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REDEFINING REHEARING: "PREVIEWING" APPELLATE DECISIONS ONLINE

J. Thomas Sullivan*

Online access to judicial decisions has had a dramatic impact upon the processes of legal research routinely used by trial and appellate lawyers. Electronic access provides a cost-effective alternative to traditional forms of research, and even Luddites must agree that its efficiency in providing a virtual equivalent[1] to the best of our law libraries is impressive. Online research capability results in obvious benefits to the processes of appellate litigation and decisionmaking, such as easy access to large quantities of relevant source material; quick access to new sources of authority; and relative economic savings to counsel over acquisition and maintenance of traditional law libraries. The availability of online research capability has altered the processes used by lawyers and judges engaging in legal research. The advantages of online research capacity are clear. They provide the most efficient means of confirming the current state of the law while the substance is in flux.

Apart from reliance on online research as a substitute or supplement to traditional modes of legal research, the flow of information electronically suggests another potential use, one which would fundamentally alter the process of appellate decisionmaking. Just as publication of even "unpublished" opinions online facilitates insight into the decisionmaking

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1. Not all sources of law and legal comment are available online at present, and research into highly specialized or esoteric sources may require more traditional searches, but the sheer speed of development of online research capability has transformed the ways in which lawyers search for legal answers and develop support for their arguments. *See e.g.* Lynn Foster & Bruce Kennedy, *Technological Developments in Legal Research*, 2 J. App. Prac. & Process 275, 281 (2000) ("For example, today LEXIS-NEXIS contains 11,400 databases, adds 8.7 million documents each week, and has 2.1 million subscribers worldwide.").

process,[2] "pre-publication" of judicial opinions would facilitate comment from beyond the appellate bench in the decisionmaking process itself.

For example, a panel of an appellate court or the court, sitting en banc, would simply post an opinion for public review for a limited period of time. Formal comment or response would be generated by the parties, interested non-parties, academic or practitioner commentators, or the public. Following the comment period, the panel or the court would then have time to reconsider its proposed disposition and supporting rationale in light of the responses offered. The opinion could then be issued in final form, withdrawn and modified, or withdrawn with a different decision substituted.[3]

Reconsideration of initial dispositions has traditionally been the heart of the rehearing process.[4] The previewing of opinions would transform the process from one in which reconsideration is conducted as a private exercise between the litigating parties and the panel or court issuing the opinion into a more public process. Formalization of this process would constitute a dramatic change in the way appellate courts work, but informal previewing is already occurring.

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2. One example is noted by Judge Richard S. Arnold of the Eighth Circuit in his essay, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999). The availability of unpublished opinions through online research sources seemingly undermines the utility and rationale behind the designation of some opinions as *not* to be published. Moreover, in a recent decision, *Anastasoff v. U.S.*, 2000 WL 1182813 (8th Cir. Aug. 22, 2000), Judge Arnold's opinion for the panel held the Eighth Circuit rule forbidding citation to unpublished opinions was violative of the judicial power set forth in Article III of the United States Constitution.

3. Something similar to this process may be used by trial judges when proposed orders are made available to counsel for objection or comment before being finalized. See *Clarification*, 68 U.S.L.W. 1352 (Dec. 14, 1999), correcting an earlier report on *Los Angeles Times v. Free Republic*, 68 U.S.L.W. 1335 (Dec. 7, 1999), to reflect that the trial court had forwarded its proposed order in case to both counsel for objections prior to rendering final decision.

4. For example, in *Clemmons v. Delo*, the court granted the rehearing petition and ordered relief in a capital habeas action, explaining:

> Two principal concerns led us to take the *unusual* step of granting rehearing by the panel. First, the petition for rehearing pointed out that, contrary to our earlier view, petitioner had in fact presented evidence crucial to his Confrontation Clause claim to the state post-conviction court. Second, we had not properly understood Missouri evidence law, a mistake that caused our analysis of the prejudice caused by the *Brady* violation to be flawed.

124 F.3d 944, 946 n. 1 (8th Cir. 1997) (opinion on rehearing) (internal citations omitted; emphasis added).

I. "REHEARING" ONLINE

The publication or dissemination of opinions online has resulted in a digital analog to the process known to lawyers in which opinions published in the advance sheets are withdrawn, changed or modified before final publication in the bound copy of a reporter. For example, a reader perusing volume 208 of the *Federal Reporter, Third Series*, will find the following notation at page 1246:

> Editor's Note: The opinion of the United States Court of Appeals, Tenth Circuit, in Blackhawk–Central City Sanitation Dist. v. American Guarantee and Liability Ins. Co., published in the advance sheet at this citation, 208 F.3d 1246, was withdrawn from the bound volume because opinion was ordered withdrawn, judgment was vacated, and modified opinion was filed May 31, 2000.[5]

Once appellate opinions are posted online as they are issued, any alteration of the initial disposition can be traced electronically. This is much the same as the inclusion of a note regarding the withdrawal of an opinion from the bound volume, which indicates that the initial opinion printed in an advance sheet or other format has been divested of precedential value in the traditional publication process. The rapid dissemination of opinions in an electronic format simply makes this process much more immediate because there is no lapse of time in the publication of an opinion in print format, whether disseminated directly by the clerk's office or through advance sheets. Not only does electronic publication improve public access, but it also generates some degree of uncertainty in the development of the law. The online histories of three cases illustrate this point.

A. Tasini v. New York Times Co.

The United States Court of Appeals for the Second Circuit posted its opinion online in *Tasini v. New York Times Co.*[6] following issuance of its decision on September 24, 1999. The case involved an important question of copyright law: whether an

5. *Blackhawk-Central City Sanitation Dist. v. Am. Guarantee & Liab. Ins. Co.*, 208 F.3d 1246 (10th Cir. 2000).

6. 1999 WL 753966 (2d Cir. Sept. 24, 1999).

author retains copyright interest in an article originally published as a "freelance" piece when it is disseminated in electronic databases available to the public. The district court ruled for the defendants in the action based on the characterization of these freelance articles as "collective works" of the defendant publishers.[7] The Second Circuit issued an opinion reversing and remanding, ordering that judgment be issued for the appellant authors.[8]

Far from conclusively deciding the issue at the time, however, the Second Circuit's decision initially posted on Westlaw included the notation that the opinion earlier published in the advance sheets had been withdrawn from the bound volume. The editor's note warned:

> 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. *A superseding opinion may be filed at a later date.*[9]

In fact the court did issue a superseding opinion in the case, on February 25, 2000,[10] and the Second Circuit again reversed, ordering summary judgment entered for the complaining authors.[11] The published history of this decision indicates that counsel, relying on the advance sheet publication and failing to confirm the continuing viability of the opinion through a search of online sources, might well have missed the fact that the circuit formally expressed reservations with its original opinion and ordered it withdrawn from the bound volume. While the court did not alter its disposition after reconsidering its initial published opinion, it might well have; in failing to check an online source rather than

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7. *Copyright Act of 1976*, 17 U.S.C. § 201(c) (1994).

8. Rendition of judgment by the appellate court appears clearly appropriate in light of the Supreme Court's holding last term in *Weisgram v. Marley Co.*, 120 S. Ct. 1011 (2000), in which the Court held that an appellate court may reverse and render judgment in a proper case, consistent with Rule 50 of the Federal Rules of Civil Procedure.

9. *Tasini v. New York Times Co.*, 1999 WL 753966 (2d Cir. Sept. 24, 1999) (emphasis added). The text of the initial panel opinion is no longer available on Westlaw. In fact, the current Westlaw version does not even include the language that appeared in the initial publication.

10. *Tasini v. New York Times Co.*, 206 F.3d 161, 2000 WL 273942 (2d Cir. 2000). A Westlaw search of the prior Westlaw citation will indicate that a new opinion had been issued in the case and the text of the initial opinion had been deleted from the database.

11. *Tasini*, 206 F.3d at 171-72.

simply relying on the advance sheets, counsel would likely have missed the court's action altogether unless by chance she had noticed that the original opinion was not included in the bound volume once it arrived.

The Second Circuit's withdrawal of its initial opinion in *Tasini* and replacement with an opinion substantially similar in holding would not have had profound consequences for practitioners relying on the panel's first effort, or perhaps, those practitioners forced to address the holding as adverse to the interests of their clients. The substituted opinion did not serve to change the disposition significantly, so that the primary impact on the appellate process was the uncertainty in the development of the law indicated by the cautionary note accompanying the opinion as initially published. A different concern is implicated when the rehearing process results in a direct change in disposition that alters the position of the parties in the litigation. Unlike technical or grammatical changes, which may not inure to the detriment of a party, substantive changes are far more significant in the rehearing process.[12] This problem is suggested by the United States Court of Appeals for the Tenth Circuit's treatment of witness bias in federal prosecutions resulting from prosecution agreements with witnesses which might influence them to testify on behalf of the government.

12. The rehearing process is often a poor means of ensuring justice. Consider the case of *Aguirre v. State*, 732 S.W.2d 320 (Tex. Crim. App. 1987). The case remained on the rehearing docket for *five years* before the opinion originally issued was reversed by the court. *Id.* at 324. The published opinion incorrectly notes that Judge Clinton authored both the original reversal and the opinion on rehearing in the synopsis; in fact, Judge McCormick authored the opinion on rehearing, and Judge Clinton dissented. The delay resulted in issuance of an intervening opinion in *Murphy v. State*, 665 S.W.2d 116 (Tex. Crim. App. 1983), which was inconsistent with the original opinion in *Aguirre* and ultimately led to affirmance of the trial court on rehearing. *See Johnson v. State*, 4 S.W.3d 254, 256-57 (Tex. Crim. App. 1999) (discussing *Aguirre* and noting the five-year delay). Such an extended period of delay in which conflicting holdings were issued by the same court hardly suggests that rehearing is always a satisfactory process for resolving questions about the accuracy of an initial ruling.

B. United States v. Singleton

In *Singleton*, a panel of the Tenth Circuit held that federal legislation barred the use of testimony procured by conferring a benefit on the witness in return for his testimony.[13]

Prosecutors panicked when suddenly faced with an inability to use cash, dismissals, immunity, sentencing leniency, or witness protection to procure testimony. The prosecutors' concern was almost laughable for defense counsel who often cannot get subpoenas served on key witnesses who may themselves face exposure to liability and then confront assertion of Fifth Amendment claims when the witnesses are brought to court. Ultimately, of course, the full Tenth Circuit overruled the panel holding and restored prosecutorial discretion to its proper place in the universe.[14] The balance, or imbalance, of power in the subpoena process was restored through rehearing. The same result could have been obtained with perhaps less distress had the panel opinion initially been previewed for comment, permitting thoughtful input from prosecutors, academics, and interested parties—before the publication of the panel opinion launched a flood of motions in limine throughout federal and state court systems relying on the panel opinion in *Singleton*. However, the potential uncertainty in the viability of the panel's decision was almost immediately made known to practitioners because the circuit court granted en banc review within ten days after release of the panel opinion.[15]

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13. *U.S. v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). The text of the panel opinion is no longer available on Westlaw. An attempt to locate the opinion results in the notification that the "document is not included in any Westlaw database." However, the panel opinion is published in the bound volume of the reporter and may still be located there, with the notation that the Circuit Court granted rehearing and ordered the panel opinion vacated.

14. *U.S. v. Singleton*, 165 F.3d 1297 (10th Cir.), *cert. denied*, 527 U.S. 1024 (1999). The en banc circuit court said: "From the common law, we have drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency.... This engrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government." *Id.* at 1301.

15. The order granting rehearing en banc is published at 144 F.3d 1361, following the published panel opinion.

C. Dodd v. State

Something similar to the situation in *Singleton* recently happened in Oklahoma and also suggests the suitability of formalizing previewing of appellate opinions.[16] The Oklahoma Court of Criminal Appeals released an opinion in *Dodd v. State*,[17] which also addressed the prosecution's use of witnesses whose motivation for testifying was subject to serious question. Dodd was convicted of a capital murder and sentenced to death, in part based on the testimony of a jailhouse informant who later recanted his testimony, and then recanted his recantation.[18] In reversing, the court held that the trial court had erred in excluding two potentially impeaching letters written concerning the informant's motivation to testify because they had not been disclosed by defense counsel in the discovery process. The appellate court observed:

> Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony. This problem is even greater here when we look at the error that is discussed above as to the withdrawal of the statements by the informant and what the informant has to say about promises made to the informant. The Court should look to how many times the informant has testified before for the District Attorney's office. Here we have two very clear letters that may or may not be true but should have been in evidence. Consequently, under the unique circumstances of

16. *See Special Discovery Scheme, Jury Instruction Required When Jailhouse Informer to Testify*, 68 U.S.L.W. 1436 (Feb. 1, 2000).

17. 1999 OK CR 29, 1999 WL 521976. The text of this opinion is no longer available on Westlaw, nor is it available on the Oklahoma Court of Criminal Appeals' website. *See OCCA Online: Opinions of the Court of Criminal Appeals* (accessed Sept. 24, 2000) <http://www.oscn.net/datafiles/legal/oklahoma/caselaw/criminal/1999/1999%20OK%20CR%2029.html>.

18. *Dodd v. State*, 2000 OK CR 2, ¶ 15, 993 P.2d 778, 782:

> After Dodd's preliminary hearing, Bryant recanted his testimony that Dodd had admitted killing the victims. The recantation occurred during an interview with investigators for another capital murder case. Bryant later reasserted the truthfulness of his original testimony. Bryant testified at trial about his recantation and the circumstances surrounding the recantation. Bryant explained that he told the investigator "what she wanted to hear" in hope that she would arrange for him to get an O.R. bond so he could get out of jail and return to his dying wife.

Id.

> this case, we find Dodd's murder conviction must be reversed.[19]

In a special concurrence, Judge Chapel set forth a specific set of guidelines to be followed by the state's trial judges in considering admission of testimony offered by jailhouse informants.[20] This rule-making in the context of an announced opinion would have dramatically changed admissibility procedure in a way necessarily requiring immediate understanding on the part of trial judges, prosecutors, and defense counsel.

But the *Dodd* opinion was not finalized upon its release online. In fact, the opinion carried a notation to that effect:

> NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.[21]

And the opinion was subsequently withdrawn by order of the court once it granted the state's motion for rehearing.[22]

The Oklahoma court then reissued its opinion, again reversing the capital conviction.[23] The reissued opinion left intact the majority's observations concerning the use of jailhouse informants.[24] In the reissued opinion the *majority* adopted the procedure for admission of an informant/witness's testimony to be

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19. *Dodd*, 1999 OK CR 29, ¶ 22, 1999 WL 521976 at *5.

20. *Id.*at ¶¶ 1-6, 1999 WL 521976 at **7-8 (Chapel, J., concurring). The text of Judge Chapel's concurrence is no longer available on Westlaw, nor is it available on the Oklahoma Criminal Court of Appeals' website.

21. *Dodd*, 1999 OK CR 29, 1999 WL 521976.

22. *Dodd v. State*, 1999 WL 907406 (Okla. Crim. App. Oct. 6, 1999). The court's withdrawal stated, in pertinent part:

> On July 22, 1999, we issued an Opinion in this matter wherein we reversed both murder convictions and remanded for new trial. See Dodd v. State, 1999 OK CR 29, —P.2d—. The State of Oklahoma filed a Petition for Rehearing on August 10, 1999.
>
> Upon consideration of the matters raised in the Petition for Rehearing, we find rehearing should be, and hereby is, GRANTED. We further find the Opinion, including the Special Concurring Opinion and Dissent, issued July 22, 1999, should be, and hereby is VACATED.
>
> IT IS SO ORDERED.

Id. at *1. The text of this order is no longer available on Westlaw.

23. *Dodd v. State*, 2000 OK CR 2, 993 P.2d 778.

24. *Id.* at ¶ 22, 993 P.2d at783. *See supra* n. 18 and accompanying text.

used to facilitate discovery and cross-examination[25] that previously had only been articulated in Judge Chapel's concurring opinion.[26]

Although the court adopted, in part, the procedure advocated initially in Judge Chapel's special concurrence, effectively engaging in an important act of judicial rule-making in the process,[27] it was not as far-reaching in terms of the trial court's exercise of discretion in determining admissibility of this type of evidence. In his concurrence, Judge Chapel would have required not only disclosure of information about the informant designed to facilitate cross-examination, but also would have imposed a duty on trial courts to make preliminary determinations about the reliability of the proffered testimony, reviewable for abuse of discretion.[28]

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25. *Id.* ¶¶ 24-26, 993 P.2d at 784.

26. *Supra* note 19.

27. Vice-Presiding Judge Lumpkin dissented in part, objecting to the court's rule making in violation of the authority granted to the legislature and its prior enactment of the discovery code governing disclosures prior to trial. *Dodd*, 2000 OK CR 2, ¶ 7, 2000 WL 12030 at *9.

28. The process advanced in Judge Chapel's concurring opinion included:

> ¶5 Prior to trial, the judge shall conduct a reliability hearing. At the reliability hearing, the reviewing court should evaluate the evidence by hearing the testimony of the informant, any other relevant witness (including possibly the defendant), and any evidence bearing on the informant's credibility. The judge shall specifically consider the following factors: (1) whether the informant has received or will receive anything in exchange for testifying; (2) whether the informant has testified or offered evidence in other cases and any benefit there received; (3) the specificity of the informant's testimony; (4) the manner in which the statement from the defendant was obtained; (5) the degree to which the statement can be independently corroborated; (6) whether the informant has changed his testimony in this case or any case; and (7) the informant's criminal history.
>
> ¶6 After considering the evidence, the judge should determine whether the moving party established that the informant's testimony is more probably true than not. If not, the testimony should be excluded. If so, the testimony should be admitted, leaving as a final safeguard any lingering questions on the witness's credibility to the jury. In all cases where a court admits jailhouse informant testimony, OUJI-CR CR 9-43 (amended as follows) shall be given: The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the defendant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever

The brief history of the appellate litigation in *Dodd* demonstrates how online publication of judicial opinions virtually invites change in the way the process will work in the future.

The process reflected informally in *Dodd* may ultimately be formalized in a system permitting previewing of opinions. In contrast to *Singleton*, the opinion initially released in *Dodd* expressly advised counsel and the public that the court had yet to finalize its position, thus cautioning against reliance on the opinion as mandatory. Informally or formally, however, a trial court could adopt the court's approach in its exercise of discretion when confronted with an admissibility issue relating to jailhouse informant testimony. There is no suggestion that the *Dodd* court "previewed" its opinion in order to assess official and public reaction prior to finalizing its holding. But the use of online "previewing" will permit formalization of a broader range of input than readily available now through the rehearing process. The decision to formalize previewing by integrating this approach into the rehearing process requires consideration of the advantages and disadvantages of input from interested parties other than the litigants in this phase of the proceedings.

II. ADVANTAGES AND DISADVANTAGES OF PREVIEWING

A. Advantages

The suggested process of "previewing" decisions online would clearly break with tradition in which appellate decisionmaking is a private enterprise.[29] However, for the judges, law clerks, and staff attorneys assigned to work on a particular case, it would offer the potential for certain discrete advantages often compromised or ignored by privacy concerns.

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changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.

¶7 The admission of such testimony shall be reviewed on appeal to determine whether abuse of discretion occurred. These requirements shall be applied prospectively to cases awaiting trial.

Dodd, 1999 OK CR 29, ¶¶ 5-7, 1999 WL 521976 at **8-9 (Chapel, J., concurring) (internal citations omitted). The text of this opinion is no longer available on Westlaw.

29. As in "cloaked in secrecy," rather than an enterprise undertaken for profit.

1. Openness

First, this process would transform appellate decisionmaking from a secretive into an open process. Just as administrative agencies engaging in rule-making formally request comment from interested parties and the public prior to adopting new or modifying existing regulations, this period of comment would permit comment on proposed "final" opinions of the court. For the overwhelming majority of cases, the "preview" will result in little prospect for input except by counsel most involved with the case or type of case being decided. Many appeals simply do not pose novel issues generating widespread interest or comment because they will pass through the process in virtual anonymity, whether in paper or digital format. Cases which do involve significant or novel claims, however, could benefit from general scrutiny—in the same way that amicus curiae representation often brings to bear important points of view, supporting arguments or particularized information on the process.[30] Where dispositions will have important impact on society beyond that on the parties, input concerning social or economic implications is critical to ensuring that a single appellate court ruling does not alter public policy or private decisionmaking to the unfair detriment of individuals, enterprises, or communities not parties to the action.[31] Online previewing would permit those interests to be expressed and at least considered by the court before a proposed disposition and opinion are finalized and issued, and at considerably less cost than in the typical additional representation required by the amicus process.

2. Accuracy

Second, if correct decisionmaking is the most important function of the appellate court, then improving accuracy would be the most important consequence of opening the decisionmaking

30. *See e.g.* Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. App. Prac. & Process 279 (1999) (summarizing role and benefits of amicus curiae representation in appellate courts).

31. A classic example of this potential for harm is seen in Justice Marshall's opinion for the majority in *Powell v. Texas*, 392 U.S. 514 (1968), in which he declined to find an adequate record before the Court upon which to make fundamental decisions about the treatment of alcoholism and intoxication in the criminal justice system.

process for public comment. "Correct" decisionmaking does not necessarily mean that the court essentially got the answer "right," as law professors often suggest, but more. It suggests that the right answer was given for the right reasons.[32] Appellate courts frequently answer questions with right answers, but not necessarily for the right reasons, a fact which results in concurring opinions and opinions distinguishing the bases for holdings. Similarly, even right reasoning often leads to an incorrect or wrong result which sometimes requires reversal, overruling, or another sign of formal disapproval. "Correct" decisionmaking contemplates the range of substantive and procedural criteria by which lawyers and judges assess the quality of the process. In other words, the decisionmaking process may be improved because the appellate court would have the advantage of a range of professional and, possibly, lay opinion that would inform its work.

Many appellate opinions are flawed by incorrect references to facts or the procedural history of a case, but these flaws do not require a change in the court's ruling. Instead, they prove to be fodder for rehearing motions and usually unsuccessful petitions for discretionary review or certiorari. In this sense, they may pose their greatest danger as irritants for the parties and counsel in the case. Attentive counsel offering comment on the proposed opinion and pointing to the error in interpreting the factual record below could readily correct these flaws. Once published or formally issued, in the context of an unpublished opinion, correction of these flaws is unlikely because there is ultimately too little value in making the correction in light of the fact that the correction will have no effect on the disposition.

But accuracy has a certain value, apart from prejudice, and the only certain way to build in corrective process for the potential for human error in the processing of large caseloads by judges, panels of judges, staff attorneys, law clerks, and law student externs, who all may be involved in the decisionmaking process, is

32. Often, appellate courts affirm rulings made by trial courts which are correct, but not for the reasons given in the course of the proceedings below. *See e.g. Drummond v. Drummond*, 1997-NMCA-094, ¶ 12, 945 P.2d 457, 461:

> C. Affirming the District Court Under Right-For-Wrong-Reason Doctrine
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> 12. Despite the fact that the legal rationale used by the district court was erroneous, we may affirm the court's decision if it is right for any reason and affirming on a different ground would not be unfair to the appellant.

Id.

to permit the parties most interested in the dispute to advise the court prior to issuance of the decision. Even a party destined to lose has some right to expect accuracy when an appellate court deals with an issue of primary significance to the party. When the court fails to state the facts correctly, it disappoints that party by suggesting that the court may have also erred in more significant contexts. A system that relies on public confidence should not quickly dismiss the perception created by its own failings, particularly when some of these failings could readily be addressed.

More importantly, when a potential error would prejudice a party, the screening of dispositions would afford correction without requiring the losing party to establish the degree of harm essential for rehearing or discretionary review. This is important because the announcement of the decision, particularly when published, serves a critical function apart from the determination as to which party should prevail. It becomes a statement of law, and the party bearing the burden on rehearing or discretionary review must often show not only that an error has been made, but that there is an additional cost to the legal system from letting the announced ruling stand. When the panel or court correctly states the rule or principle of law, and its application would be correct, were the underlying facts properly understood, the losing party may have a more difficult time in showing that the ruling should be withdrawn. The error in assessing the underlying facts to which the principle has otherwise been correctly applied simply will not warrant correction.

Of course, when the panel or court has not correctly interpreted the rule, the virtue of previewing the opinion is greatly increased because external comment can assist the court in avoiding issuance of a decision marred by a doctrinally incorrect result.[33] A legally incorrect disposition may occur with less

33. For example, the Arkansas Supreme Court, sitting en banc, improperly concluded that for purposes of ex post facto analysis, the sentencing law on the date of sentencing would control the sentencing options available, rather than the sentencing law effective on the date of the offense. *Davis v. Mabry*, 585 S.W.2d 949, 952 (Ark. 1979) (en banc). Five years later, in *Bosnick v. Lockhart*, 677 S.W.2d 292 (Ark. 1984), the court acknowledged its error, citing the controlling legislation, Arkansas Statutes Annotated section 43-2829 (Bobbs-Merrill Repl. 1977) and the intervening holding in *Weaver v. Graham*, 450 U.S. 24 (1981). *Bosnick*, 677 S.W.2d at 292. The Supreme Court traced the rule through a series of decisions to *Calder v. Bull*, 3 U.S. 386, 390 (1798), noting the holding in *Fletcher v. Peck*, 10 U.S. 87, 138 (1810):

frequency than the factual error which otherwise might not warrant a different holding. Previewing decisions to ensure accuracy in legal theory, which would permit input from other sources before finalization of a panel or court opinion, would be preferable to a system in which correction can only be made through the formal processes of rehearing or further appellate review.

3. *Facilitating settlement*

The pre-publication of dispositions and opinions online would undoubtedly facilitate settlement negotiations that are now often conducted by counsel who rely on mere guesses about the tendencies of an appellate panel and their own assessments of the strength of their supporting legal authority. If a court's predisposition is disclosed, however, a client can be rationally counseled about the prospects for continuing litigation which may be futile and expensive. Previewing also means, of course, that in many cases counsel will be able to advise against settlement pending final disposition of the appeal, because the element of uncertainty that prompts negotiation and compromise will be almost completely reduced once the proposed disposition is disclosed online. But this happens anyway once a decision is issued; the "preview" would facilitate settlement avoiding publication of a formal opinion that in many cases entails future costs for a client or similarly situated parties because precedent is thereby established.

Openness, accuracy, and facilitation of settlement, then, may be said to be three potential advantages flowing from the recognition of a technologically-enhanced rehearing process. Clearly, this approach, if formalized, would change the nature of judicial decisionmaking and interject public consideration of proposed decisions in the process. To the extent that appellate decisions should reflect the best exercise of legal thinking available, previewing an appellate court's decision and

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"An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed." 450 U.S. at 28 n. 9. The Arkansas court's correction in *Bosnick* occurred in an opinion denying a petition for rehearing in which counsel had expressly requested clarification on this precise issue. *Bosnick*, 677 S.W.2d at 292.

supporting opinion may offer distinct advantages. But these are likely not without cost.

B. Disadvantages

The most serious danger to the integrity of the appellate process would be the perception that appellate judges will no longer function independently of political pressure. Many lawyers and citizens undoubtedly hold that opinion already. Nevertheless, the danger of loss of public and professional confidence is perhaps so significant that any formalization of a process for previewing judicial decisions should be undertaken with great caution.

Nevertheless, traditional concerns for the integrity of the appellate process will be voiced in opposition to the formalization of any process in which judicial decisionmaking is fundamentally altered to reflect a more democratic, or legislative process. In effect, online previewing of appellate opinions would seem to merge the traditionally distinct lines between rule-making, in which public comment is invited, and adjudication, in which settled rules are applied to resolve factual disputes. Democratization offers the benefit of public input, of course, but at the potential cost of permitting majoritarianism to dominate the branch charged with protecting individual rights and interests from majority oppression.

But inviting public consideration of pending dispositions and opinions offers perhaps the worst of both worlds. It will invite appellate fact-finding if courts are not careful with regard to the information they consider in the process. Furthermore, much information may not actually provide additional insight into the way in which cases are decided. If the chief objection to the prospect of online previewing of decisions lies in the very threat of input from diverse sources into the decisionmaking process, then the process itself might afford a measure of protection. When comment is public and available to the community generally, citizens can determine what pressures have prompted a change in thinking on the part of a panel or court, rather than having the process shrouded in traditional notions of formality which inevitably involve secrecy. In this sense, the formalization of the

process of public comment may serve to prevent private, non-disclosed comment from influencing appellate courts.

In terms of public perception, recognition of a role for public comment may also lead to the unfortunate belief that appellate judges will abandon dispassionate enforcement of legal principle in favor of publicly acceptable positions on important issues. Concern over public perception of the motivation of actors in the process undoubtedly factors into the decision to televise court proceedings.[34] These concerns also demand secrecy in the disposition of Supreme Court decisions that makes public disclosure of the inner workings of the Court so disturbing for many in the legal community. What is likely true, however, is that many of our most able legal thinkers and jurists might not choose service on the Court out of simple concern for personal shyness or privacy. This is not an insignificant consideration for justices who do not risk public exposure by voluntarily running for elected office, including judgeships, but appointees to the Court are already subjected to substantial media exposure during the appointment and confirmation process. Perhaps our recent national experience with televised conflict in the process alone justifies the Court's continued aversion to media coverage of its public functions. Ironically, the decisions of the Supreme Court, as the final court of last resort, are those least likely to benefit from previewing. At that level, the issues have typically been fully

34. These concerns still keep cameras out of many courtrooms, and often for good reason, because the conduct of trials should not be altered by considerations of public exposure of the process. While trials, particularly those conducted before citizen-jurors serving as fact-finders, might need to be shielded from public scrutiny which may intimidate citizens in the deliberative process, appellate courts might easily be distinguished as forums for public viewing. To the extent that appellate judges are concerned with application of law to facts and not redetermination of facts already found below, televised oral arguments would appear to promote public access to an important function of our governmental system with rather obvious educational benefits, provided the judges are capable of performing well on camera.

Exclusion of television from the United States Supreme Court represents a reaction, perhaps, to long-held concerns that introduction of technology designed to expand public access may compromise the Court's ability to do its work. But exclusion of cameras from the Court cannot be justified on the usually compelling grounds that jurors and witnesses in high-profile trials should neither be influenced nor compromised by public exposure on television. Furthermore, the Justices are professionals at the pinnacle of power who should hardly be influenced by the minimal intrusion that televised proceedings would actually pose.

litigated, and the Court's posture as policy maker is often subject to the inclinations of the Justices themselves.[35]

Once decisions of even the Supreme Court are released for online dissemination, control over the process has been altered in somewhat the same way that digital communication is revolutionizing other aspects of our social, commercial, and political life. The legal system cannot realistically endorse the benefits of online research without sacrificing the tradition of bound volumes. Nor can it expect the appellate process to remain the same in its core approach to decisionmaking while other aspects of the litigation process, such as the processing of briefs, de-emphasis on oral argument, and increasing use of support staff to process cases, change to reflect demands for efficiency attributable to increasing caseloads.

The suggestion that integrity of the process will necessarily be compromised by formalizing the opportunity for public and professional comment may well raise a straw man; it reflects reliance on the system, rather than the personal integrity of the decisionmakers, as guarantor of integrity. As will almost all technological change, threats posed in terms of issues of integrity should first address the ultimate moral responsibility of those who adopt new technologies or innovations, rather than viewing the technology itself as an inherent threat to integrity. Previewing of appellate decisions will undoubtedly change the nature of that decisionmaking process to afford greater, and broader, input into the process. But this will happen when any casual or interested reader of an online decision not yet finalized takes the opportunity to comment directly to the court. Oddly, the professional rules under which attorneys operate may serve to insulate appellate courts from unsolicited comment by counsel who lack standing while permitting non-attorneys the option of expressing their concerns directly to appellate judges.

This may result in unintended pressures being brought to bear on judges deciding the most controversial of cases. For instance, the public pressure brought to bear on a court which reverses a criminal conviction in a particularly notorious case, such as the reversal of a capital conviction or sentence of death, as happened

35. But in the case of *Powell v. Texas*, the litigation had not so thoroughly developed important facts and longer range policy implications of the alternative course of action available to the Court, as Justice Marshall noted. *Powell*, 392 U.S. at 522.

in *Dodd*,[36] or grant of new trial in a case involving a child molester, may threaten the professional position of those judges involved in the decision. This prospect might support appointment, rather than election of state appellate judges, of course, but the threat of undue influence being brought to bear through online previewing appears to be as great when public pressure is brought to bear through conventional means. Yet, the threat is more substantial, because public disapproval of appellate decisions typically can only occur once a decision is formally entered. Then, pressure can only result in a reconsideration if the court grants rehearing and vacates its earlier decision. "Previewing" poses the distinct possibility that such pressure could routinely influence judges not to make controversial or politically sensitive decisions precisely because the initial publication of the decision is not even intended to be final.

The tendency to compromise judicial independence has undoubtedly already happened; online access to judicial decisionmaking simply makes the process of dissemination of information more efficient and less costly. Because it would encourage public comment on judicial decisionmaking, the inherent risk is that formal comment on proposed decisions will improperly influence judges to reach politically acceptable, but legally improper decisions. One way to address this tendency would be to require a court altering its position to state its reasons for a change from the original disposition, something that may be done in the traditional rehearing process. Balanced against this considerable cost to just appellate review is the benefit for more input from a knowledgeable and interested bar and public which may lead to better-reasoned decisions.

In this context, the previewing of decisions may suggest a legitimacy in considering public opinion in the finalizing of judicial decisions which would be inappropriate. Clearly, the role of the judiciary is to protect individual rights and interests from oppression by the majority, and traditionally, the judicial process is not a legislative process in which public preference offers a

36. The appellate court noted that the trial court had concluded, in its required report concerning the conviction and sentence, that the evidence did not foreclose all doubt about the defendant's guilt, and that the trial judge concluded that "the jury was influenced by passion or prejudice or other arbitrary factors in imposing the sentence." *Dodd v. State*, 2000 OK CR 2, ¶ 20, 993 P.2d 778, 783.

basis for policy decisions. The potential for corruption of judicial independence is not a necessary consequence of technological innovation, even though it poses the threat that judges will hesitate to judge properly in light of public outcry.

But the potential for improper influence in the judicial process does not necessarily mean that the process will, in fact, be compromised. After all, the *Dodd* Court appears to have withstood any public objection which might have followed its initial reversal and reiterated its position that the error committed by the trial court required a new trial.

A weighing of the advantages and disadvantages in retooling the rehearing process will not necessarily suggest that previewing is desirable. But what is clear is that technological developments lend themselves to rapid change, which is not always well thought out or the product of rational choice. Regardless of whether the process is formalized, recent history suggests that electronic dissemination of judicial opinions has, in fact, reshaped the rehearing process in terms of access, if not in terms of input. The informal process described in the three case histories discussed earlier suggests one critical problem for formalization of previewing as a component of rehearing: Initial opinions should, perhaps must, remain posted online so that counsel, scholars, and the public can readily trace the progress of decisionmaking in an individual case. Once initial opinions are withdrawn and otherwise generally unavailable, the ability to understand where and why a court has withdrawn or overruled an initial disposition is compromised and may, effectively, be lost.

Moreover, in order to make an online system for rehearing workable, as suggested in this essay, it will be important for the appellate briefs filed in an individual case, as well as the appendices, and other material excerpted from the record on appeal, to be accessible in the same online format. This will provide context for any comment offered in response to a proposed decision posted online.

III. CONCLUSION

In a society now driven by economic interests fueled by technological innovation, the application of technological change to traditional modes of decisionmaking, including judicial

decisionmaking, seems highly likely. Because the use of online previewing to enhance accuracy in the appellate process seems reasonable, others will undoubtedly suggest it. The threat to the integrity of the judicial process will lie in the tendency to conclude that regularity and predictability necessarily further the interests of justice. These concerns may actually represent only the drive for utilitarian or pluralistic harmony that sacrifices individual liberties for a greater economic good. Rather than embracing technology as an end, the independent judiciary will be forced to impose traditional concerns for constitutional rights and legal values on this potential tool for a more effective process.

As with many technological developments, the pace of change may drive policy, rather than be directed by it. Those who embrace application of new technologies to the legal system will be able to advance strong arguments in favor of changing appellate practice and decisionmaking to accommodate these new modes of communication. In the end, those of us who favor a quieter, slower pace of decisionmaking and traditional values—which attach more readily to a process exemplifying social norms of nineteenth and twentieth century practitioners than to the more economically efficient promises of the twenty-first—will eventually be left to reflect on the words of Henry Drummond in *Inherit the Wind*:

> (*Turning to the jury, reasonably*) Gentlemen, progress has never been a bargain. You've got to pay for it. Sometimes I think there's a man behind a counter who says, "All right, you can have a telephone; but you'll have to give up privacy, the charm of distance. Madam, you may vote; but at a price; you lose the right to retreat behind a powder-puff or a petticoat. Mister, you may conquer the air; but the birds will lose their wonder, and the clouds will smell of gasoline!"[37]

37. Jerome Lawrence & Robert E. Lee, *Inherit the Wind* 83 (Bantam Pathfinder ed. 1964).