The Resource Page: Focus on Unpublished Opinions

After a 1972 Federal Judicial Center report recommended that federal appellate courts could address their growing workload by publishing fewer of their decisions, the federal courts of appeal adopted publication plans that resulted in fewer published decisions. By 1980, seven of the federal circuits had also adopted rules providing that unpublished decisions could not be cited as precedent. Substantial debate has ensued thereafter as to the wisdom of rules prohibiting the citation of unpublished appellate court decisions in state and federal courts. In a recent decision, Judge Richard S. Arnold of the Eighth Circuit decided that such no-citation rules, at least in the federal courts, were unconstitutional. Because of the broad interest in this issue among judges, we reprint excerpts of Judge Arnold's decision. The footnotes and most of the textual citations have been omitted; other omissions are indicated with ellipses.

FAYE ANASTASOFF, APPELLANT, V. UNITED STATES OF AMERICA, APPELLEE.

No. 99-3917EM

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Submitted: May 8, 2000
Filed: August 22, 2000

Before RICHARD S. ARNOLD and GERALD W. HEANEY, Circuit Judges, and PAUL A. MAGNUSON, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

RICHARD S. ARNOLD, Circuit Judge.

Faye Anastasoff seeks a refund of overpaid federal income tax. On April 13, 1996, Ms. Anastasoff mailed her refund claim to the Internal Revenue Service for taxes paid on April 15, 1993. The Service denied her claim under *26 U.S.C. § 6511*(b), which limits refunds to taxes paid in the three years prior to the filing of a claim. Although her claim was mailed within this period, it was received and filed on April 16, 1996, three years and one day after she overpaid her taxes, one day late. In many cases, "the Mailbox Rule," *26 U.S.C. § 7502,* saves claims like Ms. Anastasoff's that would have been timely if received when mailed; they are deemed received when postmarked. But § 7502 applies only to claims that are untimely, and the parties agree that under *26 U.S.C. § 6511*(a), which measures the timeliness of the refund claim itself, her claim was received on time. The issue then is whether § 7502 can be applied, for the purposes of § 6511(b)'s three-year refund limitation, to a claim that was timely under § 6511(a). The District Court held that § 7502 could not apply to any part of a timely claim, and granted judgment for the Service. On appeal, Ms. Anastasoff argues that § 7502 should apply whenever necessary to fulfill its remedial purpose, i.e., to save taxpayers from the vagaries of the postal system, even when only part of the claim is untimely. We affirm the judgment of the District Court.

I.

We rejected precisely the same legal argument in *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished). . . .

Although it is our only case directly in point, Ms. Anastasoff contends that we are not bound by *Christie* because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the "judicial."

The Rule provides:

> 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. . . .

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L. Ed. 60 (1803).* This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991); Cohens v. Virginia, 19 U.S. 264, 6 Wheat. 264, 399, 5 L. Ed. 257 (1821).* These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude 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. That rule does not, therefore, free us from our duty to follow this Court's decision in *Christie*.

II.

The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. To the jurists of the late eighteenth century (and thus by and large to the Framers), the doctrine seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law. In addition, the Framers had inherited a very favorable view of precedent from the seventeenth century, especially through the writings and reports of Sir Edward Coke; the assertion of the authority of

precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government. In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.

Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds. By contrast, on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of the judicial power itself. As Blackstone defined it, each exercise of the "judicial power" requires judges "to determine the law" arising upon the facts of the case. "To determine the law" meant not only choosing the appropriate legal principle but also expounding and interpreting it, so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule . . . ." In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges "to determine law" in each case, a judge is "sworn to determine, not according to his own judgements, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old." The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "best and most authoritative" guide of what the law is, the judicial power is limited by them. The derivation of precedential authority from the law-declaring nature of the judicial power was also familiar to the Framers through the works of Sir Edward Coke and Sir Matthew Hale.

In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions. . . ."

The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it. Hamilton, like Blackstone, recognized that a court "pronounces the law" arising upon the facts of each case. He explained the law-declaring concept of judicial power in the term, "jurisdiction": "This word is composed of JUS and DICTIO, juris dictio, or a speaking and pronouncing of the law," and concluded that the jurisdiction of appellate courts, as a law-declaring power, is not antagonistic to the fact-finding role of juries. Like Blackstone, he thought that "the courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be. Like Blackstone, he recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power. Hamilton concludes that "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . ."

The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases. Hamilton anticipated that the record of federal precedents "must unavoidably swell to a very considerable bulk . . . ." But precedents were not to be recorded for their own sake. He expected judges to give them "long and laborious study" and to have a "competent knowledge of them." Likewise, Madison recognized "the obligation arising from judicial expositions of the law on succeeding judges." Madison expected that the accumulation of precedents would be beneficial: "among other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents." Although they drew different conclusions from the fact, the Anti-Federalists also assumed that federal judicial decisions would become authorities in subsequent cases. Finally, early Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a reliable system of American reporters in the years following the ratification of the Constitution.

We do not mean to suggest that the Framers expected or intended the publication (in the sense of being printed in a book) of all opinions. For the Framers, limited publication of judicial decisions was the rule, and they never drew that practice into question. Before the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American states. As we have seen, however, the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision. Although they lamented the problems associated with the lack of a reporting system and worked to assure more systematic reporting, judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum.

To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The 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. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III. No less an authority than Justice (Professor) Joseph Story is in accord. See his Commentaries on the Constitution of the United States §§ 377-78 (1833):

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them,

> when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
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> This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

III.

Before concluding, we wish to indicate what this case is not about. It is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision. The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not. We point out, in addition, that "unpublished" in this context has never meant "secret." So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled "published" or not, available to anyone on line. This is true of our Court.

Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. 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.

Finally, lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

IV.

For these reasons, we must reject Ms. Anastasoff's argument that, under 8th Cir. R. 28A(i), we may ignore our prior decision in *Christie*. Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the Constitution. *Willy v. Coastal Corp., 503 U.S. 131, 135, 117 L. Ed. 2d 280, 112 S. Ct. 1076 (1992)*. The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. Though prior decisions may be well-considered and directly on point, Rule 28A(i) allows us to depart from the law set out in such prior decisions without any reason to differentiate the cases. This discretion is completely inconsistent with the doctrine of precedent; even in constitutional cases, courts "have always required a departure from precedent to be supported by some 'special justification.'" *United States v. International Business Machines Corp., 517 U.S. 843, 856 (1996)*, quoting *Payne v. Tennessee, 501 U.S. 808, 842, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)* (Souter, J., concurring). Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.

Ms. Anastasoff's interpretation of § 7502 was directly addressed and rejected in *Christie*. Eighth Cir. R. 28A(i) does not free us from our obligation to follow that decision. Accordingly, we affirm the judgment of the District Court.

HEANEY, Circuit Judge, concurring.

I agree fully with Judge Arnold's opinion. He has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions. I write separately only to state that in my view, this is a case which should be heard en banc in order to reconsider our holding in *Christie*, and thus resolve an important issue.

The Resource Page

NEW BOOKS

NEIL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS. American Psychological Association, 2000 ($49.95). 301 pp.

Quinnepac College law professor Neil Feigenson attempts to explain how juries actually go about making their decisions. Feigenson summarizes current research from social and cognitive psychology to show the background factors that may influence a juror's decision-making process. In addition to the background research, he offers varied case examples of civil juries doing their work. He argues that jurors use their common sense, along with the facts of the case and the law they are given, to arrive at what he calls "total justice." In his view, juries will attempt to consider all of the evidence they deem relevant, even if consideration of it is precluded by legal rules, to reach a decision that they view as correct as a whole, even if they may reach it by blurring some of the legal distinctions provided to them in their instructions.

M. LEE GOFF, A FLY FOR THE PROSECUTION: HOW INSECT EVIDENCE HELPS SOLVE CRIMES. Harvard Univ. Press, 2000 ($22.95). 244 pp.

Book titles are supposed to be intriguing enough to catch one's attention and to get the reader to want to know more about a subject. This one worked for us. M. Lee Goff is a professor of entomology at the University of Hawaii at Manoa and a consultant to the Honolulu medical examiner. To him, each body at a crime scene is its own ecosystem, with a microenvironment inhabited by various flies, beetles, mites, spiders, and other creatures. Using actual cases on which he has consulted, Goff shows how the knowledge of these insects and their habits can allow a forensic entomologist to provide key evidence about crimes. Merging murder stories and science, this one looks of interest, even if we may never have an entomology expert witness in our own courts.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, FOURTH EDITION. Houghton Mifflin, 2000 ($60). 2050 pp.

For those contract and statutory interpretation cases that hinge on the meaning of a particular word, you want to have at least one, good dictionary on hand. The new fourth edition of the *American Heritage Dictionary* is a good choice either for your chambers or for your home. This new edition has 10,000 words and definitions that were not included in the last edition, published in 1992. In addition, this dictionary relies on a usage panel of 200 writers and scholars—including U.S. Supreme Court Justice Antonin Scalia from the judiciary—so that its entries provide both actual and proper usage guidance. New entries such as dot-com, e-commerce, and soccer mom keep this dictionary up-to-date with current usage.

WORTH NOTING

Juvenile Justice

Criminal Justice, the journal of the ABA's Criminal Justice Section, published a special issue on juvenile justice in its Spring 2000 issue. The issue included seven articles, including "What of the Future? Envisioning an Effective Juvenile Court" by Judge Arthur Burnett, Sr. Other articles examine the behind-the-scenes realities of juvenile detention facilities; whether a separate juvenile justice system is still feasible; the trend toward lowering the age at which juveniles may be treated as adults; and alternatives to punitive sentencing. Copies of the Spring 2000 issue can be obtained for $10 plus $2 for postage and handling from the ABA Service Center, 750 N. Lake Shore Drive, Chicago, IL 60611-4497.

Public Trust & Confidence

The National Action Plan on Public Trust and Confidence has gone "final." Prepared by a team as a follow-up to the May 1999 national conference, it provides a plan for building trust and confidence in the state courts. While the plan focuses primarily on what state and national organizations can do to promote public trust and confidence in the courts, it provides a useful overview of public trust and confidence issues, along with various steps that can be taken to improve trust and confidence in the courts. The national action plan can be found at http://www.ncsc.dni.us/PTC/NAP/index.html. *Court Review* published a special issue on public trust and confidence, based on the May 1999 national conference, in its Fall 1999 issue. The contents of that issue can be found at http://aja.ncsc.dni.us/courtrv/review.html.

Trial Court Performance Standards

Background resources on the Trial Court Performance Standards, including a detailed implementation manual with forms, are now available on the Web. The Trial Court Performance Standards can be an important resource for self-evaluation and self-improvement for any court or court system. They cover 22 performance standards in the areas of access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence. If something is an important mission of the courts, it's covered in these standards. Background materials on the standards are found at http://ncsc.dni.us/RESEARCH/tcps_web/. An introduction to the Trial Court Performance Standards can be found in Pam Casey's Winter 1998 article in *Court Review*. That article can be found at http://aja.ncsc.dni.us/courtrv/review.html.

FOCUS ON UNPUBLISHED OPINIONS

The Resource Page highlights a recent court decision of interest regarding the precedential effect of unpublished court opinions beginning at page 37.