although it took nearly a decade for the courts of appeals to embrace the device of unpublished opinions, [FN14] by 1979 roughly half of all federal appellate opinions were unpublished. [FN15] Today the federal courts of appeals have arrived at the point where nearly 80 percent of opinions are unpublished. [FN16]

Most of the courts that utilize unpublished opinions also have rules providing that unpublished opinions do not establish precedent and limiting the extent to which those opinions may be cited as authority to the court. The majority of federal circuit courts completely prohibit citation to unpublished opinions. [FN17] Although these rules vary in their particulars from court to court, they share a core objective of ensuring the publication of decisions that are valuable, precedential additions to the body of law. [FN18]

Advocates of limited publication have been around for some time, albeit with changing perspectives and rationales. Judge O'Connell wrote his 1949 article in response to a proposal favoring limited publication that was unanimously backed by a committee of eminent lawyers, whose concern was primarily that it had become too difficult to keep abreast of the increasingly large body of law. [FN19] The committee's suggestion stemmed from the perception that the number of pages published in a given year was disproportionate to the actual value added to the body of law because many opinions did not extend, refine, or otherwise contribute to the development of legal standards. Under this view, the only apparent purpose served by many opinions was to burden legal research.

Over time, as appellate dockets grew, many judges became staunch advocates of unpublished opinions. Beginning in the 1960s, the federal judicial caseload began to rapidly expand. More than fourteen times as many appeals were filed in the federal courts in 2000 as in 1960. [FN20] State appellate courts have seen a substantial increase in caseload over the same period. [FN21] Though the cluttering of law books with unimportant cases is still mentioned as a justification, [FN22] the exigencies of dealing with massive caseloads have driven the increasing prevalence of unpublished opinions. Indeed, Judge Boggs of the Sixth Circuit has argued that "[t]he practical need to dispose of a certain percentage of cases on an expedited basis, as a simple docket- management matter" [FN23] is the only legitimate basis for the use of unpublished opinions. "There is no strictly legal--let alone philosophical-- justification for the practice." [FN24]

Interestingly, lawyers have grown disenchanted with the practice just as courts have come to embrace it. In a telling example of the difference that a half-century can make, Judges Kozinski and Reinhardt of the Ninth Circuit note that these days the perennial proposal made by that court's bar is for a change in the rules to allow citation of unpublished opinions. [FN25] In part this shift in lawyers' attitudes may stem from the recent computerization of legal research, which greatly reduces the difficulty involved in wading through large numbers of opinions to find those most pertinent to the case at hand. It may also be a function of the increasing complexity of the law resulting from the expansion of regulation at both the federal and the state levels. Because there are so many more areas of law than there were half a century ago, the problem faced by lawyers is as often one of too little precedent as too much. [FN26]

As the number of unpublished opinions has increased, so have criticisms of the practice. There are three primary practical objections. [FN27] The first is that courts do not adequately determine which opinions are appropriate for publication, such that opinions that would, or should, contribute to the development of the law do not do so because they cannot be relied on by lawyers or courts. The second is that judges, knowing that they are not writing for posterity, do not exercise as much care in writing unpublished opinions. Because of the close relationship between the process of writing and the process of deciding, one implication of this criticism is that cases disposed of in unpublished opinions may not be as well decided as their published counterparts. In other words, a complexity that might come to light in the careful process of writing for publication may go unnoticed. The third criticism is that the proliferation of unpublished decisions leads to an inconsistent jurisprudence, in that different panels of the same court may decide the same issue in different ways with parties unable to make the court aware of these discrepancies, thereby violating the fundamental precept that like cases be treated alike. [FN28]

Additional criticisms include the views that (a) higher judicial review is more difficult to obtain when an intermediate court issues an unpublished opinion; (b) unpublished opinions contribute to a lessening of judicial accountability and reduce public regard for the judiciary by giving the impression that courts make decisions based on whim rather than reason; and (c) the system benefits "repeat players" such as governmental litigants who are in a better position to stay abreast of the body of unpublished decisions and use it to their advantage.

In addition to these process-based objections, the use of unpublished opinions raises concerns that go to the heart of the judicial function. As Judge Arnold, the author of the Anastasoff opinion, explained in a recent article on the subject, the most astonishing aspect of the mechanism is the notion that unpublished opinions are not precedent. [FN29]

A court should not, without very good reasons publicly acknowledged, depart from past holdings. [Eighth Circuit] Rule 28A(i) says, quite plainly, that this principle applies only when the court wants it to apply. If we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so. Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our choice. [FN30]

With one small exception, [FN31] Judge Arnold dismissed the proposition that any opinion, published or unpublished, lacks precedential value. Even when a case is nearly identical to previous cases, possible distinctions exist, and by

holding that these distinctions lack merit the court makes "a conclusion of law with precedential significance," no matter how small. [FN32] Judge Arnold acknowledged that in these extreme cases little is lost through the use of unpublished opinions, but nonetheless concluded that the very existence of the device has negative effects "on the psychology of judging." [FN33] The ability to issue an unpublished opinion tempts courts to dispose of cases in which strict adherence to the law might lead to a result that the judges would prefer to avoid by "sweeping the difficulties under the rug." [FN34] He concluded his analysis with a question: "is the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III" of the Constitution? [FN35] In *Anastasoff*, Judge Arnold answered this question in the affirmative, and for a short time it was the opinion of the court. A few months later, the Eighth Circuit, sitting en banc, vacated Judge Arnold's decision on the grounds that subsequent developments had mooted the parties' tax dispute.

II. ANASTASOFF V. UNITED STATES

A. The Opinion

Anastasoff v. United States [FN36] arose out of Faye Anastasoff's claim for a refund of overpaid federal income taxes. She mailed her refund claim within the applicable three-year limitations period, but it was received and filed a day after the period expired. She argued that a statutory "mailbox rule" applied to save her claim. In presenting her case to the Eighth Circuit, Anastasoff made no attempt to distinguish the court's earlier unpublished decision to the contrary. Relying on Eighth Circuit Rule 28A(i), [FN37] Anastasoff asserted that the unpublished decision was not binding precedent and could be disregarded.

In an opinion by Judge Arnold, joined by Senior Judge Gerald Heaney and Minnesota District Chief Judge Paul Magnuson (sitting by designation), the court disagreed. "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties." [FN38] To support this conclusion, Judge Arnold canvassed an array of venerable authorities, including Coke, Blackstone, and *The Federalist* in search of the Framers' understanding of the concept of precedent. To the lawyer-dominated group that gathered in Philadelphia to draft the Constitution, he concluded, the doctrine of precedent "seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law." [FN39] "[I]t was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty." [FN40] To the Framers, the declaratory theory of adjudication, pursuant to which judges do not make new law but rather merely determine what the law is, was an assumed feature of the intellectual landscape. Accordingly, in their minds, "[t]he duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power." [FN41] Simply put, "as the Framers intended, the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III." [FN42]

Having reached this conclusion, the court held "that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional." [FN43] Unable to disregard its prior opinion, the court was constrained to reject Ms. Anastasoff's claim. [FN44]

The final section of the opinion addressed the prudential concerns raised in Judge Arnold's article. The court emphasized that its ruling does not require publication of opinions but does afford them precedential weight without regard to their publication status. It also emphatically rejected the suggestion that the burdens resulting from expanding dockets require courts to produce opinions that are meaningless except in the context of a single case.

We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such

a statement exceeds the judicial power, which is based on reason, not fiat. [FN45]

B. Subsequent Developments

Ms. Anastasoff filed a petition for rehearing en banc. In response, the United States informed the Eighth Circuit that it had changed its position on the merits of her claim, and gave Ms. Anastasoff her refund together with interest. In addition, the Internal Revenue Service announced that it would no longer take the position that the mailbox rule does not apply in this sort of situation. [FN46] Based on these developments, the government argued that the case was moot. The court agreed. Accordingly, it vacated the panel opinion and noted that "[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit." [FN47]

Prior to the en banc decision, the Eighth Circuit cited and relied upon the reasoning of Anastasoff. In *United States v. Goldman*, [FN48] the court considered whether the trial court erred in giving the defendant concurrent rather than consecutive sentences for two convictions. The government argued that the district court's general discretion to choose one or the other arrangement was limited by directives contained in the commentary to the sentencing guidelines. The defendant argued that the commentary was merely suggestive and did not bind the court. The Eighth Circuit had rejected the defendant's argument in a prior, unpublished decision. The Goldman panel relied on Anastasoff for the proposition that it was constrained by this prior opinion and could not reconsider the question even in light of a split among other circuits. [FN49] Similarly, in *In re Arzt*, [FN50] the Eighth Circuit Bankruptcy Appellate Panel expressly held that it was bound by Anastasoff to follow a prior unpublished opinion. These opinions predate the en banc consideration of Anastasoff, and the en banc court's statement that the precedential effect of unpublished opinions remains an open question suggests that the court views itself as having returned to its position prior to the panel opinion in Anastasoff. Yet the en banc court did not mention these opinions, nor could it have decided those cases, which were not before it. Moreover, the panels that issued those opinions accepted the holding of Anastasoff and reached results expressly grounded on the proposition that unpublished opinions create binding precedent. There is certainly a logically tenable argument based on many of the same principles underlying the panel opinion that, regardless of the mootness of Anastasoff, the proposition that restrictions on the precedential value of unpublished opinions are unconstitutional has been accepted into Eighth Circuit jurisprudence.

Yet the language of the en banc court's opinion, coupled with the court's treatment of a subsequent case, suggest that any such argument may have little practical value. On December 29, 2000, eleven days after the filing of the en banc opinion vacating Anastasoff, the court issued a for-publication opinion in *United States v. Langmade*. The opinion stated that Eighth Circuit "unpublished decisions are binding precedent that district courts in this circuit must follow" and cited the panel opinion in Anastasoff for support. [FN51] Four days later, the court withdrew the opinion on its own motion [FN52] and six days after that issued a substitute opinion rewritten to remove the reference to Anastasoff and any implication that reliance on an unpublished opinion was necessary to the decision. [FN53] The moving finger, having writ, in this situation erases and moves on. [FN54]

III. REACTION TO ANASTASOFF

By and large, the reaction to Judge Arnold's opinion has been positive. Members of the bar especially have almost uniformly applauded the decision. The executive director of Trial Lawyers for Public Justice called it "brilliant." [FN55] The chief policy counsel of the conservative Washington Legal Foundation likewise praised the decision, characterizing it as having "done much to restore accountability to one branch of the federal government." [FN56] Lower federal courts have cited the decision when relying on unpublished opinions. [FN57]

Judge Arnold's understanding of precedent and the limits of Article III-- which one commentator described as "quite unexampled in the law of any other circuit" [FN58]--does not enjoy universal support, however. Ninth Circuit Judge Alex Kozinski characterized it as "nonsense." [FN59] More elaborate criticisms have focused on the opinion's conception of the nature of precedent and the accuracy of its historical analysis. In addition, the opinion raises a number of practical questions of implementation that create another barrier to the universal adoption of its reasoning.

A. The Nature of Precedent

In an article serendipitously published three months prior to the issuance of *Anastasoff*, Judges Kozinski and Reinhardt of the Ninth Circuit rejected the assertion, central to *Anastasoff*, that a judicial decision by its very nature results in precedent. In their view, for an opinion to serve as precedent the judges on the panel must not only endorse the result "but also ... the phrasing of the disposition." [FN60] Were parties able to cite unpublished dispositions, judges would have to spend considerably more time not only worrying about the precise wording of their own unpublished opinions, but also monitoring the language used by other judges. This, Judges Kozinski and Reinhardt assert, they simply do not have time to do. [FN61]

Judge Boggs of the Sixth Circuit argues that neither the *Anastasoff* court nor Judges Kozinski and Reinhardt fully understand the nature of precedent. What they fail to grasp, in Judge Boggs's estimation, is that there are "two senses of the word 'precedent': its analogical, common-law sense and its rule-setting sense." [FN62] Used in the former sense, precedent means only that a court is bound to follow a prior decision "to the extent that consistency and rule-of-law principles demand the same result in the case at hand." [FN63] In these cases, the result is really what matters, "since future panels may distinguish the decision of the first panel without calling into question the correctness of its result on its particular facts." [FN64] In this context he accepts Judge Arnold's reasoning, although he takes a much narrower view of its implications. Where, however, cases require a court to set a rule rather than apply one already in existence, the manner in which the court chooses to formulate the rule is significant. In these situations, Judge Boggs argues, Judges Kozinski and Reinhardt have a point in that a court might have a very good reason for not wanting to bind itself to a particular rule in the context of a single case. [FN65]

In practice, all of these formulations suffer from a tendency toward overcompartmentalization. *Anastasoff's* emphasis on the declaratory theory of adjudication and Judge Boggs's emphasis of the strict common law method of reasoning fail to account for the legal system's evolution to the point where, as some have put it, "we are all Realists." [FN66] Lawyers and judges routinely alternate between taking an extremely narrow, fact-based view of prior cases and seizing upon the language of a prior decision without regard to either its facts or its chain of reasoning depending upon which best suits the point being made. [FN67] In similar fashion, the extent to which an earlier decision will influence a later court--and thus can be characterized as "precedential"--will vary with a number of factors. Among these are the identity of the judge who wrote the earlier opinion, the presence and substance of dissents or concurring opinions, the intrinsic quality of the precedent relied on, the extent to which the opinion gives the appearance that the earlier court gave full consideration to the questions presented, the likelihood that a questionable precedent can be cured outside the judiciary, and the frequency with which the issue at hand arises. [FN68]

The mere fact that an opinion technically constitutes precedent does not ensure that it will ever be anything but ignored. [FN69] By the same token, the mere fact that an opinion is only the latest in a long series of judicial utterances on a particular subject does not mean that it will not come to be regarded as a leading case. One of the reasons most frequently advanced against allowing the citation of unpublished opinions is that it would create a class of "second-class precedents." [FN70] In practice, however, the law books are already filled with precedents of varying value, and lawyers and judges are accustomed to reacting appropriately. The practical nature of precedent supports *Anastasoff's* conclusions.

B. The Historical Analysis

One of the most impressive features of *Anastasoff* is the breadth of historical material that it considers. Yet one of the first scholarly commentaries on the opinion, while applauding the policy behind it, nonetheless finds fault with the court's historical analysis. [FN71] The commentator argues first that the Framers' concept of precedent was likely not as inflexible as Judge Arnold made it seem. In the Framers' minds the doctrine left room for courts to depart from unreasonable prior decisions, an exception facilitated by declaratory theory's conception of prior decisions not as law, but merely as evidence of law. [FN72] Because this "fiction" is identical to that involved in viewing unpublished opinions as lacking in precedential effect, the argument runs, the original understanding of Article III would likely allow for rules such as Eighth Circuit Rule 28A(i). In any case, this criticism deems the court's historical analysis too cursory, at least when assessed by the standards employed by Justice Scalia, in that it did not consider the debates surrounding the drafting of Article III or the ratification of the Constitution in the states. [FN73]

Although it seems unlikely that the Framers would have equated courts' ability to make infrequent departures from prior opinions in the name of preserving the integrity of law with the issuance of nonprecedential opinions in 80 percent of cases, at least within the context of originalism, these criticisms may have some merit, and might even be extended. While it may be that the concept of precedent was so engrained in the minds of the Framers "that it was accepted without debate," [FN74] any such acceptance occurred in the context of a system with a very different structure than the current judicial pyramid. Appellate courts as separate institutions were completely unknown at the time of the Revolution, and by establishing the U.S. Supreme Court, "Article III of the Federal Constitution thus put forward a novel design." [FN75] This fundamental structural change, together with the later addition of intermediate appellate courts, certainly had some impact on the functional meaning of precedent. [FN76] Indeed, as Pound tells us, this distinction required a change in the way that American courts operated after the Revolution. "[T]he need of making law for a new jurisdiction by a course of judicial precedents, which was felt after the Revolution, did not affect the development of appellate procedure before independence as it did afterward. When English precedents were controlling, the courts did not need to shape procedure to the exigencies of finding, formulating, and promulgating the law." [FN77]

More damning than any criticism based on Judge Arnold's assessment of the Framers' conception of judicial power is the fact that the U.S. Supreme Court itself has often acted in contrary fashion. It has, for example, frequently cast the doctrine of *stare decisis* in policy, rather than constitutional, terms. [FN78] Moreover, the Court has limited the precedential value of some of its own decisions. [FN79] More to the point of the unpublished opinions debate, the Court has noted that the courts of appeals "have wide latitude in their decisions of whether or how to write opinions." [FN80] If it is permissible for courts to decide cases without opinions, then it is difficult to see how it cannot be permissible for courts to decide cases with opinions that the court deems will have no precedential value.

C. The Implications

In addition to the debate over the nature of its reasoning, consideration of Anastasoff invites questions regarding the implications of its rationale. For example, in a jurisdiction that adopted Judge Arnold's analysis, what would be the status of the disposition of cases by summary order, with no opinion? As recently as 1997, the Third Circuit disposed of more than half of its cases in this fashion, and in the year ending September 20, 2000, the Eighth Circuit did so in just over a quarter of its cases. [FN81] If the nature of the judicial power is such that each case creates precedent that must be followed in subsequent cases, it would seem to follow that any exercise of the judicial power requires a written justification. [FN82] Absent an opinion, the only way to determine the precedential value of a summary disposition would be to attempt to divine it through an analysis of the district court's opinion, if any, coupled perhaps with a study of the arguments made to the court in the parties' briefing. This would hardly be consistent with the policies underlying Anastasoff.

Similarly unclear are the implications of Anastasoff's reasoning for state courts. If Judge Arnold's logic works at the federal level, it may work as well or better at the state level. [FN83] As of yet, however, only one state court opinion has cited Anastasoff, and not for the purpose of following its lead. The Washington Court of Appeals, while nodding respectfully in the direction of "the scholarly opinion of the Eighth Circuit," nonetheless imposed a \$500 fine on lawyers who cited and discussed an unpublished opinion in a brief. [FN84]

The Eighth Circuit recently considered a civil rights case that turned on a point of Arkansas contract law. [FN85] The plaintiff had grounded his argument to the district court on an unpublished opinion of the Arkansas Court of Appeals, but the district court declined to consider it based on an Arkansas Supreme Court rule prohibiting citation of unpublished opinions in "any court." The Eighth Circuit, speaking again through Judge Arnold, rejected the "suggestion that the Arkansas Supreme Court can dictate which cases are or are not to be cited in a court of the United States." [FN86] Because the parties had not briefed the issue, the court declined to consider whether the rule violated the Arkansas Constitution. [FN87]

IV. THE FUTURE OF UNPUBLISHED OPINIONS

Although the precise rationale of Anastasoff is subject to question, recent empirical studies suggest that at least one of the commonly raised criticisms to the issuance of unpublished opinions has merit, namely, that courts do a poor job

of selecting which opinions are appropriate for publication. The studies suggest that the courts have become too inclined toward **nonpublication**.

As a general matter, although the standards for publication are similar across all of the federal circuits, the courts and individual judges vary greatly in the rates at which they publish opinions. [FN88] More specifically, Professors Merritt and Brudney examined all unfair labor practice claims considered in the federal courts of appeals between October 1986 and November 1993. [FN89] In addition to finding that judges who graduated from "elite" law schools are more likely to publish their opinions than their colleagues, [FN90] they reached three findings that they characterized as "warning signals" about the practice of issuing unpublished opinions. They are: (i) a substantial variance in publication rates among the circuits, which may lead to some circuits shaping precedent more than others, (ii) "a surprising number of reversals, dissents, and concurrences among unpublished opinions," and (iii) an association between rules allowing citation of unpublished opinions and lower publication rates. [FN91] In all, they conclude that their findings support the Eighth Circuit's conclusions in *Anastasoff*. Because "panels authoring unpublished opinions reach some results with which other reasonable judges would disagree," there is a real possibility that like cases will not be decided in a like manner. [FN92]

Judge Posner provides further evidence that the courts may have taken things too far. He posits that one earmark of an unimportant opinion would be that it would never be cited in another case. [FN93] Yet an examination of all opinions issued by the federal courts from the 1890s through the 1960s reveals that the decade with the highest percentage of appellate court opinions that were never cited was the 1910s, at 29 percent. [FN94] The 1940s, 1950s, and 1960s--the decades leading up to the widespread use of unpublished opinions, in which the numbers of "unimportant" opinions would be thought to be growing--had the three lowest percentages of the entire period, at 17, 19, and 16 percent, respectively. [FN95] This suggests that even if the practice is assumed to be valid, the courts have their allocation of published versus unpublished opinions exactly backwards.

Yet it is unlikely that the practice will disappear. Whatever the merits or shortcomings of Judge Arnold's reasoning in *Anastasoff*, the problem of volume looms large. America has moved from a paradigm in which judges researched and wrote their own opinions to one in which most judges merely edit for-publication opinions drafted by law clerks and in many instances scarcely review unpublished opinions at all. [FN96] Judges routinely take the position that in some parts of the process quality simply has to be sacrificed in the name of expediency. A rule requiring universal publication, Judge Martin notes, would result in "an across-the-board lessening of quality." [FN97] Judge Posner opines that this quality problem is not remediable, and that "the realistic choice ... is not between publication or non-publication across the board, but rather between the current mix or a mix of published decisions and summary dispositions." [FN98]

This is an unfortunate state of affairs. The job of the courts routinely requires that they impose requirements on the parties before them, regardless of the hardships that result. In some cases, these requirements have even included the issuance of a written justification for a decision. [FN99] For the courts to simply dismiss *Anastasoff's* analysis on the grounds that compliance with its mandate would be too difficult would result in a "do as we say, not as we do" approach to justice that would only erode the public's faith in the system. Ultimately, of course, the legitimacy--even the existence--of the judiciary depends upon maintaining faith in the system. [FN100] Short-term measures that seem to alleviate the pressures of the judicial task at the expense of public confidence are the equivalent of a thirsty sailor succumbing to the temptation to drink from the sea.

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[FN1]. 223 F.3d 898 (8th Cir. 2000).

[FN2]. 8th Cir. R. App. P. 28A(i).

[FN3]. U.S. Const. Art. III, § 1, cl. 1.

[FN4]. See, e.g., Martha J. Dragich, Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?, 44 AM. U. L. REV. 757 (1995);

Elizabeth M. Horton, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 *UCLA L. REV.* 1691 (1995); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 *U. MICH. J. L. REFORM* 119 (1995); William M. Richman & William L. Reynolds, *Appellate Justice: Bureaucracy and Scholarship*, 21 *U. MICH. J.L. REFORM* 623, 632-40 (1988); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Governmental Litigants in the United States Courts of Appeals*, 87 *MICH. L. REV.* 940 (1989); Carl Tobias, *Chief Judge Martin and the Modern Sixth Circuit*, 49 *AM. U. L. REV.* 1059 (2000); Kirt Shuldberg, *Comment, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 *CAL. L. REV.* 541 (1997).

[FN5]. See Richard H. Cooper & David R. Fine, *What's Past Is Prologue*, *ORANGE COUNTY LAW.*, Feb. 2001, at 26-28 (discussing California Assembly Bill 2404).

[FN6]. One such group is The Committee for the Rule of Law. See <http://www.nonpublication.com> (last visited May 21, 2001).

[FN7]. See *Schmier v. United States Court of Appeals*, No. C-00-4076VRW, 2001 WL 313583 (N.D. Cal. Mar. 23, 2001).

[FN8]. In contrast, selective publication "has long been the practice in England." PAUL D. CARRINGTON, ET AL., *JUSTICE ON APPEAL* 36 (1976).

[FN9]. See John J. O'Connell, *A Dissertation on Judicial Opinions*, 23 *TEMP. L.Q.* 13, 14 (1949). Addressing England's treatment of judicial decisions, Judge O'Connell noted a proposal for limited publication made by Sir Francis Bacon in the first half of the seventeenth century.

[FN10]. *Id.*

[FN11]. John B. Winslow, *The Courts and the Papermills*, 10 *ILL. L. REV.* 157, 161 (1915).

[FN12]. ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 390 (1941).

[FN13]. *JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* 11 (1964).

[FN14]. See **Donald R. Songer**, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 *JUDICATURE* 307, 308 (1989).

[FN15]. See Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 *VAND. L. REV.* 71, 76 n.17 (2001).

[FN16]. *ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2000 JUDICIAL BUSINESS OF THE UNITED STATES COURTS* Table S-3 (2001), available at <http://www.uscourts.gov/publications.html> (last visited May 21, 2001) [hereinafter *Judicial Business 2000*].

[FN17]. For a breakdown of the federal court rules governing citation of unpublished opinions, see Merritt & Brudney, *supra* note 15, at 78-79. A comprehensive list of the rules of all state and federal appellate courts relating to unpublished opinions and their status as precedent can be found at <http://www.nonpublication.com> (last visited May 21, 2001).

[FN18]. See Merritt & Brudney, *supra* note 15, at 76-77. The ABA Standards Relating to Appellate Courts, for example, suggest publication if the court determines that a decision "is one that: (i) establishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation; (ii) involves a legal issue of continuing public interest; (iii) criticizes existing law; or (iv) resolves an apparent conflict of authority." *AMERICAN BAR ASS'N, STANDARDS RELATING TO APPELLATE COURTS* § 3.37 (1994).

[FN19]. See O'Connell, *supra* note 9, at 14.

[FN20]. Compare DANIEL J. MEADOR & JORDANA S. BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 12 (1994) (noting 3,899 appeals filed in 1960), with *Judicial Business 2000*, *supra* note 16, Table B-1 (noting 54,697 appeals filed in 2000).

[FN21]. MEADOR & BERNSTEIN, *supra* note 20, at 12-13.

[FN22]. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 *OHIO ST. L. J.* 177, 177-78 (1999).

[FN23]. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 *GREEN BAG* 2D 17, 19 (2000).

[FN24]. *Id.*

[FN25]. See Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, *CAL. LAWYER*, June 2000, at 43. Similarly, the American Bar Association is presently considering "a recommendation that all federal appellate courts (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet websites; and (2) permit citation to relevant unpublished opinions." ABA Section of Litigation, *Use and Effect of Unpublished Opinions in the Federal Courts of Appeal* (April 6, 2001) (unpublished draft report and recommendation) (on file with authors).

[FN26]. Judge Posner has remarked that "a surprising fraction of federal appeals, at least in civil cases, are difficult to decide" for this very reason. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 166 (1996).

[FN27]. For enumerations of the commonly advanced objections to the practice, see POSNER, *supra* note 26, at 166-68; Cooper & Fine, *supra* note 5, at 29-30; Martin, *supra* note 22, at 180.

[FN28]. See *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983) ("A fundamental duty of courts of justice is to decide like cases alike, and that duty obtains whether a decision has been mailed to West Publishing Company or not.").

[FN29]. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 *J. APP. PRAC. & PROCESS* 219 (1999).

[FN30]. *Id.* at 221.

[FN31]. The presumably infinitesimal set of opinions arising out of cases in which the parties concede that their case is governed by a prior opinion of the court, such that the opinion in the second case need only note that the prior opinion is dispositive. *Id.* at 222.

[FN32]. *Id.* at 222-23.

[FN33]. *Id.* at 223.

[FN34]. *Id.* Although Judge Arnold was careful not to suggest that judges actually engage in the practice, other judges have been more candid about the strategic use of unpublished opinions. See POSNER, *supra* note 26, at 165 ("the unpublished opinion provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty"); Merrit & Brudney, *supra* note 15, at 97 n.84 (quoting judicial admissions regarding strategic behavior in connection with the decision not to publish an opinion).

[FN35]. Arnold, *supra* note 29, at 226.

[FN36]. 223 F.3d 898 (8th Cir. 2000).

[FN37]. The rule provides in part: "Unpublished opinions are not precedent and parties generally should not cite them.

When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well." 8th Cir. R. App. P. 28A(i).

[FN38]. Anastasoff, 223 F.3d at 899-900 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).

[FN39]. *Id.* at 900.

[FN40]. *Id.*

[FN41]. *Id.* at 903.

[FN42]. *Id.*

[FN43]. *Id.* at 900.

[FN44]. Some commentators have remarked on the apparent disconnect between the court's willingness to declare a long-standing practice unconstitutional while disclaiming the authority to reconsider the conclusions reached in a single, prior case. See Recent Case, *Anastasoff v. United States*, 114 HARV. L. REV. 940, 944 n. 39 (2001).

[FN45]. *Anastasoff*, 223 F.3d at 904.

[FN46]. In doing so, the IRS acquiesced to the decision of the Second Circuit in *Weisbart v. United States*, 222 F.3d 93 (2000). See Philip N. Jones, *IRS Reverses Its Position on Late Returns and Refund Claims: The Mailbox Rule Will Apply*, 94 J. TAX'N 81 (2001).

[FN47]. *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

[FN48]. 228 F.3d 942 (8th Cir. 2000).

[FN49]. *Goldman*, 228 F.3d at 944.

[FN50]. 252 B.R. 138, 142-43 (B.A.P. 8th Cir. 2000).

[FN51]. *United States v. Langmade*, No. 00-2019, slip op. at 2 (8th Cir. Dec. 29, 2000), available at <http://www.ca8.uscourts.gov/opndir/00/12/002019P.pdf> (last visited May 21, 2001).

[FN52]. See 2000 WL 1880515 (8th Cir. Jan. 2, 2001).

[FN53]. See 236 F.3d 931 (8th Cir. 2001).

[FN54]. In contrast, of course, to the observations of Omar Khayyam, in *Rubáiyát*. Stanza lxxi ("The Moving Finger writes; and having writ, Moves on; nor all your Piety nor Wit Shall lure it back to cancel half a Line, Nor all your Tears wash out a Word of it.").

[FN55]. See *Cooper & Fine*, *supra* note 5, at 26 (quoting Arthur Bryant).

[FN56]. Robert V. Pambianco, *Taking Judicial Notice*, National Review Online, at <http://www.nationalreview.com/comment/commentprint101000a.html> (Oct. 10, 2000).

[FN57]. See, e.g., *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 126 F. Supp. 2d 69 (D. Mass. 2001); *United States v. Carrillo*, 123 F. Supp. 2d 1223, 1247 n.4 (D. Colo. 2000); *Massachusetts Housing Fin. Agency v. Evora*, 255 B.R. 336, 343 n.3 (D. Mass. 2000); *Luciano v. United States*, 2000 WL 1597771, at *1 (E.D.N.Y. 2000).

[FN58]. Jerome I. Braun, Eighth Circuit Intensifies Debate over Publication and Citation of Unpublished Opinions, 84 JUDICATURE 90 (2000).

[FN59]. See Cooper & Fine, *supra* note 5, at 26 (quoting Judge Kozinski).

[FN60]. Kozinski & Reinhardt, *supra* note 25, at 44.

[FN61]. *Id.* They candidly acknowledge that most of the Ninth Circuit's unpublished memorandum dispositions are drafted by law clerks or staff attorneys and are rarely edited. "[T]he result is what matters in those cases, not the precise wording of the disposition Using the language of the memdispo to predict how the court would decide a different case would be highly misleading." *Id.*

[FN62]. Boggs & Brooks, *supra* note 23, at 23.

[FN63]. *Id.*

[FN64]. *Id.* at 24.

[FN65]. *Id.* at 24 & 24 n.28.

[FN66]. JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 14 (2d ed. 1990).

[FN67]. See KARL N. LLEWELLYN, THE BRAMBLE BUSH 66-69 (1960).

[FN68]. See Walter V. Schaefer, Precedent and Policy, 34 U. CHI. L. REV. 3 (1966).

[FN69]. Indeed, a significant number of opinions are published and never cited in another case. See *infra* text accompanying notes 92-94.

[FN70]. Martin, *supra* note 22, at 194.

[FN71]. See Recent Case, *supra* note 44. Another recent article concedes that while the Framers may not have conceived of precedent in the strictest sense in which the term is used, the historical record is "not inconsistent with the core idea of precedent ascribed to Article III [in Anastasoff]. This core idea is simply that courts must start with their own precedent, even if there are varying ideas about the binding nature of that precedent." Polly J. Price, Precedent and Judicial Power After the Founding, 42 B.C. L. REV. 81, 84 (2000).

[FN72]. *Id.* at 943 (discussing the views of Hamilton, Madison, and Blackstone).

[FN73]. *Id.* at 944.

[FN74]. John Hanna, The Role of Precedent in Judicial Decision, 2 VILL. L. REV. 367, 367-77 (1957) (tracing the history and contours of the doctrine of precedent).

[FN75]. MEADOR & BERNSTEIN, *supra* note 20, at 7.

[FN76]. Pound, as just one example, argued that the function of intermediate courts is that of deciding cases, and that these courts should forgo the writing of elaborate opinions to devote more time to that task, with development of the law left entirely to the highest court. See POUND, *supra* note 12, at 391.

[FN77]. *Id.* at 105.

[FN78]. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (stare decisis is a "principle of policy, and not an inexorable command").

[FN79]. See Recent Case, *supra* note 44, at 944-45 (discussing the Court's limitations on the precedential value of its summary dispositions).

[FN80]. *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam). In *Taylor*, the court of appeals reversed the district court without opinion. The U.S. Supreme Court noted that the "special circumstances" of the case required a remand for the court of appeals to explain its reasoning "on a point that had been considered at length by the District Judge." *Id.* In dissent, then-Justice Rehnquist disagreed with the Court's directive to the court of appeals. "The courts of appeals are statutory courts, having the power to prescribe rules for the conduct of their own business so long as those rules are consistent with applicable law and rules of practice and procedure prescribed by this Court. No existing statute or rule of procedure prohibits the Fifth Circuit from issuing a short opinion and order, as it has done here, or from deciding cases without any opinion at all. The courts of appeals, and particularly the Fifth Circuit, which has experienced the heaviest caseload of all the circuits, need the maximum possible latitude to deal with the 'flood tide' of appeals that the 'ever growing explosive increase' of federal judicial business has produced." *Id.* at 195-96 (Rehnquist, J., dissenting).

[FN81]. See ADMINISTRATIVE OFFICE OF U.S. COURTS, 1997 JUDICIAL BUSINESS OF THE UNITED STATES COURTS Table S-3 (1988); *Judicial Business 2000*, *supra* note 16, Table S-3.

[FN82]. At least one commentator on *Anastasoff* does not share this reaction despite agreeing with the case's holding, and in fact encourages the court before which he practices to issue more summary dispositions. See Howard J. Bashman, *In Defense of the Third Circuit's Use of Judgment Orders*, THE LEGAL INTELLIGENCER, Jan. 8, 2001.

[FN83]. See John Borger & CHAD OLDFATHER, *The Uncertain Status of Unpublished Opinions*, BENCH & BAR OF MINN., December 2000, at 36 (considering the Minnesota Constitution).

[FN84]. *Dwyer v. J.I. Kislak Mortgage Corp.*, 13 P.3d 240, 244 (Wash. Ct. App. 2000). In contrast, the Ninth Circuit recently declined to sanction a lawyer who cited an unpublished opinion in violation of Ninth Circuit Rule 36-3(b)(ii), in part because the court attributed some of the responsibility to itself for issuing unpublished opinions that contain more detailed discussions than the court's guidelines call for, thus creating a temptation to cite them. See *Sorchini v. City of Covina*, 2001 WL 468410 (9th Cir. 2001).

[FN85]. *Rogerson v. Hot Springs Advertising & Promotion Comm'n*, 237 F.3d 929 (8th Cir. 2001).

[FN86]. *Id.* at 931.

[FN87]. *Id.* at 931 n.2.

[FN88]. See *Judicial Business 2000*, *supra* note 16, Table S-3 (showing a range from 56.5 percent for the First Circuit to 90.5 percent for the Fourth Circuit); Mitu Galati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 200 (1998) (finding that during a recent two-year period, Judge Posner published more than nine times as many majority opinions as several judges from other circuits).

[FN89]. *Merritt & Brudney*, *supra* note 15.

[FN90]. *Id.* at 95.

[FN91]. *Id.* at 111-15.

[FN92]. *Id.* at 119.

[FN93]. POSNER, *supra* note 26, at 163-64.

[FN94]. *Id.* at 164.

[FN95]. *Id.*

[FN96]. See *id.* at 140-57; Kozinski & Reinhardt, *supra* note 25, at 44.

[FN97]. Martin, *supra* note 22, at 183.

[FN98]. POSNER, *supra* note 26, at 168-69.

[FN99]. See CARRINGTON ET AL., *supra* note 8, at 32 (citing cases).

[FN100]. Cf. *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 542 (2000) (Stevens, J., dissenting) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."); *id.* at 557 (Breyer, J., dissenting) (noting that the public's confidence in the courts "is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself").

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