Authority Without Borders: The World Wide Web and the Delegalization* of Law

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I. INTRODUCTION

We live in an information age. Thanks to the Internet and search engines such as Google,[1] never before in history has it been so easy to access so much information so quickly. With the advent of wireless technology and smartphones, we are becoming accustomed to finding answers online anywhere, at any time, and are exposed to more information than ever before in history. The Internet is replete

* The term "delegalization" was coined by Frederick Schauer and Virginia Wise in their article, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495 (2000).

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[1] GOOGLE, http://www.google.com/ (last visited Apr. 11, 2011).

with websites designed to provide ready answers to questions.[2] Indeed, the Internet has been described by the U.S. Supreme Court as "a vast library including millions of readily available and indexed publications."[3] Wikipedia, for example, is one of the largest encyclopedias ever created and is among the ten most-visited websites.[4] Our first instinct when confronted with something we don't know is to jump online to the "irresistible and indispensable ultimate answer-finder" and search out the answer to our question.[5] For most questions, the answer can be found quickly and easily.

The majority of those individuals born in the United States since approximately 1965 have had this kind of ready access to information for most of their adult lives.[6] Those on the younger end of the spectrum have used computers since childhood.[7] These individuals, collectively members of Generation X[8] and Generation Y (or Millenials),[9] comprise the vast majority of law school graduates in the last fifteen to twenty years. The incoming generations of law students, the "digital natives," have never known a world without ready access to information via the Internet.[10] It is no surprise, then, that the technological abilities of recent generations of law school graduates have wrought changes at all levels of the legal field, from day-to-day law practice, to legal academic scholarship, to judicial decision-making.[11]

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[2] *See, e.g.*, ANSWERS.COM, http://www.answers.com/ (last visited Apr. 11, 2011); FIVETHIRTYEIGHT, http://www.fivethirtyeight.com/ (last visited Apr. 11, 2011); POLLDADDY, http://answers.polldaddy.com/ (last visited July 14, 2010); POLLSTER, http://pollster.com/ (last visited Apr. 11, 2011); WIKIANSWERS, http://wiki.answers.com/ (last visited Apr. 11, 2011); YAHOO! ANSWERS, http://answers.yahoo.com/ (last visited Apr. 11, 2011).

[3] Reno v. ACLU, 521 U.S. 844, 853 (1997).

[4] *Wikipedia*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia (last visited Apr. 11, 2011).

[5] Molly McDonough, *In Google We Trust?*, A.B.A. J., Oct. 2004, at 30 (describing Google).

[6] *See* Joan Catherine Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the "MTV/Google" Generation*, 54 LOY. L. REV. 775, 779 (2008).

[7] *Id.*

[8] *Id.* at 778 (defining Generation X roughly as those people born between 1965 and 1982).

[9] *Id.* (defining Millenials as those born between 1977 and 2003).

[10] Camille Broussard, *Teaching with Technology: Is the Pedagogical Fulcrum Shifting?*, 53 N.Y.L. SCH. L. REV. 903, 912 (2009) (noting that those who have grown up with these technologies since childhood, the "digital natives," are currently making their way into law schools).

[11] Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J.L. & TECH. 223, 224 (2008).

One of the most dramatic changes to legal practice as a result of the rise of the Internet is the transition to online legal research. It is now well documented that practicing lawyers conduct the vast majority of their research on the web.[12] The nature of electronic search technology has brought about many changes in the research process itself.[13] It is not unexpected or surprising that lawyers accustomed to jumping online for the answers to all of their questions of a personal nature prefer to go online for their legal research as well.

What is less clear is the extent to which, if at all, electronic research is changing the nature of the law and legal reasoning itself.[14] While the medium of legal research may have changed, by and large, the source material has been assumed to remain relatively stable.[15] Lawyers' stock in trade—cases, statutes, and regulations—have long been the primary sources for supporting legal analysis. While there is no doubt that these sources remain the predominant tools for supporting legal analysis, there are signs that their primacy is beginning to weaken and that, increasingly, nontraditional sources are being used to support legal analysis.

This blurring of the line between traditional and nontraditional sources is due in large part to the transition from print-based to online research. The print-based system of legal authority provided legal researchers with a sense of the law as a separate and distinct domain.[16] Today's researchers, without the print-based frame of reference, do not see the separation and are more likely to turn to the nontraditional sources that provide substantive support for their analysis. These nontraditional sources have become a new form of

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[12] *See* Sanford N. Greenberg, *Legal Research Training: Preparing Students for a Rapidly Changing Research Environment*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 241, 246–48 (2007); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L.& TECH. 82, 108–09 (2007).

[13] *See generally* Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285 (2001) (discussing the effect of computer-assisted legal research on legal thinking); Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305 (2000) (arguing that the changing habits of the new generation of lawyers due to technology changes demonstrate a change in the way we think about the law); *see also* Kuh, *supra* note 11, at 224; Margolis, *supra* note 12, at 107.

[14] Bast & Pyle, *supra* note 13, at 285 n.2 (noting the difficulty of ascertaining the relationship between the organization of legal material and the development of law itself); Kuh, *supra* note 11, at 226 (noting that little scholarly effort has gone into understanding the consequences of electronic legal research).

[15] *See* Berring, *supra* note 13, at 306.

[16] F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 571 (2002).

authority and are changing the face of judicial opinions and possibly the law itself.

The blurring of the line between legal and nonlegal authority can be seen in recent judicial opinions. A quick look through a multitude of opinions reveals that the majority of citations are to traditional sources such as statutes and cases. While research shows that lawyers are accessing these materials online, citation rules require that the print version be cited in legal documents when a print version exists.[17] Thus, many citations in judicial opinions reference the traditional sources of authority—print codes and reporters that contain statutes and cases, respectively. At the same time, the number of citations to electronic sources has increased significantly.[18] Because the citation rules require print versions to be cited when available, the citations to electronic sources are more than likely something other than traditional legal authority. Thus, there has been a dramatic increase in the citation to nonlegal authority of all kinds, both in print and online.[19] Few scholars have looked at the degree to which the information revolution and changes in the legal research process are contributing to the rise of electronic citation in judicial opinions, but at a minimum, the presence of these citations reinforces the notion that such sources can be used as authority.

This Article will look at the effect of electronic research on the use of authority in legal analysis and suggest that electronic search technology, along with easy access to information (both legal and nonlegal) on the Internet, is contributing to a loosening of the firm boundaries between legal authority and nonlegal information,[20] thus changing our collective understanding of authority. Part II will address the nature of authority and show that our understanding of au-

[17] *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18.2, at 165 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010); ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION R. 38.1, at 291 (Aspen Publishers, 3d ed. 2006).

[18] *See infra* Part III.

[19] Frederick Schauer and Virginia Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 500–03, 501 tbl.1 (2000). *See also* Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 428 (2002); Tina S. Ching, *The Next Generation of Legal Citations: A Survey of Internet Citations in the Opinions of the Washington Supreme Court and Washington Appellate Courts, 1999–2005*, 9 J. APP. PRAC. & PROCESS 387, 391–94, tbls.1, 2 & 5 (2007); John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427, 429–31, 431 tbl.1 (2002).

[20] This article does not purport to attribute the sole responsibility of changing the nature of legal authority to electronic research. That process is too complex to be attributed to a single cause. I do suggest, however, that electronic research plays a significant role in this process.

thority is rooted in a print-based system and vocabulary. Part III will describe electronic search technology and suggest that locating information online is accelerating the blurring of the line between legal and nonlegal authority by masking the print-based distinctions among different kinds of authority. Part IV will provide a snapshot of electronic citations in judicial opinions and show that they reflect the changes in legal authority discussed above. Part V will address the implications of these findings for the future of legal research and legal reasoning and call for a new system for defining authority that reflects the electronic world of legal information.

II. WHAT IS AUTHORITY?

"Authority" is the building block of any legal analysis. The common law system is built on the concept of precedent, used as authority, to develop the law and dictate future legal decisions. Yet "authority" is a complex concept, not easily boiled down to a simple definition. At a very broad level, this paper suggests that authority is anything used as support for legal analysis in writing. This Part will review the different types of authority typically recognized in the literature as they relate to legal research and analysis.

A. Traditional Legal Authority[21]

Law is a field that depends on authority. The common law tradition at the basis of our legal system is "said to be obsessed with the citation of authorities."[22] From the very beginning of law school, law students are taught about legal authority. Every legal research text begins with an overview of the sources of law and types of authority.[23] In their legal research and writing classes, law students are taught how to find and use authority to analyze issues and form legal arguments. The focus of that instruction is traditional legal authority—statutes, cases, regulations, treatises, law review articles, and legislative history.

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[21] While the concept of "authority" seems very basic, and the material covered in this section is mastered by even the most inexperienced law students, it is important to clearly lay the groundwork in order to show the ways in which technology is changing these fundamental concepts.

[22] Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 36 (2009).

[23] *See, e.g.*, STEVEN M. BARKAN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 1–9 (9th ed. 2009); LAUREL CURRIE OATES & ANNE ENQUIST, JUST RESEARCH 17–20 (2d ed. 2009); KENT C. OLSON, PRINCIPLES OF LEGAL RESEARCH 5–8 (2009); AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 2–9 (4th ed. 2009).

Sources are considered "authority" because of where they come from as much as for what they say. A judicial opinion from a controlling court carries authority because it is the decision of the court, regardless of the strength and logic of the reasoning. This idea, that a source must be honored because of its author or origin, rather than its content, is at the very heart of legal authority.[24] Traditional legal authority is produced by lawyers, primarily judges and legal academics, for use by other lawyers, judges, and legal academics. For much of this country's history, authority has come from a finite group of authors and has been published in a "stable universe of settled sources,"[25] such as case reporters, code compilations, treatises, and law reviews. Legal authority has been inextricably bound up with the books in which it appears. The combination of the author and the book in which the source is published has traditionally given legal researchers an easy way to identify "authority."

One of the first things novice lawyers are taught about authority is the difference between primary authority (statutes, cases, regulations, etc.) and secondary authority (treatises, law review articles, legal encyclopedias, etc.).[26] Primary authority "is the law itself."[27] Secondary authority is generally defined as commentary and analysis on the law, written by expert practitioners and academics.[28] Primary and secondary authority, as traditionally conceived, have two important things in common. First, they are legal in the sense that they are either direct sources of law or expressly about the law. Second, they have been published in books, controlled by the legal publishing market for at least the last century.[29] Both of these factors are intertwined and are important for understanding the ways in which the legal research environment, and authority itself, has changed.

1. Primary Authority

Primary authority is the term used to describe rules of law that emanate from lawmaking bodies such as courts, legislatures, and administrative agencies.[30] Because these bodies are constitutionally em-

[24] Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935 (2008).

[25] Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1675 (2000).

[26] *See* BARKAN ET AL., *supra* note 23, at 10; OATES & ENQUIST, *supra* note 23, at 17–19; OLSON, *supra* note 23, at 7; SLOAN, *supra* note 23, at 4.

[27] OATES & ENQUIST, *supra* note 23, at 17.

[28] SLOAN, *supra* note 23, at 12.

[29] Berring, *supra* note 25, at 1680–81; Hanson, *supra* note 16, at 566–69.

[30] BARKAN, *supra* note 23, at 2.

powered to "make law," the documents they produce are automatically authoritative.[31] Even the term "primary authority" suggests that this authority is more important and more authoritative than other kinds of authority. It is authority conferred by the status of its author or origin.[32] Primary authority carries the highest status because in our system of precedent and stare decisis, decisions by courts, as well as legislative enactments, carry automatic weight regardless of the strength of their content.

Court decisions and legislative enactments are authoritative not only because they come from governmental entities with the power to make law but also because of where they are published.[33] Judicial opinions published in the *National Reporter System* and statutes published in official codes are unquestionably accepted as official and accurate sources of law.[34] A legal reader who encounters a citation to a case in the *United States Reports* will understand that the source is a Supreme Court opinion and will not question the validity or authenticity of that source. Likewise, legal researchers implicitly understand that cases published in reporters and statutes published in code compilations, or accessed through their online equivalents on Westlaw and Lexis, are primary authority. It is the combination of the source of information and its location that gives the document its authority without regard for its content.

In addition to learning that primary authority is "the law," novice legal researchers are also introduced to the concept of "weight of authority"—the degree to which an authority controls the answer to a legal question.[35] Primary authority is typically divided into mandatory (or binding) authority and persuasive authority.[36] One of the central features of the common law system is the doctrine of stare decisis, which dictates that the rule of law from a case is binding in subsequent cases on courts from the same jurisdiction.[37] Similarly, a lower court is bound by judicial opinions from a court higher up the chain of command.[38] So, for example, a judge in the Eastern District of

[31] Schauer, *supra* note 24, at 1936–39.

[32] *Id.* at 1939.

[33] Berring, *supra* note 25, at 1692–95.

[34] *Id.* Not coincidentally, these are the publications that must be cited as the source for these primary authorities. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 17, R. 18.2, at 165, 215 tbl.T.10; ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION, *supra* note 17, R. 38.1(a)(1) at 291.

[35] SLOAN, *supra* note 23, at 5.

[36] *Id.*

[37] *See generally* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[38] SLOAN, *supra* note 23, at 6.

Pennsylvania is required to follow decisions issued by the Third Circuit Court of Appeals and the U.S. Supreme Court but is not obligated to follow a decision of the Second Circuit Court of Appeals. Authority that is not binding but is relied upon to give credence to a point is called persuasive authority.[39] Thus, the Second Circuit decision is persuasive, non-binding authority for the Third Circuit.

A judge faced with persuasive authority has discretion over whether to follow the authority or how much credence to give it. Thus, the strength of persuasive authority depends on the reader's perception of its value. Texts are not binding, but still authoritative, when, although coming from outside the jurisdiction, the sources command respect, either through position or expertise. The status of the author or origin again comes in to play in traditional notions of what is considered to be authoritative. For example, a judge from the Eastern District of Pennsylvania, when faced with an issue of administrative law, may turn to opinions from the D.C. Circuit, a court noted for its expertise in administrative matters,[40] even though the Eastern District is not bound by cases from that court. Likewise, the Second Circuit's reputation for expertise in securities law increases the likelihood that it will be cited in other jurisdictions dealing with securities issues.[41]

Even if a court does not have particular substantive expertise, the mere fact that another court has already considered an issue facing a judge gives that earlier opinion some level of authority.[42] Simply being "the law" gives primary authority a certain degree of respect, irrespective of its content, though the source of that law may have an effect on how valuable the authority is perceived to be.[43] Because of

[39] Schauer, *supra* note 24, at 1948–49. Professor Schauer suggests that "persuasive authority" is a misnomer, and that this kind of authority should really be called "optional authority" since it is being cited not for its persuasive content but for the authority of its source. *Id.* at 1946.

[40] *See* Verizon Cal., Inc. v. Peevey, 413 F.3d 1069, 1084 (9th Cir. 2005) (Bea, J., concurring) (remarking that "[t]he D.C. Circuit . . . has particular expertise in administrative law").

[41] Schauer, *supra* note 24, at 1958.

[42] *Id.* at 1945.

[43] One type of primary, persuasive authority that has generated a great deal of controversy recently, is the use of foreign authority. *See generally* Austin L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007). Technically, foreign authority is primary authority from another country and thus persuasive in a U.S. court. There has been much misunderstanding about the way courts use foreign authority. *See* Howard Wasserman, *Misunderstanding Judging: Foreign Law*, PRAWFSBLAWG (July 16, 2009, 4:20 PM), http://prawfsblawg.blogs.com/prawfsblawg/2009/07/misunderstanding-judging-foreign-law.html.

the status of the author (judge or legislator), as signaled in the citation by the publication (reporter or code), primary authority, even when "merely persuasive" or "optional," has traditionally been considered preferable to secondary legal authority as support for legal analysis.[44]

2. Secondary Authority

Secondary authority is the other major type of authority new law students are introduced to during their initial legal research instruction. While there is no official definition, secondary authority is generally considered to be commentary and analysis on the law.[45] The most typical types of secondary authority include legal encyclopedias,[46] annotations,[47] legal periodicals,[48] and treatises.[49] A simple way of understanding traditional secondary sources is that they are addressed to a legal audience.[50] New legal researchers are taught that these sources are useful for gaining general background about the law, but should rarely be cited directly in support of legal analysis.[51] Secondary sources are never binding on any court, but like nonbinding legal authority, they command a certain level of respect as authority either because of the breadth of coverage or the expertise of the authors.

Like primary authority, secondary authority has traditionally been limited to writing about the law, published in a limited universe of sources controlled by the legal publishing industry.[52] A legal reader who sees a citation to an article in the Harvard Law Review or

[44] SLOAN, *supra* note 23, at 4–5; THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 17, R.1.4, at 56.

[45] SLOAN, *supra* note 23, at 12.

[46] Legal encyclopedias provide general information about a wide variety of legal subjects. They include the national publications Corpus Juris Secundum and American Jurisprudence, as well as several state-specific encyclopedias.

[47] Annotations such as American Law Reports collect summaries of cases from a variety of jurisdictions to provide an overview of the law on a topic. *See* SLOAN, *supra* note 23, at 40.

[48] Most commonly, these are articles written by legal academics, published in law reviews or journals based at law schools. *See* SLOAN, *supra* note 23, at 36.

[49] Treatises generally provide an in-depth treatment of a particular area of law. Well known treatises include books such as W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS (5th ed. 1984) and JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (McNaughton ed., 1961).

[50] Wes Daniels, "*Far Beyond the Law Reports": Secondary Source Citation in United States Supreme Court Opinions October Terms 1900, 1940, and 1978*, 76 LAW LIBR. J. 1, 3 (1983).

[51] SLOAN, *supra* note 23, at 29–30.

[52] Berring, *supra* note 25, at 1680–81; Hanson, *supra* note 16, at 566–69.

Moore's *Federal Practice* will understand the nature of the publication and make assumptions about the validity of its content and thus perceive the source as authority supporting the point for which it is cited. The greater the status of the publication, the more likely the secondary source will be recognized as authority; a treatise by a well-regarded author or a journal article from a highly-ranked law review is likely to be viewed as more valuable secondary authority than that from a lesser-known source.[53] Thus, like primary authority, secondary authority gains its authoritativeness in large part based on the books in which it is published.

Secondary sources were not always clearly recognized as a form of legal authority. It used to be the rule in England that secondary source material could only be cited if the author were dead.[54] Prior to the twentieth century in the United States, secondary sources were rarely cited in judicial opinions.[55] By the later part of the twentieth century, however, citations to secondary sources became quite prevalent.[56] There are likely several reasons for this. First, many common secondary sources such as law reviews and the Restatements were not developed and widely available before the twentieth century.[57] Second, the very citation of secondary sources validated their use as authority. Once one judge cited a secondary source, other judges and lawyers became less hesitant to do so, and the effect snowballed until the reliance on secondary sources as authority became common.[58] In any case, today, secondary sources are viewed as a valid form of legal authority, as evidenced by their widespread citation in judicial opinions.

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[53] *See* Schauer, *supra* note 24, at 1957–59 (discussing how secondary sources become authoritative); Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1054 (1990) (noting that while the Courts of Appeals generally cite fewer law journals than the Supreme Court, those cited are predominantly from elite journals); Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 132 (1986–1987) (noting the dominance of elite law journals among Supreme Court citations to legal periodicals).

[54] Federick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1088–89 (1997).

[55] *See* Berring, *supra* note 25, at 1684–87 (noting that a review of Volume 175 of the *United States Reports* from 1899 shows that the Court relied on statutes, cases, and the record below, but very little else); Daniels, *supra* note 50, at 4 (noting a significant increase in the Court's use of secondary sources over the course of the twentieth century).

[56] Daniels, *supra* note 50, at 4–5.

[57] Berring, *supra* note 25, at 1687.

[58] Schauer, *supra* note 24, at 1957.

B. Nonlegal Authority

As the term suggests, nonlegal authority is information that is not explicitly "about the law" and not directed at a legal audience but that is nonetheless used as authority in support of legal analysis. Nonlegal sources encapsulate the universe of information outside the traditional legal authority described above, ranging from classical philosophy, to dictionary definitions, to social science data, to daily newspapers.[59] The majority of nonlegal sources provide factual information.[60] Used as authority, these sources support the legal reasoning of the court.

If binding, primary authority is at the top of the hierarchy of traditional legal authority, then nonlegal sources are at the bottom.[61] Under traditional notions of precedent and stare decisis, nonlegal sources carry no weight at all. Yet, like secondary sources, their appearance in judicial opinions has increased over time.[62] Also, like secondary sources, since nonlegal sources have no inherent power to sway the court, the perception of expertise and reputation of the author contributes greatly to the persuasive power of these sources.

Nonlegal sources have long been used in judicial opinions, but very infrequently and, until relatively recently, from a limited number of sources.[63] For example, in 1950, the New Jersey Supreme Court cited to *Life* magazine and the United States Supreme Court cited the *Harvard Business Review*, but there were few other nonlegal citations,

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[59] Schauer & Wise, *supra* note 19, at 502–03. In defining the difference between legal and nonlegal information, Schauer and Wise include all government information in the "legal" category. *Id.* at 499. This author, however, considers government information to be classified as legal authority only when it is being used as a form of legislative history. When government information is being used directly by the courts in support of their analysis of the law (as opposed to their analysis of the legislature's understanding of the law), this author submits that the information plays the role of nonlegal authority.

[60] Factual information used by the courts falls into two categories—adjudicative facts and legislative facts. Legislative facts can be recognized and used by a court without the need for judicial notice, or adjudication below. *See generally* Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Nonlegal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197 (2000). For purposes of this paper, the term "nonlegal authority" refers to sources used to support the legal analysis, not the adjudicative facts.

[61] The use of nonlegal materials by courts has been controversial and often criticized. Nonetheless, the citation of such material continues. This Article does not address the controversy, or wisdom, of courts' reliance on these materials, but accepts the reality that they are used and explores some of the reasons why.

[62] Berring, *supra* note 25, at 1688–91; Hasko, *supra* note 19, at 429–31, 431 tbl.1; William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267, 286–91 (2002).

[63] Schauer & Wise, *supra* note 19, at 496.

and most of those were citations to the dictionary.[64] Indeed, a study of the United States Supreme Court citation practices revealed that, with one exception, all of the nonlegal citations cited in the years 1940 and 1978 were to dictionaries.[65]

As several studies have shown, however, the use of nonlegal materials in judicial opinions increased significantly over the course of the twentieth century. For example, one study found that citations to nonlegal sources from 1900 to 1978 increased by 1,429%.[66] Another study of the United States Supreme Court, looking at cases from the October Term 1989 though the October Term 1998, found that nonlegal citations appeared in forty percent of the signed opinions.[67] Since 1990, the citation to nonlegal sources by the Supreme Court has again increased dramatically, even accounting for the number of overall citations, number of clerks, and number of pages produced by the Court.[68] The same trend can also be seen in the lower federal courts and state courts.[69]

In addition to the numbers of nonlegal citations increasing, the variety of sources relied on by the courts has also increased significantly. Daily newspapers have seen an increase, not only in number, but in the variety of papers cited.[70] Recent citation studies show that "virtually every discipline, scientific or not, has become fair game for citation."[71] More recent cases cite to textbooks and academic journals in the areas of economics, political science, sociology, psychology, medicine, criminology, and pharmacology.[72] In addition, judges have also cited to sources only available on the Internet, such as blogs,[73] Wikipedia,[74] and Mapquest[75].

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[64] *Id.*

[65] Daniels, *supra* note 50, at 19.

[66] *Id.* at 4.

[67] Hasko, *supra* note 19, at 430.

[68] Schauer & Wise, *supra* note 19, at 497.

[69] *Id. See generally* Robert Timothy Reagan, *A Snapshot of Briefs, Opinions and Citations in Federal Appeals*, 8 J. APP. PRAC. & PROCESS 321 (2006). For a fuller review of nonlegal, electronic citations in the Supreme Court and Federal Circuits, see *infra* section IV.

[70] Schauer & Wise, *supra* note 19, at 503.

[71] Hasko, *supra* note 19, at 442.

[72] Schauer & Wise, *supra* note 19, at 503.

[73] Margolis, *supra* note 12, at 116; *Cases Citing Legal Blogs—Updated List*, LAW X.0 (Aug. 6, 2006), http://3lepiphany.typepad.com/3l_epiphany/2006/08/cases_citing_le.html; Dave Hoffman, *Court Citation of Blogs: Updated 2007 Study*, CONCURRING OPINIONS (July 26, 2007, 6:52 PM), http://www.concurringopinions.com/archives/2007/07/court_citation.html.

[74] *See* Peoples, *supra* note 22, at 7–11.

The fact that nonlegal citations in opinions are increasing does not necessarily mean that those nonlegal sources are being used as authority, but a review of the cases suggests that many of them are.[76] While there is no doubt that judges look first to primary authority in support of their analysis, judicial opinions also include citations to dictionaries, social science data, and materials from a variety of academic disciplines. In cases of first impression, courts cite nonlegal information, particularly in the form of legislative facts, to support the court's reasoning.[77] When there is no controlling precedent directly on point, courts can, and do, cite other sources in support of their propositions. This is the likely explanation for the relatively larger numbers of nonlegal citations in U.S. Supreme Court opinions, where there are no directly binding cases and the Court is most often dealing with issues of first impression.

The citation conventions of legal writing instruct that some citation is better than no citation. The culture of citation is so entrenched that the mere fact of a citation lends some authority to the statement being cited.[78] In essence, the author is claiming that she was not the first to assert the point, and thus, because someone else said it first, it must be correct.[79] Since there are typically no formal rules setting limits on what is considered a legitimate citation,[80] when

[75] *See generally* David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?*, 16 PROF. LAW. 2 (2005).

[76] *See infra* section IV.

[77] Margolis, *supra* note 60, at 219. Courts must take judicial notice of non-record factual information used to assess the factual situation, but the rules of evidence do not require judicial notice of "legislative facts," which are facts used to help the court determine what the law is.

[78] *See* Schauer, *supra* note 24, at 1949–50.

[79] *See id.* at 1950 (indicating that "the conventions seem to require that a proposition be supported by a reference to some court (or other source) that has previously reached that conclusion").

[80] *Id.* at 1957. The chief exception here is the restriction of citation to unpublished opinions, a restriction that has been the subject of much controversy. *See* Sarah E. Ricks, *A Modest Proposal for Regulating Unpublished, Non-Precedential Federal Appellate Opinions While Courts and Litigants Adapt to* Federal Rule of Appellate Procedure 32.1, 9 J. APP. PRAC. & PROCESS 17, 21–22 (2007); Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1464–65 (2005). The recent change in the Federal Rules of Appellate Procedure allowing citation means that these restrictions exist now only in some states. *See* Margolis, *supra* note 12, at 112–13; Ricks, *supra*, at 22–24. Other citation practices, such as citation to foreign authority, have been controversial, but there are technically no restrictions on their use, and such authority plays the role of any other secondary or even nonlegal authority when relied on in support of legal

a source is used as authority, it becomes authority. Thus, as nonlegal sources are being cited increasingly, they increasingly take on the mantle of authority.

It should be no surprise that many citations to nonlegal authority are to sources found on the Internet. The number of citations to the Internet has increased steadily over the last two decades.[81] Since citation rules generally require citation to print versions of legal materials when such versions exist,[82] and most primary and secondary legal authority is available in print,[83] it stands to reason that the majority of electronic citations in judicial opinions are to nonlegal sources. Indeed, part of the reason nonlegal sources are now cited more frequently is that they are more easily available on the Internet than they were through traditional print research.[84]

The rise in citation to nonlegal authority signals a loosening of the firm boundaries of primary and secondary legal authority which have been the dominant paradigm for so long. There are two interrelated reasons for this trend. First, changes in legal publishing and electronic search technologies are making it increasingly difficult for the current generation of legal researchers to distinguish easily between types of authority and their relative weight. Second, the increase in nonlegal citations in opinions sends the signal to lawyers that reliance on these sources is acceptable and, in turn, leads to their increased use. The remainder of this paper will address these two factors in more depth.

III. ELECTRONIC RESEARCH AND THE PATH OF LEAST RESISTANCE

The shift to electronic research over the last decade has been well documented.[85] Less clear, though, is whether the results of electronic research have yielded different results than running the same searches through print media. Some scholars have suggested that "the format change [of legal research] has not truly altered the func-

reasoning. *See* Austin L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 655–56 (2007).

[81] *See infra* Part IV.

[82] *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 17, R. 18.2, at 165; ALWD: A PROFESSIONAL SYSTEM OF CITATION, *supra* note 17, at app. 2 (reviewing local court rules showing preference for print citation unless not available).

[83] The only exception is that there are a growing number of local and administrative regulations published only online. *See* Margolis, *supra* note 12, at 112–13.

[84] Schauer & Wise, *supra* note 19, at 510.

[85] *See, e.g.*, Greenberg, *supra* note 12, at 246; Kuh, *supra* note 11, at 224–26; Margolis, *supra* note 12, at 107–08.

tional basis of the materials of legal research themselves."[86] Others have allowed for the possibility that the shift to electronic research will give rise to changes in the development of doctrine as well as the practice of law.[87] It is becoming increasingly apparent that recent generations of legal researchers are looking at research results very differently, and that this is changing the nature of legal authority itself.

Robert Berring has suggested that the change in the world of legal information has been so significant that it has created a "generation gap" between lawyers who learned legal research before approximately 1995 and those who have learned to research since the online revolution.[88] The changes in legal research are affected by the changes in technology in two important ways. First, the changes from accessing legal materials in books to accessing them online have created both physical and cognitive barriers to distinguishing between types of legal authority, as well as between legal and nonlegal sources. Second, the search technology itself, combined with changes in the publication of legal information, leads legal researchers to search differently and focus on different results than traditional print research. These two factors combine to have a profound effect on what legal researchers focus on, see as relevant, and use as authority. The external clues which reinforce notions of authority in the print-based world do not exist in the online world. The technology driven changes do more than change the way we access legal materials. Indeed, they make it increasingly difficult to determine just what counts as "law" at all.

A. On the Internet, Everything Looks the Same

Legal scholars have long posited that changes in the way that law is communicated have influenced legal analysis and the development of the law.[89] For example, the shift from oral to written communication helped create and reinforce the notion that texts are authorita-

[86] Berring, *supra* note 13, at 306.

[87] Kuh, *supra* note 11, at 228.

[88] Berring, *supra* note 13, at 305.

[89] *See* Kuh, *supra* note 11, at 230 n.24 (citing M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW 17–48 (1988); Robert Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 21–23 (1987); Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 513–35 (1992); M. Ethan Katsh, *Communications Revolutions and Legal Revolutions: The New Media and the Future of Law*, 8 NOVA L.J. 631 (1984)).

tive and laid the groundwork for the concept of binding precedent.[90] Because written decisions allowed readers to point to a concrete source, lawyers were able to argue that earlier decisions of courts should control later decisions.[91] This foundational concept of legal authority could not have existed without the printed text. In addition, Robert Berring has written extensively on how the categorization of the common law, begun in Blackstone's *Commentaries* and carried through the West American Digest System, created a kind of "cognitive authority" in the common research tools that shaped the way lawyers think about the law.[92] Although they were not officially sanctioned by any court or legislature, the print volumes of the National Reporter System, West American Digest System, annotated codes, and Shepard's citators unquestionably carried the weight of legal authority for any legal researcher in the twentieth century.[93] While some scholars have questioned the relationship between the medium of legal communication and its substance,[94] there can be little doubt that there are some very real consequences of the shift to electronic research.

Because we are still just at the beginning of the shift from print to electronic media, we can only begin to assess the changes that have been wrought. There are two key ways, however, that print-based research reinforces the legal researcher's understanding of legal authority in ways that electronic media does not. First, the physical reality of print sources created a "bright-line border" between legal information and other kinds of information.[95] Second, the organization and categorization of legal materials contributed to the idea of law as a distinct domain,[96] which reinforced the idea that there is a

[90] Collins & Skover, *supra* note 89, at 533; Richard J. Ross, *Communications Revolutions and Legal Culture: An Elusive Relationship*, 27 LAW & SOC. INQUIRY 637, 641 (2002).

[91] KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW, *supra* note 89, at 33.

[92] Berring, *supra* note 13, at 307–10; *see also* Katsh, *supra* note 89, at 658 n.91 (noting that the digests "subtly shaped the attitudes of generations of lawyers and law students about the degree of order and orderliness that existed in the legal system").

[93] Berring, *supra* note 25, at 1680–81.

[94] *See, e.g.*, Nazareth A. M. Pantaloni, III, *Legal Databases, Legal Epistemology, and the Legal Order*, 86 LAW LIBR. J. 679, 682–84 (1994) (questioning whether changes in printing and other communication technologies have a direct effect on societal and cultural changes); Ross, *supra* note 90, at 642 (questioning whether there is a causal connection between changes in communication and legal developments).

[95] Berring, *supra* note 13, at 311.

[96] Hanson, *supra* note 16, at 571. This idea of law as a distinct domain is also reflected in the legal academic literature. *See, e.g.*, Jane Baron, *The Rhetoric of Law and*

firm line between what is law and what is not law. Thus, print resources give the legal researcher clear signals about the nature of authority, signals which are absent in electronic sources.

For most of the last two centuries, legal authority was easily identified and located through a "stable universe of settled sources."[97] Legal researchers understood that certain books contained reliable legal authority. For example, a legal researcher looking at the statutory text in the *U.S. Code Annotated*[98] would have no doubt that it was a source of primary legal authority that is both reliable and accurate. Similarly, a researcher would understand that what she was looking at in the *Supreme Court Reporter* is a case authored by the Supreme Court, and is thus a source of primary legal authority. Even in series such as the *Federal Reporter* or the *Atlantic Reporter*, where cases from more than one jurisdiction are collected, the contents of the books are made entirely of cases—primary authority produced by courts. Law books even look different from many other types of publications—rows and rows of tan books with red and black stripes[99] or maroon books,[100] all lined up volume after volume. A researcher holding one of these books in hand has no doubt that it contains accurate, reliable primary authority.[101] The mere fact that a case was published and physically exists in a volume of the *National Reporter System* tells the legal researcher that the case is a valid source of authority.

In contrast, when accessing materials electronically, the researcher is viewing a computer screen, the same screen the person would look at to check e-mail, catch up on the latest blogs, check the weather, or shop for shoes. The source is not isolated in a separate location. There is no obvious visual cue to tell the reader that what is being viewed is a source of primary authority, nor are there obvious visual cues that separate legal authority from other authority.

The lack of physical and visual cues is particularly salient for novice legal researchers, who may not fully understand the importance of using the official, primary source as authority to support legal

Literature: A Skeptical View, 26 CARDOZO L. REV. 2273, 2274 (2005) (noting that the law and literature movement treats law as a separate domain).

[97] Berring, *supra* note 25, at 1675.

[98] Most legal researchers use this version of the U.S. Code in conducting legal research. *See id.* at 1680.

[99] The National Reporter System books, including the *Supreme Court Reporter*, *Federal Reporter*, *Federal Supplement*, and all of the regional reporters.

[100] UNITED STATES CODE ANNOTATED.

[101] Legal research courses have typically focused on how to access and use these books, without questioning the nature of their authority. *See* Berring, *supra* note 25, at 1681.

analysis. Even when a researcher thinks she is viewing a source of primary authority, this may not be the case. Although the source on the screen may look like primary authority, unless the researcher has taken care to ensure that the database from which the case was accessed contains the official version, it is quite possible that the online source is not actually the primary, controlling authority the researcher believes she is viewing.

As an example, in addition to fee-paid sites such as Lexis and Westlaw, multiple free websites now provide access to Supreme Court cases. A legal researcher, hoping to contain costs, may go first to one of the free sites.[102] A case viewed on a free site looks much like a case accessed on Westlaw. For example, the opening paragraph of the case *Celotex Corp. v. Catrett*[103] accessed from Westlaw looks like this:[104]

> The United States District Court for the District of Columbia granted the motion of petitioner **Celotex** Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett v. Johns-Manville Sales Corp.*, 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese* **2551 *Electronic Products*, 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).1 We granted certiorari to resolve the conflict, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985), and now reverse the decision of the District of Columbia Circuit.

[102] Greenberg, *supra* note 12, at 247–49; Margolis, *supra* note 12, at 108.

[103] 477 U.S. 317 (1986).

[104] This paragraph was cut-and-pasted from the *Celotex* case as viewed from Westlaw. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (Westlaw), *available at* http://web2.westlaw.com/find/default.wl?rs=WLW10.06&ifm=NotSet&fn=_top&sv=Split&cite=477+U.S.+317&vr=2.0&rp=%2ffind%2fdefault.wl&mt=208 (last accessed Apr. 11, 2011).

The same case, accessed by a search for the case name in Google Scholar's database of legal opinions and articles looks like this:[105]

> The United States District Court for the District of Columbia granted the motion of petitioner **Celotex** Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 756 F. 2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese Electronic Products*, 723 F. 2d 238(1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986).[1] We granted certiorari to resolve the conflict, 474 U. S. 944 (1985), and now reverse the decision of the District of Columbia Circuit.

The two cases look virtually identical, including the hypertext links to the citations. A careful review, however, shows that the Westlaw version contains parallel citations, while the Google version does not. This suggests that the two versions were culled from different sources. The Westlaw version carries the cognitive authority of the West name, while it is impossible to determine (at least on the website itself) the source of the Google version. To the modern legal researcher, for whom one source looks much like another, this distinction is likely to go unnoticed.[106] Without the physical presence of the book, today's researcher is likely to be less attuned to that cognitive authority, contributing to the blurring of the boundaries of traditional authority.

Another example of this dichotomy can be seen in the controversy over "unpublished"[107] judicial opinions. Prior to the mid-1980s, unpublished judicial opinions were not widely available because they existed only at the courthouse or in the hands of the parties them-

[105] This paragraph was cut-and-pasted from the *Celotex* case as viewed from Google Scholar. *See* Celotex, 477 U.S. at 317 (Google Scholar), *available at* http://scholar.google.com/scholar_case?case=7745724468576331 37&q=celotex&hl=en&as_sdt=800000000002 (last accessed Apr. 11, 2011).

[106] *See generally* William R. Mills, *The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age*, 53 N.Y.L. SCH. L. REV. 917 (2008–2009) (noting that legal writers routinely use the book citation for sources found online without considering the possibility that the print version of the source may differ from the online source they actually used).

[107] "Unpublished" is something of a misnomer because these opinions, which have been designated as non-precedential by the issuing court, are in fact currently published both online and in print in West's *Federal Appendix*. Margolis, *supra* note 12, at 113.

selves.[108] Now, however, they are easily accessible online through a variety of sources, including commercial legal research sites and courts' own websites.[109] When viewed online, there is no visible difference between an unpublished and a published opinion, thus giving the reader no clear signal about the difference in the weight of authority.

Similarly, there may be very little difference, other than content and writing style, between a social science article and a judicial opinion. For example, in the recent case of *Abbott v. Abbott*, the Supreme Court cited to a report posted on a private website to support the proposition that child abduction can cause psychological problems.[110] Viewed on the website, the opening paragraph of the report that the Court cites looks like this:[111]

> Because of the harmful effects on children, parental kidnapping has been characterized as a form of child abuse" reports Patricia Hoff, Legal Director for the Parental Abduction Training and Dissemination Project, American Bar Association on Children and the Law. Hoff explains:
>
> > "Abducted children suffer emotionally and sometimes physically at the hands of abductor-parents. Many children are told the other parent is dead or no longer loves them. Uprooted from family and friends, abducted children often are given new names by their abductor-parents and instructed not to reveal their real names or where they lived before." (Hoff, 1997)

The text of the report on the screen looks very much like any other online text. It could just as easily be the text of a judicial opinion or a news article. On the Internet, virtually all text on a screen looks alike. Untethered from the physical reality of books, there is no clear delineation between legal authority and other kinds of information.

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[108] Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems and Legal Malpractice*, 26 MISS. C. L. REV. 185, 204–05 (2006–2007).

[109] Mills, *supra* note 106, at 930–31 (documenting the history of unpublished opinions made available on commercial websites). In addition, the E-Government Act of 2002, codified at 44 U.S.C. § 3501 (2006), mandated that all federal courts maintain websites to provide access to all their written opinions, including those that had not been designated for publication.

[110] 130 S. Ct. 1983, 1996 (2010) (citing Nancy Faulkner, *Parental Child Abduction is Child Abuse*, PANDORA'S BOX, http://www.prevent-abuse-now.com/unreport.htm (last visited Apr. 11, 2011)).

[111] This paragraph was cut-and-pasted from the Pandora's Box website. PANDORA'S BOX, http://www.prevent-abuse-now.com/unreport.htm (last visited Apr. 11, 2011). *See* Faulkner, *supra* note 110.

B. Legal Research Technology: A Paradigm Shift

The transition to online legal research has fundamentally changed the relationship between the legal researcher and the sources. While early forms of electronic research may have involved the transplanting of print research techniques into the electronic format, more recent technologies, combined with major transformations in the provision of legal information, have wrought fundamental changes in the way researchers seek and evaluate relevant information.[112] This, too, affects the way that authority is viewed.

There are several ways in which the online research process contributes to a blurring of the traditional conception of authority. These include the loss of the West's Digests and other indexing systems as the point of access into primary authority; the development of the search engine pulling from multiple sources and databases; the ease of accessing volumes of information and the relative ease of moving from source to source; and the code architecture of search technology, resulting in a greater focus on factual similarity rather than legal concepts. The result of all of these factors is that the researcher focuses less on the source of the material and more on the content. Thus, the focus of authority is no longer on who wrote it and where it is published, but instead on the factual content of the material. This is a very different view of authority than has traditionally been held.[113]

1. The Death of the Digest

First, and most discussed in the literature, is the loss of structure provided by the indexing and digest systems in the print resources.[114] Just as the physicality of books reinforces the boundaries of traditional authorities, so too do the finding tools most typically used when conducting legal research.

For at least the last century, legal researchers were taught to locate primary legal authority through West's American Digest System or other subject indexes tied directly to the print resources they in-

[112] *See, e.g.*, Bast & Pyle, *supra* note 13, at 286–89; Berring, *supra* note 13, at 312–14; Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 163–67 (2006); Kuh, *supra* note 11, at 226; Ross, *supra* note 90, at 640–46.

[113] *See supra* notes 89–110 and accompanying text.

[114] Berring, *supra* note 25, at 1693–94; Berring, *Form Molds Substance*, *supra* note 89, at 24–27; Berring, *supra* note 13, at 312–14; Kuh, *supra* note 11, at 236; Mills, *supra* note 106, at 920–28.

dexed.[115] The print indexes most typically list subjects alphabetically, and the listings contain references, such as citations, leading the researcher to the information.[116] Like the books to which they refer, these indexes reinforce the notion of primary authority by filtering the information through the lens of "the law." The subject categorization, particularly in the digests, replicates traditional legal categories originated in Blackstone's *Commentaries*.[117] These categories, maintained and modified by the editorial staff of the publications, give the researcher some understanding that the source is part of the primary authority that makes up "the law."[118] This implicit reinforcement of legal categories helps to maintain a clear boundary between legal and nonlegal authority.[119]

Second, the various indexes generally lead only to legal authority. For example, the Descriptive Word Index to the U.S. Code leads the researcher directly to the statutory provisions of the U.S. Code. The key numbers in West's Federal Practice Digest lead the researcher directly to cases decided by the federal courts. The Index to Legal Periodicals leads the researcher to law review articles, which while not primary authority, are classic sources of secondary legal authority. A researcher using these research tools is only going to find sources of legal authority and will thus not even entertain the possibility of using nonlegal authority to support legal analysis. Because they reflect "the law" and lead directly to "the law," the legal indexing systems implicitly reinforce traditional understanding of authority.

In contrast, electronic research has the potential to lead to nonlegal sources and blur the line between legal and nonlegal sources. In the early days of computer-based research, Lexis and Westlaw were primarily designed to replicate the National Reporter System.[120] Wes-

[115] The legal research texts focus on finding print resources through tables of contents and subject indexes. *See* OLSON, *supra* note 23, at 24, 62, 278–84; SLOAN, *supra* note 23, at 14, 84–91, 163–68.

[116] Bast & Pyle, *supra* note 13, at 291.

[117] Berring, *supra* note 13, at 308.

[118] For more in-depth discussions of how the loss of the digest system may affect the way lawyers conceive and understand legal problems, see Berring, *supra* note 13, at 311–14; Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 LAW LIBR. J. 307, 317–25 (2007); Kuh, *supra* note 11, at 243–46.

[119] *See* Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 23 (1994) (discussing the dominant role of the legal information system in the focus on law as finding primary sources); Kuh, *supra* note 11, at 246 (discussing the way in which using digests influences the ways in which a researcher identifies relevant sources).

[120] Mills, *supra* note 106, at 923.

tlaw did not initially have full-text search capability, but instead provided only an online version of the Digest System.[121] Thus, early computer researchers tended to use the same research process they were familiar with using to search the books, even when searching on the computer. The newer generations of researchers, however, are less likely to be familiar with the indexing systems and less likely to replicate the print research in an online format.[122] Now, instead of subject indexes, the point of access in electronic research is the search engine.[123]

The search engine is the vehicle through which material in online databases is accessed. While there are individual differences in search engines, the basic function is the same. The researcher enters search terms into a search box, which then uses an algorithm to retrieve results matching those search terms.[124] In recent years, Westlaw and Lexis have moved to appear and function more like search engines on the Internet such as Google, first through natural language searches, and more recently through WestlawNext[125] and Lexis for Microsoft Office[126]. Thus, whether using a fee-paid service or free online website, the legal researcher is likely to conduct research without the filter provided by the traditional print legal-indexing systems.[127]

Unlike the digests and other indexes, in which the researcher must use a preexisting legal framework, when using a search engine the parameters of the search are entirely up to the researcher.[128] Even when searching a database limited to primary authority, such as the database of Supreme Court cases on Westlaw, one consequence of this type of searching is that the results are dictated only by matching terms, not by concept or area of law.[129] Searches will yield a broader array of sources, not predetermined to fit into the same category of legal claim by an editorial staff. As a result, researchers are

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[121] *Id.*

[122] Greenberg, *supra* note 12, at 259–60; Kuh, *supra* note 11, at 245.

[123] Mills, *supra* note 106, at 932. *See also* Berring, *supra* note 25, at 1706 (predicting that the search engine will replace the National Reporter System as the major filter of information for legal research).

[124] *See* Bast & Pyle, *supra* note 13, at 293–95.

[125] *WestlawNext Research System*, THOMPSON REUTERS, http://west.thomson.com/westlawnext/default.aspx (last visited Apr. 11, 2011).

[126] *Lexis for Microsoft Office*, LEXISNEXIS, http://www.lexisnexis.com/NewLexis/Office (last visited Apr. 11, 2011).

[127] Mills, *supra* note 106, at 932 (noting the "growing resistance" to using subject indexes when conducting legal research).

[128] Bast & Pyle, *supra* note 13, at 297–98; Kuh, *supra* note 11, at 245.

[129] Kuh, *supra* note 11, at 245.

likely to think more broadly about what constitutes relevant authority for analysis of a particular legal problem.[130]

Thus, the loss of the digest and other indexing systems as the point of access into legal research has created a research environment in which researchers are less likely to be steered directly to controlling, primary legal authority. The lack of framing leads researchers to think more broadly about what sources are relevant to support legal analysis and thus blurs the clear lines of traditional legal authority.

2. Multiple Sources, Multiple Databases

Another effect of the search engine as the primary tool of authority is that, unlike the print-research tools, which clearly point to sources of legal authority, search engines generally pull from databases containing multiples sources, and even from multiple databases at once. Because legal and nonlegal sources often come up in the same search, it is less likely that the researcher will be attuned to the differences between primary, secondary, and nonlegal authority.

As noted above, when using the books and their attendant finding tools, the researcher knows exactly which type of source is being viewed. A researcher running a search through a search engine, however, is much less likely to understand how the search engine works, or what databases the search results are drawn from.[131] While the online legal research services tend to focus on legal authority, it can be difficult to discern the scope of the database or where the information comes from. For example, as presented above,[132] the Westlaw and Google Scholar versions of the *Celotex* case appear slightly different, but it is extremely difficult, if not impossible, to learn where the cases came from.[133]

Not only is the database often unclear, but the researcher can use the same strategies, and same search engines, to access both legal and nonlegal materials.[134] A researcher no longer needs to go to a law-only database to access legal materials. As a result, a search via a

[130] *Id.* at 255–60.

[131] *See* Bast & Pyle, *supra* note 13, at 298–99 (noting that the average attorney does not have the time or patience to learn the research protocols of the research systems and is not likely to use them if they are too complicated).

[132] *See supra* notes 103–106 and accompanying text.

[133] *See* Mills, *supra* note 106, at 934 ("The cases on websites from outside the West paradigm derive from a variety of sources and are complied and issued through a variety of processes that are not generally identifiable or subject to scrutiny.").

[134] Schauer & Wise, *supra* note 19, at 510–11.

search engine such as Google will yield primary, secondary, and nonlegal sources all in the same search.[135] Even the legal-research sites are moving to platforms that are more likely to yield these multiple results. For example, the new WestlawNext has a search box that looks much like Google, and is preset to draw from multiple databases.[136] While it is possible to select particular databases, the default settings will draw from primary and secondary materials relevant to the search topic.[137] Thus, from the perspective of the researcher, "[m]ultiple sources of information merge into one source; one does not even feel that one is consulting multiple sources."[138]

When information appears to be coming from one source, and there are no physical reminders to the researcher that some sources are traditional forms of authority and others are not, the researcher is much less likely to be attuned to the differences between primary, secondary, and nonlegal authority. Thus, not only the medium of the Internet, but also the multiple database search technology contributes to the blurring of the lines between different types of authority.

3. Low Transaction Costs and Information Overload

One of the most wonderful aspects of computer-assisted legal research, and one of the most challenging, is the sheer ease of accessing information. A researcher need only type a few words into a search engine to receive a voluminous amount of information.[139] The time and energy cost of retrieving information is quite low in compar-

[135] For example, the search "hostile work environment" in Google, conducted on July 11, 2010, yielded references to an employee rights website (UNDERCOVER LAWYER, http://www.undercoverlawyer.com), a Wikipedia definition (*Hostile Work Environment*, WIKIPEDIA, http://en.wikipedia.org/wiki/Hostile_work_environment), a private attorney's website (*Hostile Work Environment*, TIM'S MISSOURI EMPLOYMENT LAW, http://www.timslaw.com/hostile-environment.htm), and an article by law professor Eugene Volokh (Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, UCLA SCHOOL OF LAW, http://www.law.ucla.edu/volokh/harassg.htm), among other results.

[136] For example, the search "hostile work environment" on WestlawNext, conducted on July 11, 2010, with the database selection of "All Federal," resulted in Supreme Court cases, federal statutes, regulations, administrative decisions, secondary sources, briefs, pleadings, motions and memoranda, among other search results.

[137] *See, e.g.*, *Getting Started with Online Research*, WESTLAW (2010), *available at* http://lscontent.westlaw.com/images/content/GettingStarted10.pdf.

[138] Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 465 (1993).

[139] Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173, 189 (2010).

ison to print-based research.[140] Thus, it is likely that the researcher will have a much greater amount of material to sift through in identifying material relevant to the issue being researched.

Unless the researcher has been careful about limiting the database, the volume of material is likely to obscure the clear lines between different kinds of authority.[141] Even a case law search limited to a controlling jurisdiction will retrieve unpublished as well as published opinions.[142] Most searches on Westlaw or Lexis will retrieve a broader array of primary and secondary sources across multiple jurisdictions.[143] Unmediated by the Digest System, the cases retrieved will likely touch on a broader array of subjects than those discovered through print research.[144] Research on the Internet will yield an even greater variety of primary, secondary, and nonlegal authority. The vast array of materials is likely to de-emphasize the importance of traditional primary authority. The researcher is less likely to focus on the source and instead to look more broadly at what is relevant, eroding traditional definitions of usable authority.

In addition to the sheer volume of material facing a researcher, hypertext technology[145] allows the research to move about within the document. For example, the results of a case law search will include the case name and a relevant snippet of the material that matches the researcher's search terms.[146] Because the researcher is "invited to jump directly into not just the case text, but the section of the case text deemed most responsive to the search terms,"[147] the researcher is less likely to focus on the traditional indicators of authority—which court issued the case, where it was published (if at all), how it is categorized, etc. Once again, the technology leads the researcher to focus more directly on the content of the material.

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[140] *See, e.g.*, Hanson, *supra* note 16, at 576 (noting that what used to take hours of tedious work can now be done in minutes); Kuh, *supra* note 11, at 247 (asserting that the lower time and energy costs for electronic research will expose researchers to more text during the course of their research); Schauer & Wise, *supra* note 19, at 513 (pointing out that what once would have taken two hours can now be done at "the click of a mouse").

[141] Valentine, *supra* note 139, at 189.

[142] Hanson, *supra* note 16, at 579–80.

[143] Valentine, *supra* note 139, at 194.

[144] Kuh, *supra* note 11, at 249.

[145] Hypertexting allows the researcher to move in a digitized document by opening links to other digitized documents. Camille Broussard, *Teaching with Technology: Is the Pedagogical Fulcrum Shifting?* 53 N.Y.L. SCH. L. REV. 903, 910 (2008–2009).

[146] Kuh, *supra* note 11, at 246.

[147] *Id.*

Hypertext technology also makes it easy for the researcher to move from document to document in a nonlinear fashion.[148] For example, a researcher may retrieve a case through Google Scholar, and while reviewing that case, click on a link to a second case, and so on.[149] Even if a researcher starts in a clearly identified database, as she clicks through from one source to another, she may soon lose track of whether the source is primary, secondary, or nonlegal authority. It is no wonder that hypertext technology, in combination with the sheer volume of material that electronic searching facilitates, has begun to blur the boundaries of authority.

4. Focus on Facts

The final factor contributing to the blurred lines between types of authority is that the electronic search technology pushes the researcher to focus on facts rather than legal concepts, which reinforces a focus on the content of the source material over the authority of the source's author or origin. This is due in part to the lack of digests or other classification schemes to inform the researcher and in part because of the function of the search technology itself.

In addition to the effects of the abandonment of the digest and similar systems noted above,[150] another consequence is that, for the researcher, there is no context for the results of an electronic search beyond the words the researcher has chosen.[151] Word searching "inhibits the searcher's impetus to seek out overarching legal principles within which to base legal arguments."[152] Without an understanding of how the source fits into the broad context of legal analysis, the researcher is likely to focus more on the factual content of the information. As the focus becomes removed from the law to the facts, the understanding of authority as "the law" will also fade.

This is exacerbated by the search technology which leads the researcher to retrieve sources containing factual similarities rather than legal ones. In a typical electronic search, whether on a fee-paid legal database or directly on the Internet, the researcher enters search terms into a search box. The search engine matches those terms against whatever database it is designed for and retrieves the results. The search returns documents containing exact matches to the

[148] Broussard, *supra* note 145, at 911.
[149] Kuh, *supra* note 11, at 248.
[150] *See supra* notes 92–118 and accompanying text.
[151] Valentine, *supra* note 139, at 195–96.
[152] *Id.* at 196.

search terms.[153] Because the search engine retrieves results based on matching terms, there is no indication of any relationship between the results,[154] and indeed no relationship may exist beyond the appearance of the search terms. Unless the search has been run through a West's Key Number,[155] or other classification system, the search is likely to yield a much broader array of results not directly related to the legal principle being researched.[156]

Several scholars have noted that keyword searching leads the researcher to focus on facts over legal principles.[157] It is much more difficult to search for abstract concepts and legal principles because the search words are likely to yield a much larger number of results.[158] The words used in abstract concepts are more likely to appear in a broader variety of sources and the complex relationship between words cannot easily be captured by the search technology.[159] In contrast, facts tend to be more narrow and concrete, and thus easier to search for. Younger generations of researchers, who expect to be able to plug a few words into a search engine and get answers, are not likely to engage in developing sophisticated search strings to find authority in a more conceptual way.[160]

Because the search technology facilitates a focus on facts, rather than legal concepts, the researcher is more likely to be drawn away from thinking about law in terms of traditional legal categories. Those traditional categories play a significant role in reinforcing traditional categories of authority. A researcher focusing on facts is going to see factual information as relevant before thinking about the source from which it came. An emphasis on facts as opposed to legal doctrine, in addition to the lack of filtering through digests and similar classification systems and the removal of the physical reminders of authority books provide, has resulted in a world of electronic research that lacks the traditional indicators of authority. This leads researchers to consider a broader array of different kinds of materials as relevant support for legal analysis.

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[153] Bast & Pyle, *supra* note 13, at 293.

[154] Hanson, *supra* note 16, at 574.

[155] *West's Key Number System*, THOMPSON REUTERS, http://lawschool.westlaw.com/knumbers/default.asp?mainpage=16&subpage=4 (last visited Apr. 11, 2011).

[156] Kuh, *supra* note 11, at 259.

[157] Bast & Pyle, *supra* note 13, at 297; Hanson, *supra* note 16, at 583.

[158] Bast & Pyle, *supra* note 13, at 293–94.

[159] *Id.*

[160] Thomas Keefe, *Teaching Legal Research from the Inside Out*, 97 LAW LIBR. J. 117, 122 (2005).

IV. ELECTRONIC CITATION IN JUDICIAL OPINIONS

In addition to the technology-driven changes in legal research, the second major factor in the blurring of the traditional categories of authority is the example courts set in judicial opinions. In an opinion, an internet citation to a nonlegal source sends the message to the reader that the source is legitimate, and that it provides good support for the proposition being cited.[161] The more that online sources are cited as nonlegal authority, the more accepted they become, and the more accepted they become, the more authoritative they become.[162] From the reader's perspective, if the court is citing a source, it must be a legitimate authority, and thus the boundary between traditional legal authority and nonlegal authority is blurred. There are now a sufficient number of citations to online authority to send that message clearly to legal readers and researchers.

A number of scholars have documented the rise in both internet citations and citations to nonlegal authority over the last twenty years.[163] The Judicial Conference of the United States has also noted the increasing frequency of judges' use of internet-based information in their opinions.[164] The increase in citations to internet sources can easily be seen by looking at the number of citations in the federal circuit courts since the mid-1990s, when internet citations first began to appear.[165]

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[161] *See, e.g.*, Peoples, *supra* note 22, at 7 (noting that use of Wikipedia as support for legal analysis lends authority to Wikipedia as a credible source); Schauer, *supra* note 24, at 1957 ("A citation to a particular source is not only a statement by the citer that this is a good source but also a statement that sources of this type are legitimate.").

[162] Schauer, *supra* note 24, at 1957–58.

[163] *See supra* notes 60–72 and accompanying text. These numbers do not entirely overlap. The rise in citations to nonlegal authority began before the Internet explosion, and at least some of the citations to nonlegal authority are citations to print sources rather than the Internet. *See* Hasko, *supra* note 19, at 430–40, 432 tbl.2.

[164] Memorandum from James C. Duff, Secretary, Judicial Conference of the United States, to Chief Judges, U.S. Courts (May 22, 2009), *available at* http://www.inbar.org/LinkClick.aspx?fileticket=hptDW9DIhFY%3D&tabid=356 (providing guidelines for judges on citing to, capturing, and maintaining internet sources in judicial opinions as well as guidelines on using hyperlinks in opinions).

[165] Determined by searching each Westlaw circuit court database ("CTA") for the term "http" in the opinion.

FIGURE 1
NUMBER OF FEDERAL CIRCUIT COURT CASES CONTAINING INTERNET CITATIONS

Year	Circuit Court													Total
	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	DC	Fed	
1996	0	0	0	0	0	0	0	0	0	0	0	0	0	**0**
1997	1	0	1	0	1	0	1	0	1	0	3	2	0	**10**
1998	1	1	2	3	4	0	0	2	2	2	2	2	0	**21**
1999	1	2	3	1	1	1	6	2	6	1	3	4	1	**32**
2000	2	3	9	1	3	5	6	4	9	1	6	5	1	**55**
2001	4	12	10	4	6	6	11	4	23	15	5	6	5	**111**
2002	12	19	15	8	9	6	15	4	51	6	3	14	12	**174**
2003	15	21	17	8	6	11	22	8	66	10	10	11	12	**217**
2004	15	30	23	17	16	18	43	11	77	17	10	12	14	**303**
2005	12	33	23	12	12	26	34	11	51	21	10	10	7	**262**
2006	18	61	36	14	9	35	48	11	82	22	13	14	5	**368**
2007	14	45	34	12	14	48	56	12	64	34	16	21	21	**391**
2008	16	56	33	19	10	48	84	16	85	25	10	32	40	**474**
2009	24	40	25	16	14	41	58	12	82	32	21	21	55	**441**
Total	**135**	**323**	**231**	**115**	**105**	**245**	**384**	**97**	**599**	**186**	**112**	**154**	**173**	**2859**

These numbers represent the individual cases containing internet citations, but not the number of citations themselves. Many of the cases contain more than one citation to online authority, making the total number even higher.[166] As Figure 1 demonstrates, the Circuit Courts of Appeals went from no internet citations in 1996 to citations in the double digits by 2004, eight years later. The number seems to have leveled off somewhat in the last two years, though some of the circuits that initially were slow to include electronic citations, such as the Federal Circuit, still show significant increases. While Figure 1 encompasses a relatively small percentage of the total cases decided by the circuits,[167] the Internet is sufficiently represented in citations to appear to readers as a valid source of authority.

[166] It was beyond the scope of this research project to count individual citations in the thousands of federal court cases containing at least one internet citation.

[167] For example, the 441 cases citing internet sources in 2009 represent 1.6% of the 26,828 total cases decided by the circuit courts. Total numbers were derived by searching each CTA for generic terms "court appeal" in the opinion, with dates restricted to each consecutive year.

The Supreme Court serves as an even stronger example that online sources are valid authority. The Court first cited an internet source in 1996, when Justice Souter referenced two internet sources describing cable modem technology.[168] Since that time, the Court's use of the Internet has risen dramatically, and by 2002, all of the justices had used at least one internet citation in an opinion.[169] According to one study, during the 2004 and 2005 terms, over thirty percent of the Court's opinions contained citations to the Internet.[170] The numbers are similar in the more recent terms. For example, in the Court's October Term 2009, twenty-eight cases[171] contained internet citations out of the eighty-six cases decided,[172] for a total of thirty-three percent. The highest percentage was for the October Term 2007, in which twenty-nine cases out of seventy-one, or forty-one percent, contained electronic citations.[173] As with the circuit court cases, the actual number of internet citations is even greater than the number of opinions, because several opinions contain multiple internet citations.[174]

Yet the number of citations does not tell the whole story. The numbers alone do not make clear the degree to which courts use nonlegal information as authority to support legal analysis. The numbers do not show to what extent the sources cited are part of the lower court record, or are references to traditional legal authority available online. Although it is still true that citation to traditional legal authority far exceeds citation to nonlegal sources,[175] there are a substantial number of examples of significant reliance on nonlegal sources, demonstrating that nonlegal sources will serve as a model to today's legal readers.

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[168] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 777 n.4 (1996).

[169] William R. Wilkerson, *The Emergence of Internet Citations in U.S. Supreme Court Opinions*, 27 JUST. SYS. J. 323, 325 (2006).

[170] *Id.* at 326.

[171] Determined by searching the Westlaw Supreme Court database for the term "http" in the opinion, with dates restricted between October 2009 and July 2010.

[172] Memorandum from SCOTUSblog.com on End of Term Statistical Analysis—October Term 2009 (July 7, 2010), *available at* http://www.scotusblog.com/wp-content/uploads/2010/07/Summary-Memo-070710.pdf.

[173] Determined by searching the Westlaw Supreme Court database for the term "http" in the opinion with dates restricted between October 2008 and July 2008.

[174] Wilkerson, *supra* note 169, at 326 tbl.1.

[175] *See, e.g.*, Reagan, *supra* note 69, at 328 (noting that citations to published opinions greatly outnumber citations to other sources in a study of federal courts of appeals cases).

In their study of citation to nonlegal sources in the United States and New Jersey Supreme Courts, Federick Schauer and Virginia Wise specifically looked at the use of nonlegal information as authority in judicial opinions and found a significant increase in the use of nonlegal materials at the same time as a decrease in traditional secondary sources.[176] This suggests that nonlegal materials play a similar role to that of traditional secondary sources in supporting legal analysis, and courts are increasingly citing to the Internet for nonlegal sources. A recent study of the citation to Wikipedia in judicial opinions notes a number of instances in which courts use Wikipedia to support reasoning or define legislative facts.[177] While there is no way to know the degree to which courts are relying on nonlegal sources, as opposed to using them as "window dressing,"[178] the fact that nonlegal sources at least appear to play the same role in opinions as traditional sources sets an example for legal readers.

The U.S. Supreme Court's use of nonlegal materials as authority provides a good snapshot of the different ways these materials can be used. It should be no surprise that a higher number of nonlegal citations appear in Supreme Court opinions, since the Court is more likely to decide the types of cases where traditional legal authority is less helpful.[179] It is also more likely that nonlegal citations will appear in dissents, where judges may be less constrained by traditional legal reasoning. A comprehensive study of the Court's 1995–2005 terms bears this out.[180]

The study also showed that internet citations are not limited to cases addressing particular issues, but instead are present in a wide range of cases, including criminal procedure, economic activity, First Amendment, civil rights, and judicial power.[181] The majority of internet citations are to government websites of some kind.[182] In addition to state and federal government documents, the Court has cited

[176] Schauer & Wise, *supra* note 19, at 506–07.

[177] Peoples, *supra* note 22, at 7–11.

[178] Schauer & Wise, *supra* note 19, at 513.

[179] *See* Margolis, *supra* note 60, at 221–32 (explaining why nonlegal materials are most useful in cases of first impression, cases of statutory interpretation, and constitutional issues).

[180] Wilkerson, *supra* note 169, at 329 (finding that forty-four percent of references appeared in dissenting opinions, thirty-seven percent in majority or plurality opinions, and nineteen percent in concurring opinions).

[181] *Id.* at 329 tbl.3.

[182] *Id.* at 330. In this study, Wilkerson follows the coding categories developed by Schauer and Wise, *see supra* note 59, and classifies all government information as legal. Wilkerson, *supra* note 169, at 332.

sources on the Internet for documents from other countries, nonprofit and academic research (both legal and nonlegal), commercial information, news, and popular culture.[183]

The Court's October Term 2009 opinions are not only consistent with these findings, but provide some clear examples of the use of nonlegal authority in support of legal reasoning. In the twenty-eight cases containing electronic citations, there are a total of sixty-one electronic citations.[184] These are fairly evenly divided, with twenty citations in majority opinions, eighteen in concurrences or combined concurrences and dissents, and twenty-three in dissenting opinions.[185] Out of the sixty-one citations to internet sources, three are references to the factual circumstances of the case on review.[186]

Only six of the citations can clearly be classified as references to traditional primary or secondary legal authority.[187] Fourteen out of the remaining fifty-two are clearly nonlegal sources, since they are references to educational, nonprofit, or commercial websites.[188] The

[183] *Id.* at 332 tbl.6.

[184] *See supra* note 169 and accompanying text. *See supra* note 171 for explanation of the source of the October 2009 term statistics.

[185] *Id.*

[186] *See* Johnson v. Bredesen, 130 S. Ct. 541, 542 (2010) (Stevens, J., dissenting from denial of cert.) (citing STATE OF TENN., DEP'T. OF CORR.'S, ADMIN. POLICIES AND PROCEDURES, INDEX # 506.14(VI)(B)(2) (Sept. 15, 2009), *available at* http://www.state.tn.us/correction/pdf/506-14.pdf); Hollingsworth v. Perry, 130 S. Ct. 705, 709 (2010) (citing Press Release, U.S. Courts for the Ninth Circuit, Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial (Jan. 8, 2010), *available at* http://www.ca9.uscourts.gov/datastore/general/2010/01/08/Prop8_Remote_Viewing_Locations.pdf); Salazar v. Buono, 130 S. Ct. 1803, 1822, n.8 (2010) (Alito, J., concurring in part and concurring in the judgment) (citing *Mojave National Preserve Operating Hours & Seasons*, DEP'T OF INTERIOR: NATIONAL PARK SERVICES, http://www.nps.gov/moja/planyourvisit/hours.htm (last visited Apr. 11, 2011)).

[187] For example, in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), the Court cites the *Federal Rules of Bankruptcy* to an online source. *Id.* at 2474 (citing FED. R. BANKR. P. 3015(b), *available at* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/BankruptcyRules.aspx) (requiring that a plan be filed within fourteen days of the filing of a petition). The Court also cites several law review articles to online, rather than print versions. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3089 n.2 (2010) (Stevens, J., dissenting) (citing Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557870); Free Enter. Fund v. Pub. Accounting Oversight Bd., 130 S. Ct. 3138, 3170 (2010) (Breyer, J., dissenting) (citing Harold Bruff, *Bringing the Independent Agencies in from the Cold*, 62 VAND. L. REV. 63, 68 (2009), *available at* http://vanderbiltlawreview.org/articles/2009/11/Bruff-62-Vand-L-Rev-En-Banc-63.pdf).

[188] Determined by the domain name containing .edu, .org, or .com. *See, e.g.*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2980 (2010) (citing HOFSTRA LAW SCHOOL STUDENT HANDBOOK (2009–2010), *available at* http://law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/stuhb_handbook.pdf); *McDonald*, 130

remaining citations are to government websites,[189] twenty-four of which cite to the federal government.[190] Thirty-three of the governmental references are to statistical information or other support for factual assertions of the Court.[191]

The remaining citations fall into a gray area. While they are not strictly traditional legal authority, they are much more law-like and are used to support legal rather than factual propositions. For example, in *Schwab v. Reilly*,[192] the Court cites a Department of Justice *Handbook for Chapter 7 Trustees* in support of a statement about the proper role of the bankrupt individual's estimated market value.[193] Handbooks of this nature, prepared by the Department of Justice to implement the administration of a federal statute, are clearly an interpretation of law much like traditional sources of authority, but do not clearly fall into most lawyers' understanding of primary authority. Before handbooks like this were made available online, they were not searchable by traditional means of legal research and, if not introduced into the record below, were much less likely to be used as authority. This gray area provides yet another example of a way in which legal authority may be changing.

While many of the internet citations in Supreme Court opinions appear in footnotes and in conjunction with a variety of other cita-

S. Ct. at 3135 (citing *Regulating Guns in America*, LEGAL COMMUNITY AGAINST VIOLENCE (Feb. 2008), http://www.lcav.org/publications-briefs/regulating_guns.asp); Nurre v. Whitehead, 130 S. Ct. 1937, 1938 n.2 (2010) (Alito, J., dissenting from denial of cert.) (citing David R. Holsinger, ON A HYMNSONG OF PHILIP BLISS (TRN Music Publisher, Inc. 1989), *available at* http://trnmusic.com/pdfs/string-orchestra-pdfs/onahymnsongofphilipblissorch.pdf).

[189] Determined by the domain name .gov, or other identifying information. *See, e.g.*, *Salazar*, 130 S. Ct. at 1823 n.9 (citing *Available Emblems of Belief for Placement on Government Headstones and Markers*, U.S. DEP'T OF VETERANS' AFFAIRS, http://www.cem.va.gov/hm/hmemb.asp (last visited Apr. 23, 2010)); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 941 n.27 (2010) (Stevens, J., concurring in part and dissenting in part) (citing *Electioneering Comm'ns Summary*, FED. ELECTION COMM'N, http://fec.gov/finance/disclosure/ECSummary.shtml (last visited Apr. 11, 2011)).

[190] *See supra* note 171.

[191] The high percentage of citations to factual information is consistent with other studies finding an increase in citations to nonlegal material. *See supra* notes 17, 60, 169 and accompanying text. The use of legislative facts in this way raises a serious question of whether, and the degree to which, courts are increasingly taking on a legislative role. Those questions are beyond the scope of this article, but well worth considering.

[192] 130 S. Ct. 2652 (2010).

[193] *Id.* at 2663 (citing DEP'T. OF JUSTICE, EXEC. OFFICE FOR U.S. TRS., HANDBOOK FOR CHAPTER 7 TRS. 8-1 (2005), *available at* http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/7handbook1008/Ch7_Handbook.pdf).

tions,[194] there are examples of an opinion relying solely on an internet source. For example, in his concurring opinion in *John Doe No. 1 v. Reed*,[195] Justice Alito cited a report of the nonprofit Initiative and Referendum Institute to make the point that publicly disclosing names on a ballot initiative is not necessary to prevent fraud and mistake.[196] A citation like this shows the reader that information from nonprofit organizations can serve as valid authority for legal analysis.

In some cases, the Court uses factual data to reinforce either the record below or the legal authority the court is citing. For example, in *U.S. v. Comstock*,[197] the majority, in addressing concerns that its holding was too broad, cited the record below, as well as online statistics from the Department of Justice to show that the statutory provision at issue had not been extensively applied.[198] This type of citation sends the message that an assertion is stronger if backed up by authority beyond the record below, and will send lawyers searching for factual data to back up their legal assertions.

Thus, with the example set at the top by the Supreme Court and carried through to many of the lower courts, lawyers and law students developing an understanding of how authority supports legal analysis will see nonlegal sources being used as authority. In combination with the ease of access to a seemingly limitless amount of information on the Internet and the loss of traditional markers of authority provided by print legal research sources, the move to more and different uses of nonlegal information as authority will likely continue and increase.

V. CONCLUSION

As technology marches forward and the generation of digital natives enters the profession in greater and greater numbers, changes

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[194] *See, e.g.*, Nurre v. Whitehead, 130 S. Ct. 1937, 1938 n.2 (2010); *Citizens United*, 130 S. Ct. at 941 n.27; Carr v. United States, 130 S. Ct. 2229, 2245 (2010) (Alito, J., dissenting) (citing OHIO LEGISLATIVE SERV. COMM'N, RULE DRAFTING MANUAL 47 (4th ed. 2006), *available at* http://www.lsc.state.oh.us/rules/rdm06_06.pdf).

[195] 130 S. Ct. 2811 (2010).

[196] *Id.* at 2840 (citing INITIATIVE AND REFERENDUM INST., INITIATIVE USE 1 (Feb. 2009), *available at* http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(1904-2008).pdf).

[197] 130 S. Ct. 1949 (2010) (holding that the federal statute allowing a district court to order civil commitment beyond the date that a federal prisoner would be released is constitutional).

[198] *Id.* at 1964 (citing William J. Sabol et al., *Prisoners in 2008*, BUREAU OF JUSTICE STATISTICS BULL. (Dep't of Justice), Dec. 2009 (Rev. June 2010), at 8 tbl.8, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf).

to the traditional definitions of authority are likely to continue. If the experiences with unpublished opinions[199] and foreign authority[200] have taught us anything, it is that, whether or not their use is controversial, sources will be cited if a lawyer or judge perceives them to provide support for a proposition. The same can be said of nonlegal authority.

While some courts have balked at the citation of nonlegal authority in support of legal analysis,[201] its use is on the rise, and many courts are clearly accepting and using nonlegal authority. The problems with citation to online materials are legion. There is often no way to authenticate sources, links may become inactive, and website content is subject to change.[202] Despite these drawbacks, for the generations that are used to easy access to legal and nonlegal information of all kinds, there is no going back.

This change is happening gradually—but it is happening. Instead of lamenting the loss of traditional definitions of authority, or trying to figure out ways to train lawyers to recognize authority in the same way they have for the last century, the time has come to find a new way. There is simply too much available information to permit the use of any source for any reason—there must be boundaries and ways to recognize when a source is authoritative.

There is much about the new world of electronic legal research that is not new. Lawyers have long had to comb through large amounts of information to find relevant sources. The law is complex, and even in the print world researchers had to distinguish among different kinds of primary and secondary authority to recognize the most binding and most relevant sources. The difference today is that the way those distinctions were once recognized is not as obvious in the world of electronic research. There is much that is better about the easy availability of information on the Internet. We can find a greater number of sources more quickly and we have access to relevant information that may never have been unearthed in a print-based search. These improvements, however, bring new challenges.

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[199] *See* Solomon, *supra* note 108, at 191–201.

[200] *See* Parrish, *supra* note 43, at 680.

[201] *See, e.g.*, Badasa v. Mukasey, 540 F.3d 909, 910 (8th Cir. 2008) (rejecting the use of Wikipedia to establish the meaning of an immigration document).

[202] For a more in-depth treatment of the problems with authenticity and permanence in internet citations, see Barger, *supra* note 19, at 438–45; Ching, *supra* note 19, at 396–97; Mary Rumsey, *Runaway Train: Problems of Permanence, Accessibility, and Stability in the Use of Web Sources in Law Review Citations*, 94 LAW LIBR. J. 27, 34–37, 35 tbl.1 (2002).

If law is to remain a separate domain, there must be limits on the way sources are used to support legal analysis. But the limitations can no longer be rooted in the print sources of the twentieth century, and they can no longer be based solely on traditional notions of precedent and stare decisis. If the notion of authority has shifted away from who said it, and where it was said, then it must be replaced by another system. It is time for the profession—lawyers, judges, and legal academics—to formulate a new system. We need a new vocabulary for defining authority, and we need new methodologies for teaching and learning how to identify relevant nonlegal authority. The legal profession should embrace the changes brought about by the online revolution and figure out how to make the technological advances work in the legal analysis of the future.