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The Perils of Online Legal Research: A Caveat for Diligent Counsel

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Abstract

Online legal research is emerging as a preferred tool for judges, attorneys, and law students, providing a vast amount of nearly real-time legal resources at the speed of electronic search. This Article analyzes the risk of error associated with the immediacy of online opinion publishing and how the uncertainty of accuracy potentially compromises the litigator's ability to provide accurate advice.

Introduction

All lawyers are by now undoubtedly aware of the extent to which technological developments impact practice. Some of these affect the way everyone does business, such as the prevalence of cell phones, voicemail, fax machines, and photocopiers in every office. These developments are hardly unique to law practices and courts, of course, and often simply require judges, clerks, and attorneys to learn how to effectively integrate new technology into the pre-existing regime for performing duties and mundane activities.

A more important consideration at the heart of the practice of law and the work of courts resides in the digital revolution that has transformed the processes of announcing and accessing the law.[1] Practicing lawyers

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[1] For an interesting philosophical assessment on the way in which technology is shaping legal research, see Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305 (2000). Professor Berring argues that the digital revolution not only impacts legal research, but also the way in which legal

are now heavily invested in online research, using a variety of databases.[2] Perhaps the most used online research tools are commercial libraries, such as Westlaw and LexisNexis, but other search engines are increasingly available, including court-sponsored and maintained websites that include immediate posting of opinions issued by appellate courts.[3] The creation of judicial websites has resulted in development of a vendor neutral citation format serving as an alternative to the traditional citation to printed materials.[4] Non-profit, non-judicial research tools are also available on the Internet, and some legal research can be accomplished through general search engines, such as HotBot, Google, and now Google Scholar, which is devoted to academic research, including some legal research that will likely expand in the future.

Moreover, not only do lawyers and courts now routinely rely on digital research capabilities for legal research, but the use of information

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concepts are processed, despite the fact that legal education grows more isolated from legal practice. He concludes:

> So mix a technology that provides wide-ranging information, a new breed of users, and an academic setting that is separating itself from the actual practice of law, and one creates information anarchy. This jumble is fast coming to resemble the world of chaotic legal information that Blackstone found. Sound crazy? Think it through. The old classification system of West topic and key numbers can be an important element in research, but they no longer define the reality of legal thinking. The new generation of researchers is governed by the algorithms of its search engines. There is simply too much stuff to sort through. No one can write a comprehensive treatise any more, and no one can read all of the new cases. Machines are sorting for us. We need a new set of thinkable thoughts.

Id. at 314.

[2] *See* Lynn Foster & Bruce Kennedy, *Technological Developments in Legal Research*, 2 J. APP. PRAC. & PROCESS 275, 279-83 (2000) (discussing the impact of technological change, including online data bases, on legal research).

[3] *See* Henry H. Perritt, Jr. & Ronald W. Staudt, *The 1% Solution: American Judges Must Enter the Internet Age*, 2 J. APP. PRAC. & PROCESS 463, 467 (2000) ("Most federal circuits have web sites publishing the full text of their opinions. A rapidly growing number of state appeals courts are doing the same . . . .").

[4] *See, e.g.*, Coleen M. Barger, *The Uncertain Status of Citation Reform: An Update for the Undecided*, 1 J. APP. PRAC. & PROCESS 59 (1999). An example is the publication and citation format employed by the New Mexico courts in which appellate opinions are cited by year of issuance, issuing court, the number of the opinion in the sequence of opinions issued by the state supreme court or court of appeals. Pinpoint citation is to the numbered paragraph of the opinion. *E.g.*, State v. Martinez-Rodriguez, 33 P.3d 267 (N.M. 2001).

available through Internet sources in the litigation process has become more common.[5] The use of non-traditional sources of information has created problems precisely because digital data is subject to alteration, disappearance from the Internet,[6] and often lack of verification.[7]

The existence of digital research alternatives raises substantive issues, such as the designation of opinions as "unpublished" by appellate courts that continue the practice of proscribing citation to those opinions, even though they are now readily available through online sources.[8] Over the

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[5] The importance of Internet citation by appellate courts as a factor in appellate decision making is demonstrated by the fact that it is now studied. *See, e.g.*, William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 BUFF. L. REV. 1273, 1312 n.104 (2001).

> A search in the Westlaw "Allstates" database for 1999-Mar. 2001 using "http" as a search term found that the New Jersey Supreme Court led in citations to material on the Internet with twenty-one. The numbers of citations by top state courts other than New York and New Jersey were as follows: no cites: 20; one cite: 12; two cites: 8; three cites: 3; four cites: 2; five cites: 2; seven cites: 1. There were two Internet cites by the Supreme Court in 1999, and seven in 2000. As with LEXIS and Westlaw, it is possible that additional material was located using electronic research but was then cited to the print version, in accord with The Bluebook. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.2 (b) at 131 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

Id.

[6] Nearly a decade ago, editors of one law review noted the problems associated with citation to Internet sources in its articles. *See* Symposium, *The Development and Practice of Law in the Age of the Internet*, 46 AM. U. L. REV. 327, 346 (1996).

> *The American University Law Review* has supplemented the Bluebook citation to Internet sources because of the *transient* nature of the medium.... *The Law Review* retains file copies of all Internet sources so that readers may obtain sources that may have been online at the time an article was published, but that may no longer be available at a future date.

Id. at 346 n.81 (emphasis added).

[7] For a provocative examination of the problem of reliability of online data generally, including problems with citation to Internet-based information, see Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417 (2002).

[8] Philip A. Talmadge, *New Technologies and Appellate Practice*, 2 J. APP. PRAC. & PROCESS 363, 372 (2000). Justice Talmadge, of the Washington Supreme Court, observes:

> It is difficult to make a distinction between a published and unpublished opinion disseminated over the Internet. New terminology will be required. Plainly all of the

past several years, the dominant controversy in appellate practice has involved the continuing prohibition in many jurisdictions against using unpublished appellate opinions in subsequent litigation.[9]

Ironically, the same force that pressed forward the publication-citation debate, digital publication of judicial opinions resulting in increased accessibility, has resulted in a less-studied aspect of the changing nature of legal research and practice.[10] The speed with which appellate opinions

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opinions disseminated through the Internet are "published," but the real issue is whether or not they have precedential value. Appellate courts should eschew the "published/unpublished" terminology in favor of "precedential/non-precedential" opinions.

Id.

[9] For a discussion of the professional, judicial, and academic debate on the question of citation prohibitions, see 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 (2002); Stephen R. Barnett, *No Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003). Although the questions concerning use of unpublished opinions by appellate courts have been considered previously, the current stage of debate is attributable to the position advanced by late Senior Circuit Judge Richard S. Arnold of the Eighth Circuit, first in his essay, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999), and then in his opinion for the panel in *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000). In both, Judge Arnold argued that the Article III judicial power of the United States Constitution did not authorize the characterization of appellate opinions as lacking precedential value by virtue of their status as "unpublished." The debate has featured academic comment in scholarly reviews, such as *Anastasoff, Unpublished Opinions, and "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 169 (2001), which includes eleven essays and articles addressing publication issues and prohibitions against citing unpublished opinions. The debate has also focused on judicial discussion in both opinions and professional publications. *See, e.g*, Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001) (stating that "Article III [does not] require[] that all case dispositions and orders issued by appellate courts be binding authority"); *see also* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!*, 20 CAL. LAW. 43 (June 2000).

The debate has led to proposed amendment of Rule 32.1 of the Federal Rules of Appellate Procedure to permit citation to all judicial opinions, regardless of their publication status. *Judicial Conference Approves Rule Changes on E-Discovery, Unpublished Opinion Citation*, 74 U.S.L.W. 2168 (Sept. 27, 2005) (reporting the action of the Judicial Conference of the United States that would, prospectively, override court rules in four circuits still barring citation to unpublished opinions).

[10] In fact, the process has been studied. *See, e.g.*, Kenneth H. Ryesky, *From Pens to Pixels: Text-Media Issues in Promulgating, Archiving, and Using Judicial Opinions*, 4 J. APP. PRAC. & PROCESS 353 (2002) (providing a thorough and quite interesting history of the transformation of the process of disseminating judicial opinions).

can now be disseminated has seemingly increased the potential for infection of error in the litigation process attributable to editing error in the appellate process.[11] Along with the almost immediate general availability of appellate opinions, the sheer rapidity of dissemination means that traditional processes of refinement may be lost, at least temporarily.[12] This prospect should be of particular concern to trial counsel relying on recently released opinions available through digital research tools, to trial courts making decisions based on citation of newly released opinions, and to the appellate courts themselves. Appellate judges should recognize the potential harm from imprecision in the opinion writing process itself because the speed with which decisions are now "reported," whether designated for publication in the reporter system or not, necessarily requires trial lawyers and trial courts to be aware of the most recent expressions of law on any particular point relevant to the case being litigated.

I. Correction, Revision, or Re-issuance of Appellate Opinions: "Now You See It . . . But Maybe Not Later"

Appellate courts have traditionally been able to use the issuance of advance sheets by official and unofficial reporters as a means of expediting the publication of appellate opinions. An important side effect of the

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[11] Ryesky, *supra* note 10, at 404.

> Prior to the printing press, each hand-scribed book or other literary work was a unique creation, subject to textual variations from one specimen to the next. With the advent of the printing press, the individual books from the entire press run became textually identical. Likewise, photocopying processes, xerographic or otherwise, faithfully and accurately reproduce the text of the original. But modern on-demand printing technology now allows, for good or evil purposes, textual variations between press runs of the same edition, and indeed, variations of individual books within a single production run.

Id. (citations omitted).

[12] *See* Stephen L. Wasby, *A Judicial Secretary's Many Roles: Working With an Appellate Judge and Clerks*, 7 J. APP. PRAC. & PROCESS 151, 155 (1005) (noting the role of one judge's secretary in serving as an intermediary between chambers and West Publishing when requesting a delay in release of an opinion requiring correction).

issuance of unbound advance sheets has been that the availability of a newly issued appellate opinion in paper form permits correction before the opinion is "finalized" in the publication process by being included in the bound volumes of the official and unofficial reporters.

Sometimes, appellate courts have even notified readers that they should expect revisions to appear. For example, in *Tasini v. New York Times Co.*, the Second Circuit initially issued an opinion published in the advance sheets of the Federal Reporter in an important copyright case.[13] The court held that an author retains copyright interest in an article originally published as a "freelance" article when it is disseminated in electronic databases made available for the public.[14] The district court had ruled for the publishers, characterizing these articles as "collected works" under the Copyright Act.[15] After issuing its initial opinion reversing the district court, however, the Second Circuit issued a warning that its initial opinion had been withdrawn and stated that another opinion may be filed at a later date.[16] A superceding opinion was, in fact, later filed.[17]

The notice was important in alerting litigants and interested readers that the circuit court was in the process of reconsidering its initial decision with potentially far-reaching consequences. Although the court's superceding opinion reached the same result, and one affirmed by the

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[13] 192 F.3d 356, 1999 WL 753966 (2d Cir. Sept. 24, 1999), *superseded by* 206 F.3d 161 (2d Cir. 2000). A Westlaw search for this document will lead to the revised opinion at 206 F.3d 161. The original opinion remains available on Westlaw.

[14] *Tasini*, 1999 WL 753996, at *4.

[15] Tasini v. N.Y. Times Co., 972 F. Supp. 804, 826-27 (S.D.N.Y. 1997) (applying Copyright Act of 1976, 17 U.S.C. § 201(c) (1994)), *rev'd*, 206 F.3d 161 (2d Cir.), *cert. granted*, 531 U.S. 978 (2000), *aff'd*, 533 U.S. 483 (2001)).

[16] *Tasini*, 1999 WL 753996, at *1. The Westlaw version advises before the opinion begins:

> Editor's Note: The opinion of the United States Court of Appeals, Second Circuit, in Tasini v. New York Times Co., Inc., published in the advance sheet at this citation, 192 F.3d 356, was withdrawn from the bound volume at the request of the court. For superseding opinion, see 206 F.3d 161.

Id. The same notice appears in the bound volume on a page denoted as 356-66. The ten pages originally devoted to the *Tasini* opinion were deleted from the bound volume.

[17] Tasini v. N.Y. Times Co., 206 F.3d 161, 170 (2d Cir.), *cert. granted*, 531 U.S. 978 (2000), *aff'd*, 533 U.S. 483 (2001).

United States Supreme Court,[18] the litigation demonstrates the potential problem posed when appellate courts find it necessary to revise their thinking after issuance of an initial decision. The superceding opinion in *Tasini* provided a more detailed rationale for the circuit court's holding with regard to the publication practices of the individual defendants. But the court's notice that its initial opinion would be treated as withdrawn provided litigants, counsel, and the public with no clear directive that the issues would be resolved in the same way. Consequently, for the period of time between the notice that the initial opinion had been withdrawn and issuance of the superceding opinion, counsel and interested parties may well have simply been unable to predict exactly what the court intended to do.

The *Tasini* litigation demonstrates the potential lack of certainty in the interpretation or application of law that may result from an appellate court's determination that an initial opinion should be altered. Of course, the same problem arises when a panel opinion is overruled by an en banc court, as illustrated by the rehearing in *United States v. Singleton*,[19] litigation in the Tenth Circuit Court of Appeals notable for the dramatic initial holding by the panel that the government was precluded from obtaining testimony from reluctant witnesses through the use of benefits offered to the witnesses in return for an agreement to testify. In *Singleton*, however, the panel opinion was so obviously controversial that, within ten days, the circuit court noted that rehearing had been granted in the case, and a notice to this effect was included with the online panel opinion.[20]

Sometimes, an appellate court's decision in altering an initial opinion may be designed to address an issue other than its original rationale. Thus, in *McCoy v. State*,[21] the Alaska Court of Appeals revised its initial opinion published in the Pacific Reporter.[22] The court initially included

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[18] N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001).

[19] 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999).

[20] *Id.* at 1361-62. The circuit court issued its order granting rehearing and directing the parties to brief potential collateral issues of retroactive and prospective application of the panel holding on July 10, 1998. The panel decision was issued on July 1, 1998. The decision of the circuit court overruling the panel was issued on January 8, 1999.

[21] 80 P.3d 751 (Alaska Ct. App.), *reh'g granted*, 80 P.3d 757 (Alaska Ct. App. 2002).

[22] McCoy v. State, 59 P.3d 747 (Alaska Ct. App. 2002). The text of the opinion no longer appears in Westlaw's online database. Instead, the reader is advised that the opinion has been reissued and is published at 80 P.3d 751, 755, 757.

in its single opinion its separate opinions affirming the trial court's judgment, denying rehearing, and prohibiting citation to unpublished opinions by way of Judge Mannheimer's separate opinion addressing the question of citation to prior, unpublished court opinions under the state's "no citation" rule.[23]

In revising its opinion at Volume 80 of Pacific 3d, the court elected to divide the three-part opinion into separate opinions with separate page citations. There appears to be no substantive difference in the initial published opinion contained in Volume 59 and the superceding opinions published in Volume 80. The court's action might be explained by the likelihood that Judge Mannheimer's separate opinion,[24] which addressed the operation of the "no citation" rule, will probably have more far reaching implications for future litigants–suggesting greater frequency of citation–than the disposition of the *McCoy* case that allowed the trial court to consider the defendant's juvenile record when meting out punishment.[25]

Finally, uncertainty in the system is created by institutional procedures in place in some jurisdictions in which intermediate appellate court decisions are "depublished" by superior courts.[26] In reality, this process suggests no greater immediate threat to counsel's ability to predict the interpretation or application of a particular point of law than discretionary review of a lower court's appellate decision.[27] When discretionary review

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[23] These three opinions are included in the bound volume of the Pacific Reporter.

[24] McCoy v. State, 80 P.3d 757 (Alaska Ct. App. 2002).

[25] *Id.* at 751. If that is so, however, the court might well have explained its reason for revising the initial opinion so that lawyers and law review cite checkers will be spared the need to make verbatim comparisons in an effort to determine what, if any, substantive changes were intended or made.

[26] *See, e.g.*, Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 522 (1984) (discussing depublication used by state supreme court when lower court reaches the correct result using questionable or incorrect rationale); Steven B. Katz, *California's Curious Practice of "Pocket Review,"* 3 J. APP. PRAC. & PROCESS 385, 386 (2001) (discussing depublished opinions not citable as precedent under CAL. R. CT. 976(c)(1) (West 2001)); Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 ARIZ. ST. L.J. 175 (2000).

[27] For example, by rule, published opinions of the Oklahoma Court of Appeals are denied precedential value until formally adopted by the Oklahoma Supreme Court. OKLA. SUP. CT. R. 1.200(c)(2) (2000); *see* Cimarron Fed. Sav. Ass'n v. Jones, 832 P.2d 420, 1992 OK 55 (1992) (adopting opinion of court of appeals, 832 P.2d 426, 1991 OK CIV APP 67 (Ct. App. 1991)).

is granted, however, typically the higher court decides the question presented and issues an opinion designed to guide citizens and counsel in understanding the law.

II. Error in Online Versions of Judicial Opinions: "What You See May Not Be What You Get"

A worst case scenario of online access is presented when an appellate opinion, digitally issued and electronically accessed, contains an error of law. Unfortunately, the systems of digital access are not without the potential for error, and the speed with which decisions may be published online after being issued occasionally draws problems.[28]

In September of 2001, Arkansas attorneys arguing for defensive jury instructions in a capital murder trial[29] encountered the unusual situation in which different sources for controlling caselaw provided different rules governing a key issue for the defense. The range of lesser-included offenses in a capital felony murder charge under state law was in issue.[30]

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[28] For instance, in *Larkin v. Larkin*, the court observed that an unpublished opinion had been issued by the appellate court in another cause, "seemingly supportive of the trial court here," but had been withdrawn four days later, only to be followed by another unpublished opinion in a different cause some two months later which reached a different result, consistent with that of *Larkin*. The court noted "it is conceivable some confusion could have resulted before and at oral argument," and denied attorney's fees to the prevailing party. No. C6-87-2231, 1988 WL 31404, at *2 (Minn. App. Apr. 5, 1988).

[29] State v. James Fisher, No. CR-2001-1 (Franklin County, Charleston Dist., Ark. Sept. 17-21, 2001).

[30] Arkansas law provides for jury consideration of lesser-included offenses by statute.

> A defendant may be convicted of one offense included in another offense with which he has been charged. An offense is so included if:
> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
> (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

ARK. CODE ANN. § 5-1-110(b) (Michie 1997). "The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for

Defense counsel moved for lesser-included offense instructions on second-degree murder and manslaughter, but the trial court denied both on the basis of recent decisions issued by the Arkansas Supreme Court.

Under Arkansas law, a lesser-included offense instruction on first-degree felony murder must be given in all capital felony murder prosecu-

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a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *Id.* § 5-1-110(c).

Subsection 5-1-110(b)(1) sets out the test for lesser-included offense analysis using the long-standing elements analysis originally applied to prior jeopardy claims in *Blockburger v. United States*. 284 U.S. 299, 304 (1932). The test looks to the elements of offenses. If each offense requires proof of an element not required for proof of the other, the two offenses are not the same for double jeopardy purposes. *Id.* However, if the elements are identical, or if all of the elements for proof of one are included in the other, the offenses are the same for double jeopardy purposes. In the latter instance, the offense requiring proof of an additional element is typically considered the greater offense, while the other is the lesser-included offense. *See also* Sansone v. United States, 380 U.S. 343, 349-50 (1965) (applying the lesser-included offense analysis). The typical example of an elements-based lesser-included offense is presented when the accused is charged with an aggravated or armed robbery. This offense is usually distinguished from robbery by the additional element of proof that the defendant committed the offense while using a deadly weapon or threatening the use of a deadly weapon or physical violence in order to effect the robbery. If there is evidence in the record on which a jury could rationally conclude that the defendant neither used nor threatened use of a weapon or serious injury, the trial court should instruct the jury on the lesser offense of simple robbery if requested by either party. *See* Hamilton v. State, 556 S.W.2d 884, 888-89 (Ark. 1977).

Subsection 5-1-110(b)(2) recognizes perhaps the most obvious situation in which the lesser-included offense issue arises, although an interesting point is often raised with regard to whether the evidence could rationally give rise to either of two competing inferences. If the evidence (apart from the accused's own testimony) gives rise to the inference that the offense of burglary was only attempted, that inference almost necessarily means that the objective evidence would require acquittal on the burglary charge because, by definition, the offense was not completed. It would seem that the objective evidence could not support either of these conclusions if proof of an unlawful entry was required for conviction for burglary and the physical evidence shows only an attempt to gain entry without consent.

Subsection 5-1-110(b)(3) describes the situation in which the severity of the offense is graded based on the degree of injury to a person or property, or the same act may be committed with greater or lesser degrees of culpability. For instance, an intentional homicide may constitute the basis for a murder charge, but if the actor is simply "reckless" in committing the act, or if the actor commits the act while under the influence of an "extreme emotional disturbance," the same act may only support a conviction for manslaughter. ARK. CODE ANN. § 5-10-104(a)(1) & (3) (Michie 1997); Robinson v. State, 598 S.W.2d 421, 424 (Ark. 1980) (finding that evidence of the defendant's disoriented state of mind was sufficient to warrant instructions on lesser-included offenses in murder prosecution), *appeal after remand at* 624 S.W.2d 435 (Ark. 1981).

tions.[31] But the Arkansas Supreme Court determined in *Brown v. State* that a lesser-included offense instruction on second-degree murder was not available when charged with felony murder, based on its analysis of the elements defining second-degree murder.[32] In a subsequent decision in *Hill v. State*, the court concluded that manslaughter similarly was not a lesser-included offense under a charge of felony murder.[33] The court reasoned that both second-degree murder[34] and manslaughter offenses,[35] as defined by state law, required proof of a culpable mental state, whereas

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[31] Rhodes v. State, 716 S.W.2d 758, 761 (Ark. 1986). This rule is necessitated by the overlapping provisions of the capital felony murder and first-degree felony murder statutes. The latter permits conviction on proof of a homicide committed during the commission of any felony, while the former authorizes conviction and subjects the accused to possible penalty of death only upon proof of homicide committed during certain inherently dangerous felonies prescribed by statute. *Compare* ARK. CODE ANN. § 5-10-101(a)(1) (Michie 1997 & Supp. 2003) (identifying underlying felonies as terrorism, rape, kidnapping, vehicular piracy, robbery, burglary, delivery of a controlled substance or first-degree escape) and (2) (underlying felony of arson), *with id.* § 5-10-102(a)(1) (defining first-degree felony murder as homicide committed under circumstances "manifesting extreme indifference to the value of human life" while in the course of committing or attempting to commit *a* felony) (emphasis added).

The United States Supreme Court held in *Hopkins v. Reeves* that state courts are not required to instruct on lesser-included offenses in capital prosecutions if no lesser-included offenses to the capital crime–there, capital felony murder–are recognized under state law. 524 U.S. 88 (1998). The holding limits the application of *Beck v. Alabama*, in which the Court had held that failure to instruct on an applicable lesser-included offense in a state capital prosecution violated Eighth Amendment protections relating to use of the death penalty and Fourteenth Amendment due process protections. 447 U.S. 625, 632 (1980).

[32] 929 S.W.2d 146, 148 (Ark. 1996).

[33] 40 S.W.3d 751, 755-56 (Ark. 2001). The current version of *Hill* available on Westlaw continues to include incorrect references to second-degree felony murder in Headnotes [1] and [2] discussed in this Article, although the text of the opinion has been corrected.

[34] Under Arkansas law, "[a] person commits murder in the second degree if . . .[h]e knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or . . . [w]ith the purpose of causing serious physical injury to another person, he causes the death of any person." ARK. CODE ANN. § 5-10-103(a) (Michie 1997).

[35] Under Arkansas law, "[a] person commits manslaughter if . . . . [a]cting alone or with one (1) or more persons, he commits or attempts to commit a felony, and in the course of and in furtherance of the felony or in immediate flight therefrom. . . . [h]e or an accomplice negligently causes the death of any person . . . ." ARK. CODE ANN. § 5-10-104(a) (Michie 1997).

the criminal intent in a felony murder is supplied by proof of the actor's intent to commit the underlying felony.[36] Consequently, given its approach to elements analysis, the court rejected characterization of second-degree murder and manslaughter as lesser offenses of felony murder, because each required proof of an element that felony murder does not.[37] It further rejected the alternative theories of lesser offenses under state law,[38] because the death of the victim necessary for proof of

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[36] *Brown*, 929 S.W.2d at 148; *Hill*, 40 S.W.3d at 755. The *Hill* court also ignored the alternative theory of manslaughter in the statute that provides for conviction upon proof that the actor committed a reckless act resulting in death. ARK. CODE ANN. § 5-10-104(a)(3) (Michie 1997). Since the general culpability requirement provides for conviction only upon proof that the actor acted "purposely, knowingly or recklessly," ARK. CODE ANN. § 5-2-203(b) (Michie 1997), if the definition of the offense does not include a specific culpable mental state, a reckless manslaughter charge would arguably also offer the possible lesser-included offense rationale for felony murder. *But see* Ellis v. State, 47 S.W.3d 259, 261-62 (Ark. 2001) (holding that reckless manslaughter would not be an appropriate lesser-included offense of first-degree purposeful murder based on the fact the accused shot the victim only once from a distance of three to five feet, that evidence alone being insufficient to demonstrate that he acted recklessly in causing the victim's death).

[37] *Brown*, 929 S.W.2d at 148; *Hill*, 40 S.W.3d at 755. Arguably, the court incorrectly interpreted Arkansas law with regard to the requirement for proof of the culpable mental state in a felony murder prosecution. Arkansas law provides that, "[i]f a statute defining an offense prescribes a culpable mental state and does not clearly indicate that the culpable mental state applies to less than all the elements of the offense, the prescribed culpable mental state applies to each element of the offense." ARK. CODE ANN. § 5-2-203(a) (Michie 1997).

Neither the capital felony murder statutory provisions, ARK. CODE ANN. § 5-10-101(a)(1) (Michie 1997 & Supp. 2003) (specifying capital murder as committed during the commission or attempted commission of terrorism, rape, kidnapping, vehicular piracy, robbery, burglary, felony violation of the Controlled Substances Act, or first-degree escape) or (2) (specifying murder committed during commission of arson), nor first-degree murder, ARK. CODE ANN. § 5-10-102(a)(1) (Michie 1997) (murder during commission or attempted commission of any felony), prescribes a culpable mental state for the felony murder itself. When a statute does not provide a culpable mental state, however, section 5-2-203(b) states that, "culpability is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly." Consequently, the Arkansas Supreme Court's conclusion that the only required culpable mental state required for proof of felony murder is that required for proof of the underlying or predicate felony may actually be in conflict with the statutory requirement for proof of all elements of the offense charged–the murder itself. This construction would appear to undermine the traditional rationale for the felony murder offense but may be technically required by a proper reading of the Arkansas statutes.

[38] ARK. CODE ANN. § 5-1-110(b) (Michie 1997); *see supra* note 30 (reciting the text of the statute).

manslaughter indicated that a lesser injury was not involved in the offense, nor was there evidence even arguably supporting an inference that there was an attempted offense.[39]

Unfortunately, counsel preparing for the capital murder trial in September, 2001, were confronted by different versions of the Arkansas Supreme Court's opinion in *Hill*. The *Hill* court had incorrectly included dicta in its opinion suggesting that "second-degree felony murder" is an offense under Arkansas law. At least, it did so in some versions of its opinion.

The official printed advance sheet version of the opinion included three references to "second-degree felony murder." First, Headnote 2 stated that "first-degree felony murder and second-degree felony murder are lesser-included offenses of capital felony murder."[40] Furthermore, in the text of the opinion, the court observed: "No instruction on second-degree felony murder was sought or given."[41] And finally, in discussing the culpable mental state or mens rea required for felony murder, which the court found related only to proof of the underlying felony, the court also noted: "The same holds true for first-degree felony murder *and second-degree felony murder*, which qualify as lesser included offenses of capital felony murder."[42]

The same language, referring to "second-degree felony murder," appeared in the online version of the opinion posted on the website maintained by the Arkansas Supreme Court.[43] Similarly, the same language was included in the online version of the opinion published by LexisNexis.[44]

However, the online and advance sheet version of *Hill* issued by Westlaw did not contain the same language used by the court in referring

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[39] *Hill*, 40 S.W.3d at 755.

[40] *Id.* at 751. Arkansas continues to publish official reports and issue advance sheets for its official reporter.

[41] *Hill*, 40 S.W.3d at 754.

[42] *Id.* at 755 (emphasis added).

[43] The text was originally located at Hill v. State, No. CR 00-921, at **1, 5 & 6 (Ark. Mar. 22, 2001), *available at* http://courts.state.ar.us/opinions/corrections.html, but on December 10, 2001, the opinion was corrected to delete the references to "second-degree murder."

[44] Hill v. State, No. CR 00-921, 2001 Ark. LEXIS 182, at *7 (Ark. Mar. 22, 2001).

to "second-degree felony murder." The Westlaw and Southwestern Reporter advance sheet versions retained a reference to "second-degree felony murder" in Headnote 2.[45] However, there are significant differences in the text of the decision between the Westlaw versions published online and in the advance sheets[46] when compared to the official and LexisNexis versions. The Westlaw versions deleted the reference to lack of a request for an instruction on "second-degree felony murder."[47] The court's reference to "first-degree and second-degree felony murder" as qualifying as "lesser-included offenses of capital felony murder" in the text of the opinion were also corrected in both the online and advance sheet versions published by Westlaw: "The same holds true for first-degree felony murder, which qualifies as a lesser included offense of capital felony murder."[48]

Even when presented with the advance sheet version of *Hill* in the official reports, the trial judge refused to give a lesser-included offense instruction on second-degree murder, concluding that the express holding in *Brown* controlled over the dicta in the later opinion in *Hill*.[49] Complicating the situation faced by counsel was the existence of a uniform jury instruction, approved by the Arkansas Supreme Court, which specifically provided for use of a lesser-included offense instruction on manslaughter in capital felony murder cases.[50] Arkansas Model Criminal Instructions (AMCI) authorize jurors, in an applicable capital felony murder case, to

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[45] *Hill*, 40 S.W.3d at 751.

[46] *Id.* This version was printed in the traditional advance sheet format on September 27, 2001.

[47] *Hill*, 40 S.W.3d at 755.

[48] *Id.*

[49] *Id.* The confusion in the differing versions was cleared up by Bill Jones, the Official Reporter of Decisions for the State of Arkansas. He explained that the opinion had been corrected by the authoring judge but was concerned that the corrections had not immediately been included on the official website. Apparently, the Attorney General's office, noting the potential *Brown-Hill* conflict, called it to the attention of the court, but at a time when multiple sources of legal information are available, failure to ensure complete correction can be troubling. Telephone Interview with Bill Jones, Official Reporter of Arkansas Decisions (Oct. 29, 2001).

[50] ARKANSAS MODEL CRIMINAL INSTRUCTIONS 2D 1006 (Michie 1994) [hereinafter AMCI].

consider both first-degree felony murder and manslaughter as lesser-included offenses. The model instruction provides, in pertinent part:

> The difference between murder in the first degree and manslaughter is that in murder in the first degree the death of _____ *(victim)* must have been caused under circumstances manifesting extreme indifference to human life, but in manslaughter the death of _____ *(victim)* must have been caused "negligently" (as that term has been denied for you). Of course, all other elements of either crime must be proved, but the difference between them is what I have just explained.[51]

This instruction builds on the model instruction for manslaughter, generally.[52] The court's opinion in *Hill* noted the existence of AMCI 1004 in observing that Hill had tendered a requested instruction on manslaughter as a lesser-included offense.[53] Yet the *Hill* court never discussed why the model instruction on manslaughter it had authorized was not applicable, given the specific transitional instruction approved with the adoption of AMCI 1006. In fact, the court proceeded with its analysis of the elements of felony murder and manslaughter without further discussion of model instructions 1004 or 1006 at all.[54]

Under Arkansas law, a trial judge is obligated to give an official model instruction if one exists that properly states applicable law.[55] Only if the

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[51] *Id.*

[52] AMCI 2D 1004. This instruction provides, in pertinent part:

> _____ *(Defendant(s))* [is] [are] charged with the offense of manslaughter. To sustain this charge the State must prove beyond a reasonable doubt that:
>
> . . . .
>
> (d) [(Acting alone or with one or more persons) _____ *(Defendant(s))* (committed) (or) (attempted to commit) _____ *(applicable felony)*, and in the course of and in furtherance of that crime (or in immediate flight therefrom):
>
> (1) ([He] [they] [or] [a person acting with (him) (them) (defendant[s]) negligently caused the death of _____ *(victim)*.

Id. This model instruction tracks the statutory language of the manslaughter offense in the Arkansas Criminal Code. *See Brown*, 929 S.W.2d at 148.

[53] *Hill*, 40 S.W.3d at 753-54; *see also* AMCI 2D 1004.

[54] *Hill*, 40 S.W.3d at 755-56.

[55] *In re* Ark. Model Crim. Instructions, 264 Ark. Appx. 967 (1979) (per curiam). This order directed that "the AMCI instruction shall be used unless the trial judge finds that it does not accurately state the law. In that event he will state his reasons for

trial court finds the model instruction to be in error can it depart from the authorized instructions.[56] Based on the Arkansas Supreme Court's opinion in *Hill*, the trial court declined to give a lesser-included offense instruction on felony manslaughter.[57]

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refusing the AMCI instruction." *Id.* The note on use to AMCI 2D 1006 specifically provides that the bracketed clause set out in the text "should be given only if the court has defined the term 'negligently' in its manslaughter instruction." AMCI 2D 1006 note on use. Thus, the only theory of manslaughter that is applicable as a lesser-included offense in a capital or first-degree felony murder prosecution is an act negligently causing the death of an individual in the course of commission or attempted commission of a felony. ARK. CODE ANN. § 5-10-104(a)(4)(A) (Michie 2001). Arguably, the trial court could have declined the instruction on the theory that the victim's death was not caused negligently, but rather intentionally, in which case the prosecution's felony murder theory was not supported by the evidence.

[56] Conley v. State, 607 S.W.2d 328, 330 (Ark. 1980) (stating "[i]f Arkansas Model Criminal Instructions (AMCI) contains an instruction applicable in a criminal case, and the trial judge determines that the jury should be instructed on the subject, the AMCI instruction shall be used unless the trial judge finds that it does not accurately state the law. In that event he will state his reasons for refusing the AMCI instruction").

[57] *Fisher*, No. CR-20001-1. The Arkansas Supreme Court's decision in *Hill* is also troubling because the court simply failed to account for the felony manslaughter statute the General Assembly had adopted and upon which AMCI 2D 1006 was predicated. Even assuming that felony manslaughter would fail under the court's analysis of Arkansas lesser-included offense law, the existence of the felony manslaughter statute demonstrates that two different statutes proscribed the same conduct, at least in certain circumstances. In such a case, the doctrine of lenity typically applies to require that the accused be prosecuted under the less onerous provision. But the rule of lenity is not favored, as the United States Supreme Court made clear in *Smith v. United States*. 508 U.S. 223, 239 (1993) ("Finally, the dissent and petitioner invoke the rule of lenity. The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable. Instead, that venerable rule is reserved for cases where, 'after 'seiz[ing] every thing from which aid can be derived,'' the Court is 'left with an ambiguous statute.'") (citations omitted).

Alternatively, the court might have considered whether the felony manslaughter and felony murder statutes reflect a relatively common problem that arises when two different provisions address the same subject, one generally and one specifically. In *Lawson v. State*, the Arkansas Supreme Court stated that the more specific statute will control over the general provision:

> We have long recognized the familiar principle that where a special act applies to a particular case, it excludes the operation of a general act upon the same subject. We have also always recognized the principle that penal laws should be strictly construed, that all doubts in construing a criminal statute must be resolved in favor of the defendant . . . .

746 S.W.2d 544, 546 (Ark. 1988) (citations omitted).

The recognition that manslaughter would constitute an appropriate lesser-included offense under certain facts, as evidenced by the model instruction on point, would further suggest that second-degree murder should have been viewed as an acceptable intermediate lesser-included offense in the steps down from capital felony murder to felony manslaughter. The *Brown* court may have correctly concluded that the culpable mental state of "knowingly" in the second-degree murder statute, which describes a murder committed with "extreme indifference to the value of human life," requires proof of a greater degree of intent than required for conviction for felony murder, which provides for no element of knowledge or intent at all. However, the *Brown* court's second-degree murder analysis was too narrow and its conclusion too broad. *Brown* addressed only one statutory theory of second-degree murder in rejecting the requested instruction presented.[58] Alternatively, Arkansas law permits conviction on second-degree murder for an act done with intent to cause serious injury that results in death.[59] In at least some cases, an act done

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However, with respect to both lines of argument, it is reasonably safe to say that the felony manslaughter statute is more specific only to the extent that it addresses negligent homicide, rather than something approaching a deliberate act clearly evident in many felony murder prosecutions. This reality suggests that the felony murder doctrine itself may have served its usefulness, as some courts and commentators have suggested. *See, e.g.*, People v. Washington, 402 P.2d 130, 134 (Cal. 1965) (en banc) ("To invoke the felony-murder doctrine to imply malice in such a case is unnecessary and overlooks the principles of criminal liability that should govern the responsibility of one person for a killing committed by another."); People v. Aaron, 299 N.W.2d 304, 328 (Mich. 1980) (abolishing felony murder doctrine in Michigan due to "harshness and inequity" in "violat[ing] the basic premise of individual moral culpability"); Michael J. Roman, *"Once More Unto the Breach, Dear Friends, Once More": A Call to Re-Evaluate the Felony-Murder Doctrine in Wisconsin in the Wake of* State v. Oimen *and* State v. Rivera, 77 MARQ. L. REV. 785, 821 (1994) (noting that "[n]early all . . . commentary is derogatory to the [felony murder] doctrine"); James W. Hilliard, *Felony Murder in Illinois–The "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues*, 25 S. ILL. U. L.J. 331, 343 (2001) ("Courts and 'commentators have 'almost universally condemned' the felony murder rule.' It 'has been the subject of vitriolic criticism for centuries.' Indeed, 'the criticism levelled against the doctrine 'constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine.' 'There are, however, a few defenders of the doctrine, although they are significantly outnumbered in the literature.'") (citations omitted); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1430 n.8 (1994).

[58] 929 S.W.2d at 147-48.

[59] ARK. CODE ANN. § 5-10-103(a)(2) (Michie 2001).

in the course of committing a felony designed to cause serious injury will result in death and should support a conviction for second-degree murder.

Time is often limited at trial, and decisions must be made on the basis of the best information available. Given competing versions of the same text, trial counsel are understandably likely to rely on a version furthering the interests of their clients. The problem posed in the trial discussed here was accentuated when jurors sent out a note during deliberations asking if there was any other less serious offense they might consider.[60] The trial court correctly limited the jury's options under what ultimately proved to be the official statement of Arkansas law at the time.

Ironically, *Brown* and *Hill* were subsequently overruled in *McCoy v. State*, where the Arkansas Supreme Court "receded" from those and other decisions that had excluded lesser-included offenses not predicated on a strict elements analysis.[61] The defendants in the instant case, having been issued relatively light sentences upon conviction for first-degree felony murder, elected to waive their appeals, thus forfeiting any benefit from the subsequent change in the law announced in *McCoy*.[62]

This scenario reflects but a single instance of difficulty occasioned by existence of alternate sources of case law, delivered or accessed in different formats.[63] What is true about online databases is that correction likely involves the deliberate removal of previously available information.[64] The reality of the ability to alter existing information is

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[60] Telephone Interview with Mark F. Hampton, Trial Counsel (Sept. 23, 2001).

[61] 69 S.W.3d 430 (Ark. 2002), *on state's petition for review from* 49 S.W.3d 154 (Ark. Ct. App. 2001). The court of appeals also reversed on direct appeal.

[62] Telephone Interview with Mark F. Hampton, Trial Counsel (Sept. 27, 2001).

[63] Even the traditional print format is hardly infallible. A LexisNexis version of the Arkansas Criminal Code, 2001 edition, was published without the complete negligent homicide statute. ARK. CODE ANN. § 5-10-105 (1987). The statute, as published, left out essential elements of the offense in the printed volume; it contained only sections (a)(1)(A) and (a)(1)(B). LexisNexis subsequently supplied corrected copies of the statute to be pasted into the softbound copies. The corrected copies contained, in addition to the other (a) sections, (a)(2), (b)(1), (b)(2), and (c).

[64] *See, e.g.*, J. Thomas Sullivan, *Redefining Rehearing: "Previewing" Appellate Decisions Online*, 2 J. APP. PRAC. & PROCESS 435, 441-44 nn.17, 22 & 23 (2000) (discussing the withdrawn opinion in *Dodd v. State*, 1999 OK CR 29, 1999 WL 521976 and substituted revised opinion on rehearing by the Oklahoma Court of Criminal Appeals at *Dodd v. State*, 993 P.2d 778 (Okla. Crim. App. 2000)).

that reliance on digitally-reported legal authority is necessarily linked to the accuracy of human activity in creating the information. Because of the incredible speed with which such information is now transmitted and made available, the potential for error resulting from lack of reflection or editing is significant.[65]

Conclusions

New and developing technologies often only precipitate minor changes in daily life. For trial and appellate lawyers, the impact of online publication of judicial opinions and availability of information in digital format has clearly altered the dynamics of publication decisions and citation practice.[66] What is almost certain is that diligent trial and appellate lawyers will routinely search online databases for recent decisions that may affect their clients' cases. To the extent that the immediacy of information availability results in reliance on the most up-to-date appellate court disposition of legal issues, both courts and online publishers must strive to accurately report appellate opinions.

Publishers can, in one sense, be no more reliable than the courts themselves. When appellate panels or courts err in the information presented in their opinions, or when they determine that an opinion may need to be altered in the rehearing process, they often interject uncertainty into the legal system. This uncertainty compromises the ability of litigators to

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[65] When a Texas attorney sought sanctions for opposing counsel's reliance on an opinion designated for publication but as yet unpublished, the appellate court rejected the argument, holding that the publication designation permitted use of the opinion in subsequent litigation. The court observed that, "if rule 90(i) were interpreted to require actual publication, we would have to decide what 'publication' means, *i.e.*, slip opinions versus typeset advance sheets and bound books versus online computer services versus compact disks." Bloch v. Dowell Schlumberger Inc., 925 S.W.2d 301, 304 (Tex. App. 1996). The court also pointed out the particular relevance of the opinion in question, noting that "[i]t is no small wonder Dowell has sought tenaciously to preclude the use of [the prior decision]," because that decision was unfavorably dispositive of the issue in the case. *Id.*

[66] For instance, Iowa Rules of Appellate Procedure permit citation to an unpublished opinion in a brief, but require the party to attach a copy of the unpublished opinion to the brief and to include "an electronic citation indicating where the opinion may be readily accessed online." IOWA R. APP. P. 6.14(5)(b) (2004).

provide accurate advice and trial courts to reach correct conclusions. The technological revolution now altering the way lawyers and courts do their work requires a continuing commitment to excellence and accuracy in drafting and reporting appellate decisions. It is key that appellate courts recognize the importance of the digital dissemination of their opinions as a tool for practitioners and lower courts so that reliance on electronically accessed legal information is not compromised.