

# IT'S TIME TO EMBRACE THE NEW— UNTANGLING THE USES OF ELECTRONIC SOURCES IN LEGAL WRITING

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## I. INTRODUCTION

The proliferation of citation to online sources in judicial opinions and legal briefs has been well documented in recent years.<sup>1</sup> As the world of information, both legal and nonlegal, has

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<sup>1</sup> Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 937–38 (2011) [hereinafter Margolis, *Authority Without Borders*]; Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 116–18 (2007–2008) [hereinafter Margolis, *Surfin' Safari*]; Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites Is Appropriate*, 84 ST. JOHN'S L. REV. 633, 634–36

gone digital, lawyers and judges have turned to the Internet as a medium to conduct legal research and the results of that research are reflected in the citations to electronic sources.<sup>2</sup> A search for URLs<sup>3</sup> in any legal database will show that cases, briefs, and law review articles are replete with citations to sources as varied as Wikipedia, state and local regulations, blogs, online dictionaries, and statistical data from government websites.

Given the easy availability of such a wide variety of online information, it is not surprising that lawyers and judges are turning to these sources to inform their legal writing. The fluidity with which a researcher can move from a legal database to a nonlegal one when conducting research online makes it even more likely that electronic materials will be found and used.<sup>4</sup> It is almost impossible to imagine a researcher finding relevant information, thinking about how it might affect the analysis in a piece of legal writing, be it opinion or brief, and then not using it to enhance the document. Nevertheless, the use of online sources has not been without controversy.

Since the onset of the information revolution and citation of electronic materials, lawyers and law librarians have called for limitations and raised concerns about authenticity, reliability, comprehensiveness of coverage, and permanence of citations.<sup>5</sup> While these are legitimate concerns, none have stopped the

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(2010); Lee F. Peoples, *The Citation of Blogs in Judicial Opinions*, 13 TUL. J. TECH. & INTELL. PROP. 39, 50–51 (2010) [hereinafter Peoples, *Citation of Blogs*]; Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1, 3 (2009) [hereinafter Peoples, *Citation of Wikipedia*]; Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegation of Law*, 29 J. LEGAL STUD. 495, 497 (2000); David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding A Case?*, 16 NO. 2 PROF. LAW. 2, 13 (2005); William R. Wilkerson, *The Emergence of Internet Citations in U.S. Supreme Court Opinions*, 27 JUST. SYS. J. 323, 325–26 (2006).

<sup>2</sup> See generally Margolis, *Surfin' Safari*, *supra* note 1, at 115–18.

<sup>3</sup> A URL is a Uniform Resource Locator, the address by which a website can be located. URL, MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriam-webster.com/dictionary/url> (last visited Feb. 23, 2013).

<sup>4</sup> See Margolis, *Authority Without Borders*, *supra* note 1, at 935 (explaining how hypertexts within online legal sources allow researchers to seamlessly jump to other legal or nonlegal documents).

<sup>5</sup> Coleen M. Barger, *On the Internet, Nobody Knows You're A Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 425–26, 433–34, 438–43 (2002); Tennant & Seal, *supra* note 1, at 14–16; Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISCOURSE 27, 33–41 (2010).

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growing tide of reliance on the Internet for research. The high cost of publishing has led state and local governments to discontinue print publication and place the official version of the law online, so there is often no choice but to cite the online version.<sup>6</sup> While some courts have continued to resist reliance on Web 2.0 sources such as Wikipedia,<sup>7</sup> other courts frequently rely on Wikipedia and similar sources.<sup>8</sup> Even in the United States Supreme Court, citation to online sources has grown significantly over the last fifteen years.<sup>9</sup> Yet even while citation has increased, judges continue to express concern and confusion over how and when to use electronic materials, and lawyers avoid them for fear of offending judges and losing credibility.<sup>10</sup>

Some of the hesitation over the citation of online materials stems from the fact that there are virtually no standards or guidelines indicating when citation to these materials is appropriate, or how to best use online materials. Academics have noted the lack of standards in the context of particular sources, such as dictionaries,<sup>11</sup> Wikipedia,<sup>12</sup> and blogs,<sup>13</sup> but it is worth noting that there are also no general standards for how and when to use any materials found online. Some courts have expressly discouraged the use of online materials and refused to recognize them,<sup>14</sup> while others clearly embrace them.<sup>15</sup> In spite of the lack of standards, however, the reliance on online materials continues to rise,<sup>16</sup> driven by the continued reliance on the Internet as a research tool.

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<sup>6</sup> Whiteman, *supra* note 5, at 38–40.

<sup>7</sup> See, e.g., U.S. v. Sypher, No. 3:09-CR-00085, 2011 WL 1314669, at \*3 n. 4 (W.D. Ky. Apr. 1, 2011) (noting that Wikipedia is not an acceptable source of authority in the United States District Courts).

<sup>8</sup> Joseph L. Gerken, *How Courts Use Wikipedia*, 11 J. APP. PRAC. & PROCESS 191, 192 (2010); Peoples, *Citation of Wikipedia*, *supra* note 1, at 3.

<sup>9</sup> Margolis, *Authority Without Borders*, *supra* note 1, at 920.

<sup>10</sup> See Whiteman, *supra* note 5, at 42–44 (describing the competing approaches taken by courts on the use of the Internet).

<sup>11</sup> See Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 82 (2010) (noting that the Court has never delineated the appropriate use of dictionaries in American jurisprudence).

<sup>12</sup> Peoples, *Citation of Wikipedia*, *supra* note 1, at 7.

<sup>13</sup> See Peoples, *Citation of Blogs*, *supra* note 1, at 41 (mentioning that no previous study has uncovered why or how courts cite blogs).

<sup>14</sup> See Whiteman, *supra* note 5, at 50, 52 (explaining that some judges continue to discourage the use of Wikipedia and other online resources).

<sup>15</sup> *Id.* at 52–53.

<sup>16</sup> See *id.* at 52.

The lack of norms for the use of electronic sources causes a great deal of confusion over how to categorize the sources, as well as over when to use them. While some electronic material takes the form of traditional legal authority<sup>17</sup> much of it does not. Is it appropriate to cite the Internet for facts? Policy? Social science data? Opinions and legal analysis in blogs? What is the authoritative value of these sources? Electronic materials fall on a spectrum from sources whose use should be treated with great skepticism to those that should be embraced and used without hesitation. It is time to develop more nuanced norms for when and how electronic materials should be used in legal writing so that both bench and bar can embrace them with greater confidence.

There are few articulated parameters for when it is appropriate to cite online sources, particularly sources of nonlegal information.<sup>18</sup> The more recent editions of the Bluebook and ALWD Citation Manuals have developed citation guidelines for Internet sources.<sup>19</sup> These rules contemplate the citation of a variety of online sources, ranging from official and authenticated legal authority to commercial legal databases to blogs.<sup>20</sup> While these rules reflect an understanding that lawyers do and will continue to cite a multitude of online sources, they do not give any real indication of how and when such citation is appropriate.

The time for lamenting the changes wrought by the Internet and resisting the use of electronic materials has passed. Regardless of whether some judges and lawyers are comfortable

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<sup>17</sup> For an explanation of the differences between traditional legal authority and other sources, see Margolis, *Authority Without Borders*, *supra* note 1, at 913–23.

<sup>18</sup> See Kirchmeier & Thumma, *supra* note 11, at 82 (noting that the Court has never delineated the appropriate use of dictionaries in American jurisprudence); Peoples, *Citation of Wikipedia*, *supra* note 1, at 28–32 (suggesting a need to develop standards regulating citations to Wikipedia in judicial opinions).

<sup>19</sup> See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18, at 164–76 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010); See ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION, 291–307 (3d Ed. 2006) (rules 38–40).

<sup>20</sup> See THE BLUEBOOK, *supra* note 19, R. 18.2.1, at 165–66 (explaining how to cite authenticated and official copies available online); *Id.* R. 18.2.2, at 165–69 (explaining how to cite dynamic websites such as blogs); *Id.* R. 18.3, at 171–73 (demonstrating how to cite commercial databases such as LexisNexis, Westlaw, and Bloomberg Law); ALWD, *supra* note 19, at 291–307, Rule 40.3 (showing how to cite blogs); Rule 14.1(b) (explaining that it is acceptable to cite the online version of official codes); Rule 39 (explaining how to cite information available through Westlaw and LexisNexis).

with the use of electronic materials, they are being used. Rather than fight the inevitable, it is time to acknowledge that online materials will be cited and focus our attention on how best to do so while avoiding the problems feared by so many. In many ways, the use of online materials parallels the controversy over the use of unpublished (or non-precedential) opinions.<sup>21</sup> Just as the federal courts adopted Federal Rule of Appellate Procedure 32.1 to impose some uniformity on the use of non-precedential opinions,<sup>22</sup> it is time to develop some standards and guidelines for the use of online materials. The Internet is not going to go away, and people are not going to stop relying on it.

Despite the lack of accepted norms or standards, there are many positive reasons to use traditional and nontraditional Internet sources in support of legal reasoning in judicial opinions and briefs. This article will assess the various ways that online materials are used in judicial opinions, make suggestions about the most effective ways electronic materials can be used, and encourage the use of electronic sources in appropriate situations. Part II will address the different ways online materials are used in briefs and judicial opinions, and identify potential pitfalls with those approaches. Part III will explain that the confusion over the use of electronic sources stems, at least in part, from the legislative/adjudicative fact distinction that has evolved over the years. The article will conclude by encouraging lawyers and judges to recognize the varying uses of electronic information and to embrace the use of electronic sources as a valid form of persuasive authority.

## II. WHAT IS THIS STUFF? FACTS? AUTHORITY? BOTH?

Electronic sources are used in legal writing for a variety of reasons, and their use ranges from the benign to the problematic. Perhaps the greatest confusion regarding electronic materials cited in legal writing is how to categorize them. This is due in part to the wide variety of types of materials cited, and in part to

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<sup>21</sup> See Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 Neb. L. Rev. 895, 899–901 (2008) (explaining that despite initial resistance, reliance on non-precedential opinions is not going to stop and therefore the better approach is to accept their use and develop standards).

<sup>22</sup> See *id.* at 927.

the fact that they are used in many different ways with few standards or guidelines governing their use. When a judge cites a dictionary to define a statutory term,<sup>23</sup> is that legal authority? When a lawyer cites the Wikipedia explanation of “tractor pulling” in the statement of facts of an appellate brief,<sup>24</sup> is the court being implicitly asked to take judicial notice of factual information? When a judge cites government statistics on the number of people waiting for an organ transplant in support of a finding that an enhanced sentence was warranted because a fraudulent website was intended to reach a large number of people,<sup>25</sup> are the statistics being used as authority? The answer, and the confusion, is that all of these might be true, and more.<sup>26</sup>

Because judges do not generally explain how, or for what purpose they are citing particular sources, it can be difficult to ascertain precisely how a source is used. Sources can be roughly categorized, however, into use as judicially noticed adjudicative facts, legislative facts to aid in interpretation and application of legal rules, facts providing background or deeper understanding of legal rules and policy considerations, and, as a catch-all, authority to support reasoning or analysis.

Many electronic sources are forms of traditional primary and secondary legal authority.<sup>27</sup> The electronic citation to these sources is a natural outgrowth of the fact that so much legal publishing has migrated online.<sup>28</sup> The use of other electronic sources is more challenging to categorize and requires a deeper analysis.

A large number of non-trivial citations to electronic authority

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<sup>23</sup> See, e.g., *State v. Hohenwald*, 815 N.W.2d 823, 830 (Minn. 2012) (citing several dictionaries to define the term “proceedings” in Minn. R. Crim. P. 20.01); *In re Sempeles*, 471 B.R. 178, 179–80 (Bankr. W.D. Va. 2012) (citing both print and online dictionaries to define the term “heirloom” in the Virginia Code).

<sup>24</sup> Brief for Appellee at 5 *U.S. v. Wagner-Dano*, 679 F.3d 83 (2d Cir. 2011) (No. 10-4593), 2011WL 2531151.

<sup>25</sup> *U.S. v. Feldman*, 647 F.3d 450, 462 (2d Cir. 2011).

<sup>26</sup> In addition to all of the substantive uses of online materials, they (and nonlegal sources in general) may be used as rhetorical devices, or “flourishes” to enliven a piece of writing or illustrate a point. Literature, for example, often plays this role. See, e.g., MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 11–14 (2002) (addressing different uses of literature in legal writing). This Article will focus on the more substantive uses of online materials.

<sup>27</sup> See Margolis, *Authority Without Borders*, *supra* note 1, at 913–22.

<sup>28</sup> Judith Lihosit, *Research in the Wild: CALR and the Role of Informal Apprenticeship in Attorney Training*, 101 L. LIB. J. 157, 158 (2009).

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are factual in nature.<sup>29</sup> A search for “http” in Westlaw’s ALLCASES database yields thousands of cases containing multiple citations to websites.<sup>30</sup> A huge number of these citations are to factual information, such as data generated by government agencies: financial data,<sup>31</sup> census data,<sup>32</sup> immigration statistics,<sup>33</sup> social science data,<sup>34</sup> weather information,<sup>35</sup> and just about anything else imaginable. Factual material cited in legal writing generally falls into one of two categories—adjudicative facts or legislative facts.<sup>36</sup>

Other electronic citations are to sources such as dictionaries,<sup>37</sup> blogs,<sup>38</sup> policy statements,<sup>39</sup> and economic theory.<sup>40</sup> These sources are used to provide context or as a form of authority, providing support to the legal analysis or reasoning in an opinion or brief. All of these uses of electronic sources will be explored in further

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<sup>29</sup> As increasing numbers of primary sources of law such as local ordinances, regulations, and statutes are being published online, the numbers of electronic citations to these sources will rise. Whiteman, *supra* note 5, at 38. These citations operate in much the same way any citations operate, and, while subject to the authenticity and permanence concerns, are not the subject of this paper.

<sup>30</sup> In Westlaw Next, this search could be replicated by typing “http” into the search box after specifying the “Cases” content area and checking the “All State” and “All Federal” boxes. In Lexis Advance, this search can be performed by choosing to “Browse Sources,” selecting “all jurisdictions” and then entering “http” into the search box.

<sup>31</sup> *See, e.g.*, *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 896 (E.D. Mich. 2008) (citing the website containing Ford Motor Company’s Annual Report).

<sup>32</sup> *See, e.g.*, *Shelby Cnty, Ala. v. Holder*, 679 F.3d 848, 862 (D.C. Cir. 2012) (citing online U.S. Census Bureau information regarding minority voters).

<sup>33</sup> *See, e.g.*, *Sanchez v. State*, 692 N.W.2d 812, 815 n. 2 (Iowa 2005) (citing the *2002 Yearbook of Immigration Statistics* regarding the number of illegal aliens in Iowa).

<sup>34</sup> *See, e.g.*, *U.S. v. Staten*, 666 F.3d 154, 163 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1937 (2012) (citing findings from an online report from the National Institute of Justice concerning violence against women).

<sup>35</sup> *See, e.g.*, *Alexander v. Mitchell*, 930 A.2d 1016, 1021 n. 6 (Me. 2007) (citing the National Weather Service website to define the “normal” annual snowfall in Maine).

<sup>36</sup> *See infra* Part II.B–C.

<sup>37</sup> *See, e.g.*, *Commodity Futures Trading Comm’n v. Erskine*, 512 F.3d 309, 324 (6th Cir. 2008) (citing to an online dictionary).

<sup>38</sup> *See, e.g.*, *Arkansas Carpenters Health & Welfare Fund v. Bayer AG*, 625 F.3d 779, 781 n. 15 (2d Cir. 2010) (citing the Prescription Access Litigation Blog).

<sup>39</sup> *See, e.g.*, *Wolski v. Fremont Inv. & Loan*, 25 Cal. Rptr. 3d 500, 506 (Cal. App. 4th Dist. 2005) (citing Senate Committee statement online).

<sup>40</sup> *See, e.g.*, *In re Certification of Need for Add’l Judges*, 3 So.3d 1177, 1180 n.4 (Fla. 2009) (citing a study by the Washington Economics Group).

detail.

*A. Primary and Secondary Legal Authority*

The easiest form of electronic source to understand is traditional legal authority transplanted online – cases too recent to carry a reporter citation or statutes or regulations from a jurisdiction that publishes them online. These sources, while available digitally, are essentially identical to the same forms of authority available in print. In addition, a judge or lawyer might cite to an unpublished or non-precedential opinion, available only through an online source, but use that source much as traditional authority would be used.<sup>41</sup> These sources are familiar as primary legal authority and are used in much the same way they were when published in books. There is little mystery in this kind of citation, and it unlikely that lawyer or judge would question its use. As more and more legal authority is published online, it is likely these citations will rise, with a corresponding decrease in citation to print sources.

Similarly, traditional secondary sources are sometimes cited electronically as their publication has migrated online.<sup>42</sup> Secondary sources are generally defined as commentary on the law—treatises, legal encyclopedias, and law review articles.<sup>43</sup> While these sources continue to be available in print, as more law firms and libraries cut out print collections as a cost saving measure, lawyers and judges will turn to the online versions for citation. In addition, as with primary authority, a number of law reviews and other secondary sources are being published only online, so a print citation is not possible.<sup>44</sup> For example, the Second Circuit cited to an article posted in OSJCL Amici: Views From the Field, an online companion to the Ohio State Journal of Criminal Law, to support its analysis of the proper scope of

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<sup>41</sup> See Sloan, *supra* note 21, at 896–900 (discussing the citation of unpublished opinions); See also Whiteman, *supra* note 5, at 60–61 (noting how easily accessible unpublished opinions are online).

<sup>42</sup> See, e.g., All Nations Music v. Christian Family Network, Inc., 989 F. Supp. 863, 866 (W.D. Mich. 1997) (citing MARTINDALE–HUBBELL LAW DIRECTORY, available at <http://lawyers.martindale.com/marhub/> (last visited Feb. 23, 2013)).

<sup>43</sup> See Margolis, *Authority Without Borders*, *supra* note 1, at 917.

<sup>44</sup> See, e.g., In re Direct Response Media, Inc., 466 B.R. 626, 651 n.16 (Bankr. D. Del. 2012) (citing Widener Law Sch. Legal Studies Research Paper No. 09-13, Harvard Law & Econ. Discussion Paper No. 630 (2009)) (showing example of online-only article).



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review of a criminal sentence.<sup>45</sup> This source is cited in much the same way a traditional law review would be cited, and, while a reflection of the migration to online publication, does not represent a new or controversial use of authority.

In addition, a new form of secondary authority, the law blog, or blawg, has taken hold and become a source that lawyers and judges turn to for support of legal analysis.<sup>46</sup> The citation to blogs has grown dramatically over the last several years.<sup>47</sup> A recent study documented citations to blogs written by law faculty in eighty-nine judicial opinions.<sup>48</sup> These blogs, which are generally commentary on the law, play the role of the traditional law review, and are generally cited for the same reasons. For example, the most commonly cited law blog, Sentencing Law and Policy,<sup>49</sup> which is cited in forty-five cases, was cited to by a federal district court for its interpretation of a Supreme Court opinion.<sup>50</sup>

The chief advantage of blogs over more traditional law review articles is the speed with which blog entries can be posted. Legal scholars can, and do, publish on timely issues that are currently pending before courts.<sup>51</sup> Because blogs do not have to go through the slow law review publication process, lawyers and judges are more likely to find analysis directly bearing on the legal analysis in the case than they might in a traditional law review article.<sup>52</sup>

The speed of publication is also one of the downsides of reliance on blogs. Unlike the traditional law review, blogs do not go

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<sup>45</sup> U.S. v. Stewart, 590 F.3d 93, 147 (2d Cir. 2009) (citing Hon. Gerard E. Lynch, *Letting Guidelines Be Guidelines (And Judges Be Judges)*, OHIO STATE J. OF CRIM. L. AMICI: VIEWS FROM THE FIELD (Jan. 2008), available at [http://moritzlaw.osu.edu/osjcl/blog/Articles\\_1/Lynch-final-12-28-07.pdf](http://moritzlaw.osu.edu/osjcl/blog/Articles_1/Lynch-final-12-28-07.pdf)).

<sup>46</sup> See, e.g., Rachel C. Lee, *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 Stan. L. Rev. 1535, 1542–43 (2009); Peoples, *Citation of Blogs*, *supra* note 1, at 44 (discussing the reliance on blogs).

<sup>47</sup> See J. Robert Brown Jr., *Law Faculty Blogs and the State of the Blogosphere: Citations in Legal Publications*, THE RACE TO THE BOTTOM (Jul. 26, 2012, 6:00 AM), <http://www.theracetothetobottom.org/home/law-faculty-blogs-and-the-state-of-the-blogosphere-citations-1.html> (showing a growth from 486 citations in a 2006 study to 6340 in June 2012).

<sup>48</sup> J. Robert Brown Jr., *Law Faculty Blogs and Disruptive Innovation: The Data 2* (Univ. of Denver Sturm Coll. of Law, Working Paper No. 12-22, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2115587](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115587).

<sup>49</sup> Douglas A. Berman, SENTENCING LAW AND POLICY, <http://sentencing.typepad.com>, (last visited Jan. 13, 2013).

<sup>50</sup> U.S. v. Peterson, 774 F. Supp. 2d 1024, 1033 (D.N.D. 2011).

<sup>51</sup> Peoples, *Citation of Blogs*, *supra* note 1, at 40.

<sup>52</sup> *Id.*

through the intensive editing process that is part of the publication process, and thus might be seen as less reliable or authoritative.<sup>53</sup> The reputation of the author becomes even more important as a result. A lawyer should be hesitant to cite the blog of an unknown author, though that same author's work, vetted through the law review process, might be a useful citation. On the other hand, a blog entry from a known and respected scholar on an evolving and current issue may be more persuasive than an older law review article by that same author. Blogs also suffer from the same problems of permanence and authentication as other Internet sources. Nonetheless, blogs have become and will continue to be a source that judges and lawyers can turn to for support of legal reasoning and analysis in much the same way secondary sources have always been.

### *B. Judicial Notice of Adjudicative Facts*

One category of electronic citation in briefs and judicial opinions is factual information relevant to the underlying situation giving rise to the claim, commonly called "adjudicative facts."<sup>54</sup> Typically, adjudicative facts are introduced at trial through testimony or other evidentiary mechanisms.<sup>55</sup> Federal Rule of Evidence 201, however, allows a court to take judicial notice of an adjudicative fact "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."<sup>56</sup> All states have a similar rule.<sup>57</sup> One of the chief purposes of judicial notice is to promote judicial efficiency so that time and resources are not wasted in proving facts that are clear

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<sup>53</sup> *Id.* at 51 (citing *In re Gen. Motors Corp.*, 407 B.R. 463, 502 n. 96 (Bankr. S.D.N.Y. 2009)).

<sup>54</sup> Adjudicative facts are facts concerning the parties, and answer questions such as who, what, where, when and why. They are most typically the kinds of facts presented and determined at trial. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 10.6 (3d ed. 1972).

<sup>55</sup> Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 *Rev. Litig.* 131, 150 (2008).

<sup>56</sup> FED. R. EVID. 201(b).

<sup>57</sup> Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 *Duke L.J.* 1263, 1289 (2007) (explaining that while most states have adopted Rule 201, those states that have not explicitly incorporated Rule 201 have used it as a model for their evidentiary rules). *See, e.g.*, ALA. R. EVID. 201(b); OR. REV. STAT. ANN. § 40.065 (West 1981); PA. R. EVID. 201(b); WIS. STAT. ANN. § 902.01 (West 2012).

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and uncontroversial.<sup>58</sup>

Under Federal Rule of Evidence 201 and equivalent state law provisions, either party can request a court to take judicial notice of a fact and provide the relevant information.<sup>59</sup> The court can also take judicial notice of a fact on its own.<sup>60</sup> Judicial notice can be taken at any stage of a proceeding, including on appeal.<sup>61</sup>

While a court can take judicial notice of facts from any source meeting the requirements of the rule, numerous cases cite electronic sources for purposes of judicial notice.<sup>62</sup> The easy availability of information online makes it virtually irresistible to look up a fact in question.<sup>63</sup> Even the courts themselves have noted that “[i]t is not uncommon for courts to take judicial notice of factual information found on the world wide web.”<sup>64</sup>

A look at some of the cases taking judicial notice of information found on the Internet shows the range of reasons this material might be cited. It is common practice to save the time of a full evidentiary hearing by taking judicial notice of lower court proceedings.<sup>65</sup> For example, one of the more common situations that arises is when a federal court in a federal habeas petition takes judicial notice of the state appellate court proceedings.<sup>66</sup> This is an uncontroversial use of judicial notice, and one that would have occurred anyway, regardless of the location of the records. In this case, the citation to the Internet merely reflects

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<sup>58</sup> David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39-NOV Colo. Law. 19, 20 (Nov. 2010).

<sup>59</sup> FED. R. EVID. 201(c)(2).

<sup>60</sup> *See id.* 201(c)(1) (providing that a court can take judicial notice whether requested or not).

<sup>61</sup> *Id.* 201(d).

<sup>62</sup> On October 28, 2012, a boolean search in Westlaw’s ALLCASES database for “judicial notice” in the same paragraph as “http” yielded 1,795 cases.

<sup>63</sup> Dansky, *supra* note 58, at 19; Thornburg, *supra* note 55, at 132-33.

<sup>64</sup> *See O’Toole v. Northrup Grumman Corp.*, 499 F. 3d 1218, 1225 (10th Cir. 2007) (holding that the district court abused its discretion in failing to take judicial notice of defendant’s earnings history in calculating damages award).

<sup>65</sup> *See, e.g., Alvarez v. Hedgpeth*, No. CV 10-9486-DMG (OP), 2011 WL 3021267, at \*1 n.1 (C.D. Cal. July 22, 2011) (taking judicial notice of the state appellate court records, *available at* [://appellatecases.courtinfo.ca.gov](http://appellatecases.courtinfo.ca.gov), and noting that *Smith v. Duncan*, 297 F.3d 809 (9th Cir. 2002) states that federal courts may take judicial notice of relevant state court records in federal habeas proceedings); *O’Connell v. Yates*, 2011 WL 3101816 at \*1 n. 2 (C.D. Cal. July 22, 2011).

<sup>66</sup> *Id.* (noting that “federal courts may take judicial notice of relevant state court records in federal habeas proceedings”) (citing *Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir.2002)); *O’Connell v. Yates*, No. EDCV 11-982-RGK (OP), 2011 WL 3101816, at \*1 n.2 (C.D. Cal. July 22, 2011).

that court records are now often digital and housed on a court website rather than in a file drawer.

In addition to proceedings in the context of habeas petitions, courts take judicial notice of a wide variety of information on judicial websites. These include citations to docket sheets<sup>67</sup> and court clerk records<sup>68</sup> among others. As with the habeas petitions, there is nothing different about judicial notice in this context, other than the fact that this information is no longer found only in hard copy records, but is also (and sometimes only) maintained digitally.

Many cases fall into the category of taking judicial notice of things they traditionally would have taken notice of in a print source, but now cite to the Internet instead. These include things such as the weather on a particular day,<sup>69</sup> the definition of a particular slang term,<sup>70</sup> the distance between two points,<sup>71</sup> census figures,<sup>72</sup> the U.S. Prime Rate,<sup>73</sup> etc. The fact that these sources are on the Internet, rather than in print, does not fundamentally change the nature of judicial notice. However, the easy availability and low cost of online information may cause litigants to request judicial notice for facts that may previously have been just as easy to prove through testimony.

One of the chief problems raised by judicial notice of Internet

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<sup>67</sup> *Dickens v. Dauphin Cnty Prison*, No. 1:CV-10-2619, 2011 WL 292249, at \*1 n.2 (M.D. Pa. Jan. 26, 2011) (taking judicial notice of pending criminal proceedings against Petitioner in state court).

<sup>68</sup> *Lopez v. Sec'y, Dept. of Corrections*, No. 8:10-CV-2699-T-OTGW, 2010 WL 5140747, at \*2 n.3 (M.D. Fla. Dec. 13, 2010) (taking judicial notice of court clerk records).

<sup>69</sup> *Frigerio v. U. S.*, No. 10 Civ. 9086 (SAS), 2011 WL 3163330, at \*2 n.34 (S.D.N.Y. July 22, 2011) (providing example of a court taking judicial notice of the weather based on information found on the Internet).

<sup>70</sup> *Rd. Dawgs Motorcycle Club of the U.S., Inc. v. "Cuse" Rd. Dawgs Inc.*, 679 F. Supp.2d 259, 286 n.65 (N.D.N.Y. 2009) (citing both the print and online versions of the Urban Dictionary to take judicial notice of the association between the term "Road Dawgs" and the Plaintiff's club).

<sup>71</sup> *See Brisco v. Ercole*, 565 F.3d 80, 83 n.2 (2d Cir. 2009) (taking judicial notice of the distance between two houses as determined by Yahoo! Local Maps); *see also Rindfleisch v. Gentiva Health Sys, Inc.*, 752 F. Supp.2d 246, 259 n.13 (E.D.N.Y. 2010) ("Courts commonly use internet mapping tools to take judicial notice of distance and geography.").

<sup>72</sup> *Bench Billboard Co. v. City of Toledo*, No. 3:07CV2027, 2011 WL 135349, at \*4 n.1 (N.D. Ohio Jan. 13, 2011) (taking judicial notice of census data indicating size of various cities in Ohio).

<sup>73</sup> *3525 North Reta, Inc. v. F.D.I.C.*, No. 10 C 3087, 2011 WL 62128, at \*2 n.6 (N.D. Ill. Jan. 6, 2011) (taking judicial notice of the "U.S. Prime Rate," as reported by the Wall Street Journal).

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sources is how to determine whether a website is a source “whose accuracy cannot reasonably be questioned.”<sup>74</sup> Because anyone, for a small amount of money, can create a website and publish information without any oversight, verifying the accuracy of websites is extremely important in the judicial notice context. In general, government websites are perceived to be reliable, and are frequently the source of judicially noticed information.<sup>75</sup> Non-governmental websites are more controversial, though courts seem to have come around to relying on well-known sites such as Google Maps, reputable medical sites such as the Mayo Clinic’s site,<sup>76</sup> and established media outlets.<sup>77</sup> Private corporate websites have caused more controversy, as some courts have relied on them while others have refused. For example, the Third Circuit disapproved a trial court’s taking judicial notice of facts about a corporate party from its website because anyone can buy an Internet address and post information,<sup>78</sup> while the Tenth Circuit held the trial court abused its discretion by not taking judicial notice of information on a corporate website.<sup>79</sup>

Another controversial source, one that has been much discussed in the literature, is Wikipedia.<sup>80</sup> Both accuracy and reliability are issues when a court is asked to take judicial notice of information on Wikipedia. Because anyone can edit a Wikipedia entry at any time, its content can change rapidly, and the court cannot necessarily ascertain the accuracy of the requested information.<sup>81</sup> Certainly, Wikipedia should not be the

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<sup>74</sup> FED. R. EVID. 201(b)(2).

<sup>75</sup> See Dansky, *supra* note 58, at 22 (noting that courts often take judicial notice of facts from websites produced by public authorities).

<sup>76</sup> See *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1056 (9th Cir. 2010) (relying on reports on mayclinic.com for information regarding safety practices of tattoo artists).

<sup>77</sup> See *Sprint Nextel Corp. v. AT & T Inc., et al.*, 821 F.Supp.2d 308, 325 n.29 (D. D.C. 2011) (taking judicial notice of Sprint’s ability to sell the iPhone by relying on news reports on [www.engadget.com](http://www.engadget.com) and [news.cnet.com](http://news.cnet.com)).

<sup>78</sup> Dansky, *supra* note 58, at 23 (citing *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007)).

<sup>79</sup> *O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224–25 (10th Cir. 2007).

<sup>80</sup> See generally, Gerken, *supra* note 8, at 192; Miller & Murray, *supra* note 1, at 634; Peoples, *Citation of Wikipedia*, *supra* note 1, at 3. See also, Whiteman, *supra* note 5, at 42, 48–51 (noting that while there are other websites that function in the same way as Wikipedia, they are not as well-known or as frequently cited).

<sup>81</sup> See Barger, *supra* note 5, at 433; Peoples, *Citation of Wikipedia*, *supra* note 1, at 14–15.

source of scientific and technical data, or other similarly complex subjects. Nonetheless, courts have taken judicial notice of material on Wikipedia and will likely continue to do so.<sup>82</sup> Despite this, it is probably better to avoid requesting judicial notice based on information in Wikipedia, unless no alternative sources are available.

While there are certainly problems with the reliance on Internet materials when taking judicial notice at the trial level, most of these problems are not unique to the Internet context. Judicial notice of online materials at the appellate level raises additional concerns.<sup>83</sup> Because judicial notice focuses on adjudicative facts, and appellate courts are not fact-finders, when an appellate court takes judicial notice of a fact, it risks ethical and constitutional violations.<sup>84</sup> Particularly when an appellate judge conducts independent factual research to take judicial notice of a fact, it could be seen as an *ex parte* communication, depriving the litigants of an opportunity to address the information.<sup>85</sup> In addition, while facts at trial are tested through the operation of the adversarial process, a fact obtained by an appellate judge through research on the Internet is not likely to undergo such rigorous evaluation.<sup>86</sup>

Nonetheless, there are times when an appellate court will take judicial notice of facts, either at the request of the parties or on the judge's own initiative.<sup>87</sup> These include when the trial record is underdeveloped, when the issues are highly complex, or when there have been subsequent developments in technology relevant

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<sup>82</sup> Miller & Murray, *supra* note 1, at 649. These authors do suggest, however, that Wikipedia may be a valid source when a consensus definition is needed, and when the information is easily verifiable. *Id.* at 646; Peoples, *Citation of Wikipedia*, *supra* note 1, at 13–19 (citing several cases taking judicial notice of information on Wikipedia).

<sup>83</sup> See Peoples, *Citation of Wikipedia*, *supra* note 1, at 19–21 (demonstrating why it is difficult to accept information on Wikipedia as factually accurate because the substance is always changing; thus making it difficult for a trial Court to make a final decision on the facts).

<sup>84</sup> Thornburg, *supra* note 55, at 132, 137–39.

<sup>85</sup> See *id.* at 136–38 (equating a judge's independent research to the impermissible introduction of new evidence at the appellate level). See also, ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.9(C) (2007) (indicating that a judge's acquisition of facts not provided by the parties is an *ex parte* communication unless those facts can be judicially noticed); *Id.* R. 2.9 cmt. 6 (including electronic information).

<sup>86</sup> Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 6 (2011).

<sup>87</sup> Thornburg, *supra* note 55, at 138.

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to the issues.<sup>88</sup> Since both the Rules of Evidence and the Code of Judicial Conduct contemplate a judge taking judicial notice at the appellate level, there is clearly no prohibition against doing so.<sup>89</sup> The rules are a little more specific for litigants, since a lawyer cannot bring in new evidence at the appellate level but even here, the rules of evidence seem to contemplate the possibility that a party could request judicial notice of a fact on appeal.<sup>90</sup>

Given that both rules and convention allow judicial notice on appeal, the ease of obtaining information online, and that fact that we are increasingly acculturated to jump onto a computer or mobile device to look something up when we have a question, makes the temptation to look up facts on appeal very high. When a judge knows that information may be obtained at the click of a mouse, it is hard to resist doing so. A lawyer representing a client on appeal may want to supplant a record not fully developed at trial, especially when the facts are easily found in an online source. Although it has not been specifically documented, there is no doubt that there has been an increase in judicial notice at the appellate stage because of the easy availability of information on the Internet. Despite the temptation, judges and lawyers ought to use caution in taking judicial notice of online information, since it exacerbates all of the problems inherent in judicial notice at the appellate level.

### C. Legislative Facts

Another common use of electronic, non-record factual information in legal writing is as legislative facts.<sup>91</sup> While adjudicative facts are those directly related to the case at issue, legislative facts provide more general information about the world and help courts understand and interpret the law.<sup>92</sup> The term was coined by Kenneth Culp Davis, because when using

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<sup>88</sup> *Id.* at 132.

<sup>89</sup> FED. R. EVID. 210; MODEL CODE OF JUDICIAL CONDUCT R. 2.9(C); Thornburg, *supra* note 55, at 135, 158.

<sup>90</sup> 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5101.1 n.16 (2d ed. 2005).

<sup>91</sup> See Margolis, *Authority Without Borders*, *supra* note 1, at 940 (discussing courts' increasing use of the Internet for sources of legislative facts).

<sup>92</sup> Gorod, *supra* note 86, at 39–40; Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 198–99 (2000) [hereinafter *Beyond Brandeis*].

facts in this way, courts act as legislatures.<sup>93</sup> Legislative facts are most often used in common law cases of first impression, cases involving first-time statutory interpretation, and constitutional cases.<sup>94</sup> As with judicial notice, the use of legislative facts in legal reasoning is nothing new, but because information is so much easier to find as a result of electronic search technologies, the citation of electronic information as legislative facts is on the rise.<sup>95</sup>

Unlike adjudicative facts, there are no evidentiary restrictions on the use of legislative facts. Rule 201 and its state equivalents only limit the judicial notice of adjudicative facts.<sup>96</sup> In fact, the Advisory Committee Notes explicitly state that legislative facts should not be subject to any limitations in terms of “indisputability” or notice.<sup>97</sup> Likewise, there are no restrictions on a lawyer’s use of legislative facts in support of a legal argument in a brief or other piece of legal writing.<sup>98</sup>

The citation of nonlegal information, particularly from online sources, in judicial opinions has been well documented.<sup>99</sup> Examples abound in both federal and state cases. For example, in *U.S. v. Staten*,<sup>100</sup> the court cited numerous web resources to establish that domestic violence was a serious problem and that the rates of recidivism were high for individuals convicted of domestic violence.<sup>101</sup> The court cited these facts in the process of determining whether the defendant’s conviction could withstand

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<sup>93</sup> See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) (describing “legislative facts” as those facts which “inform legislative judgment”).

<sup>94</sup> See *Beyond Brandeis*, *supra* note 92, at 219 (pointing to the usefulness of legislative facts for developing policy arguments in cases involving “novel” issues).

<sup>95</sup> See Dansky, *supra* note 58, at 21 (noting the use of websites by judges “as sources of ascertainable facts for the purpose of taking judicial notice”); see also Margolis, *Authority Without Borders*, *supra* note 1, at 922 (noting the increase in citations to the Internet as a nonlegal authority); Peoples, *Citation of Wikipedia*, *supra* note 1, at 7 (discussing courts’ use of Wikipedia to define legislative facts); Whiteman, *supra* note 5, at 52 (pointing to the courts’ growing use of Wikipedia for “finding authority to bolster arguments”).

<sup>96</sup> FED. R. EVID. 201(a), Advisory Committee Notes.

<sup>97</sup> *Id.*

<sup>98</sup> *Beyond Brandeis*, *supra* note 92, at 203.

<sup>99</sup> Barger, *supra* note 5, at 428; Margolis, *Authority Without Borders*, *supra* note 1, at 912, 920–22; see also Schauer & Wise, *supra* note 1, at 508–09 (examining the Supreme Court of New Jersey’s citation to nonlegal sources).

<sup>100</sup> 666 F.3d 154 (4th Cir. 2011).

<sup>101</sup> *Id.*



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intermediate scrutiny in an as-applied challenge under the Second Amendment.<sup>102</sup> The court's use of statistical information in this way is a classic example of how legislative facts can help the court determine how the law applies.

Legislative facts often appear in the form of social science or scientific data.<sup>103</sup> The availability of this information online has made it much easier for lawyers and judges to locate, and the citation of statistics, particularly those found on government websites, abounds.<sup>104</sup> Federal and state government websites are a logical place to look for statistics, both because governments have the resources to collect such information, and because a government source conveys an impression of authority and objectivity that private websites may not automatically convey.

Government websites are not the only source of legislative facts, however. Courts can and do turn to a multitude of sources. For example, in ruling on a motion to dismiss, a New York trial court looked to Wikipedia, the New World Encyclopedia online, and lenntech.com to determine that helium was a "noxious chemical" within the meaning of a New York criminal law.<sup>105</sup> In an appeal of a medical malpractice claim, the Arizona Court of Appeals cited the websites of the American Medical Association and other medical associations to determine what the word "specialty" meant in an Arizona statute.<sup>106</sup> In both of these examples, the legislature had failed to define the relevant term, leaving the courts to look to outside sources in order to interpret and apply the statute.

Amicus briefs are another common source of citation to

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<sup>102</sup> *Id.* at 163, 168.

<sup>103</sup> *See id.* at 161, 163–67 (relying on social science reports conducted by government agencies).

<sup>104</sup> *See, e.g.,* United States v. Bannister, 786 F. Supp. 2d 617, 624–25, 628 (E.D.N.Y. 2011) (citing the websites of the U.S. Census Bureau, New York Housing Authority, New York City Department of City Planning, New York City Police Department, and Centers for Disease Control & Prevention); Carrdale H., II v. Carrdale H., 781 N.W.2d 622, 628–30 (Neb. Ct. App. 2010) (citing the websites of the National Center on Addiction & Substance Abuse at Columbia University, U.S. General Accounting Office, and U.S. Department of Health and Human Services); Maple Heights. v. Ephraim, 898 N.E.2d 974, 979 (Ohio Ct. App. 2008) (citing the websites of the Ohio Department of Public Safety, U.S. Department of Justice, Office of Juvenile Justice, and Federal Bureau of Investigation).

<sup>105</sup> People v. Givenni, 898 N.Y.S.2d 829, 832 (N.Y. Crim. Ct. 2010).

<sup>106</sup> Baker v. Univ. Physicians Healthcare, 269 P.3d 1211, 1214 (Ariz. Ct. App. 2012).

legislative facts. It has been observed by many scholars that one of the chief roles of amicus briefs has been the provision of legislative facts to the courts.<sup>107</sup> A random sampling of amicus briefs in the state and federal courts reveal a high number of citations to nonlegal, online sources for legislative facts.<sup>108</sup> For example, in the recent litigation over the constitutionality of the Affordable Care Act (ACA), the amicus brief of the Democratic Congressional Leadership cites a variety of online sources to provide factual support for the argument that the Medicaid provisions of the statute do not coerce the states, and that the states' actions show that they can make choices within the framework of the Act.<sup>109</sup> Using factual information to support an argument about how a piece of legislation affects action in the real world is a classic example of persuasive use of legislative facts.

Parties can, and do, also use legislative facts in support of arguments in briefs. For example, in *Mitchell v. Board of Bar Examiners*,<sup>110</sup> the Petitioner's Brief cited numerous online factual sources to support an argument that the court should amend the state bar rule requiring that attorneys graduate from an accredited law school in order to sit for the bar.<sup>111</sup> The brief cites sources ranging from law school websites to bar association materials in support of an argument about the policy implications of the bar requirements.<sup>112</sup> Again, this is a classic use of legislative facts.

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<sup>107</sup> Gorod, *supra* note 86, at 36–37, 57.

<sup>108</sup> For examples of opinions citing nonlegal authorities to support their arguments *see e.g.*, Brief for the American Psychological Ass'n, et al. as Amici Curiae Supporting Plaintiffs-Appellees at 22–24 *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214), 2011 WL 5517818; Brief for Senate Majority Leader Harry Reid et al. as Amici Curiae Supporting Respondents at 26–27, 29–30 nn. 5–9 *Florida v. U.S. Dep't of Health & Human Servs.* (No. 11-400) (U.S. filed Sept. 29, 2011), 2012 WL 523365; Brief for the Cato Institute et al. as Amici Curiae Supporting Respondents at 6–8 nn. 2–9 *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5562515; Brief for AARP et al. as Amici Curiae Supporting Appellee at 6, 9–10; *Commonwealth v. Life Ctrs. of Am., Inc.*, 926 N.E.2d 206 (Mass. 2010) (No. SJC-10546), 2010 WL 3612921.

<sup>109</sup> Brief for Senate Majority Leader Harry Reid et al., *supra* note 108, at 26–30.

<sup>110</sup> *Mitchell v. Bd. of Bar Exam'rs*, 897 N.E.2d 7 (Mass. 2008).

<sup>111</sup> Brief of Petitioner-Appellant at 30–36 *Mitchell v. Bd. of Bar Exam'rs*, 897 N.E.2d 7 (Mass. 2008) (No. SJC-10157), 2008 WL 4216449.

<sup>112</sup> *See id.* at 31–33, 42–43 (citing the websites of several law schools and the National Bar).

Of course, there are many concerns with the use of legislative facts. Because legislative facts are not covered by the rules of evidence, they are not subject to the rigorous testing of the adversarial process.<sup>113</sup> Since, unlike adjudicative facts, the judicial notice rules don't apply, there is no built-in guarantee that the website or other electronic source being cited is reliable and reputable.<sup>114</sup> Thus, many scholars have expressed concern over courts' reliance on legislative facts that the parties may or may not have access to, and that may or may not be accurate.<sup>115</sup>

Many who have expressed concern about the use of legislative facts have proposed solutions, including changing standing rules to allow more input from other parties at the trial level,<sup>116</sup> a judicial research service<sup>117</sup> and more robust ethical restrictions on judicial research.<sup>118</sup> None of these suggestions have been implemented.

#### D. Definitions and Context Facts

The current adjudicative/legislative fact distinction does not capture all of the ways in which nonlegal information is used in legal writing and, in fact, may not be the best way to think about information supporting legal analysis. There is a huge gray area of sources that are cited that do not fit into a clearly defined category. This includes dictionary definitions, information about popular culture, and other kinds of contextual information. Many of the citations to electronic sources in recent judicial opinions are for this kind of information.

As with the other categories of information, contextual facts and definitions have always been a part of legal writing. There is a long history of courts and lawyers citing dictionaries without a

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<sup>113</sup> Gorod, *supra* note 86, at 51-53, 57-60.

<sup>114</sup> *See id.* at 58-59 ("[I]n a world of highly contestable facts, judges cannot easily discern factual reality simply by picking up a book.")

<sup>115</sup> *See* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(A) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1066-67 (2007) (identifying the issues with courts' reliance on legislative facts); Barger, *supra* note 5, at 436 (questioning the credibility of courts' researched findings); Gorod, *supra* note 86, at 54 (suggesting that courts may have "preconceived views" when cases are decided based on legislative facts).

<sup>116</sup> *See* Gorod, *supra* note 86, at 69-71 (proposing altering the standing rules to allow more input from other parties at the trial level).

<sup>117</sup> Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 15-18 (1986).

<sup>118</sup> Thornburg, *supra* note 55, at 200-01.

clear explanation of the role the definitions play in legal reasoning.<sup>119</sup> Since many dictionaries now have online versions that are more accessible, it isn't surprising that judges and lawyers would choose to cite to the online version of a dictionary.<sup>120</sup> A citation to an online dictionary plays the same role in an opinion as a print dictionary, even if that role has never been fully understood. As with many other online sources, it is likely that the easy accessibility of online definitions has increased the likelihood that a court would cite a definition where previously the judge might have relied on common knowledge. Judges do not question the use of online dictionary definitions, even where they have called the use of the Internet in general into question.<sup>121</sup>

Likewise, courts have easily accepted context facts without subjecting them to the rules of evidence or treating them as legislative facts. Sometimes changes in technology and popular culture necessitate explanation of contextual facts that the judge or juror may not understand. For example, if a witness in a trial testified about a telephone conversation, the parties would not need to explain what a telephone is. Commonly understood everyday objects and cultural references are not seen as facts in need of proof. In our rapidly changing world, though, lawyers and judges sometimes feel the need to explain a new technology or popular culture reference.<sup>122</sup> Information from online sources often provides the best, most readily available source for these explanations.

One judge recognized, for example, that a website that

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<sup>119</sup> See Kirchmeier & Thumma, *supra* note 11, at 79 (explaining that dictionaries have been used in court decisions for centuries).

<sup>120</sup> See Barger, *supra* note 5, at 422–23 (“[M]any researchers find it easier and faster to use an Internet search engine to locate and retrieve their target materials than to physically visit a bricks-and-mortar library for a paper version of the same materials . . . .”); see, e.g., Shlahtichman v. 1-800 Contacts, Inc., 615 F.3d 794, 799 (7th Cir. 2010) (citing the Oxford English Dictionary Online, Merriam-Webster Dictionary Online, and Dictionary.com to define “print”); *In re Carleisha P.*, 50 Cal. Rptr. 3d 777, 783 (Cal. Ct. App. 2006) (citing the Merriam-Webster Dictionary Online to define “ammunition”); *Pope v. Superior Court*, 39 Cal. Rptr. 3d 183, 187 (Cal. Ct. App. 2006) (citing Merriam-Webster Dictionary Online, Dictionary.com, and Cambridge University Press Online Dictionary to define “elect” and “appoint”).

<sup>121</sup> See *supra* note 120 (listing cases where the courts cite online dictionaries). See also *People v. Mar*, 52 P.3d 95, 115–16 (Cal. 2002) (Brown, J., dissenting) (criticizing the use of the Internet in decision-making).

<sup>122</sup> See, e.g., *People v. Harris*, 949 N.Y.S.2d 590, 597 (N.Y. Crim. Ct. 2012) (discussing the role of social media in society).

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operates by consensus, such as UrbanDictionary.com, was a valid source to rely on for an explanation of current slang usage.<sup>123</sup> In another case, in deciding whether to require Twitter to disclose the user information of a criminal defendant, a New York court cited a blog and other online sources to discuss the difficulty of judges keeping up with developments in social media.<sup>124</sup> These are both examples of judges bringing in information from the real world to help give context to and explain their analysis, even though the sources are not being used specifically as adjudicative facts, legislative facts, or legal authority.

Courts also turn to the web for definitions of terms in statutes, as well as in private contracts. The Utah Court of Appeals recently addressed at length the value of citing to Wikipedia for the definition of the term “jet ski.”<sup>125</sup> The majority noted that, “where an understanding of the vernacular or colloquial is key to the resolution of a case . . . Wikipedia is tough to beat.”<sup>126</sup> One of the judges wrote a separate concurrence devoted entirely to the subject of citing Wikipedia.<sup>127</sup> The concurrence notes the controversy over relying on Wikipedia and concludes that its citation is most appropriate when the court is “getting a sense of the common usage and plain meaning of a contract term.”<sup>128</sup>

In addition to turning to the web for current understanding of popular terms and popular culture, courts use online information to provide general context as a backdrop to the decision. For example, a bankruptcy judge devoted an entire section of an opinion to providing an overview of the student law school debt situation.<sup>129</sup> In support of this backdrop, the judge cited numerous websites.<sup>130</sup> There is no indication that any of this

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<sup>123</sup> See *United States v. Arnold*, 486 F.3d 177, 210 n.8 (6th Cir. 2007) (Moore, J. dissenting) (discussing the use of UrbanDictionary.com to understand the term “finna”).

<sup>124</sup> *People v. Harris*, 949 N.Y.S.2d 590, 597 (N.Y. Crim. Ct. 2012) (citing Stephanie Rabiner, *Do Judges Really Understand Social Media?*, TECHNOLOGIST: THE FINDLAW LEGAL TECH. BLOG (May 9, 2012, 4:59AM), <http://blogs.findlaw.com/technologist/2012/05/do-judges-really-understand-social-media.html>).

<sup>125</sup> *Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 805 n.1 (Utah Ct. App. 2012).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 807–09.

<sup>128</sup> *Id.* at 809.

<sup>129</sup> *Hedlund v. Educ. Res. Inst., Inc.*, 468 B.R. 901, 906–08 (Bankr. D. Or. 2012).

<sup>130</sup> *Id.* at 908 n.7 (citing *Willamette Law School Overview*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best->

information was cited in the brief, so the judge did all of the research for this section independently. Lawyers ought to bear this in mind and remember that judges often want to be provided with the kind of contextual information that this judge used.

Web resources can play a valuable role when used to explain the context in which a judge is rendering a decision, or as context to inform the litigants' legal analysis. There are more problematic uses of online information to provide definitions or context, however. A number of judges turn to the Internet for background on medical conditions and terms.<sup>131</sup> Citation of online

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graduate-schools/top-law-schools/willamette-university-collins-03136 (last visited Jan. 28, 2013); *University of Oregon Law School Overview*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/university-of-oregon-03135> (last visited Jan. 28, 2013); *Lewis and Clark Law School Overview*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/lewis-clark-college-northwestern-03134> (last visited Jan. 28, 2013); *Best Grad Debt Programs*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings> (last visited Jan. 28, 2013); *2010 Associate Salary Survey*, NATIONAL ASSOCIATION FOR LAW PLACEMENT (Sept. 9, 2010), <http://www.nalp.org/uploads/PressReleases/2010NALPSalPressRelease.pdf>; Gerry Shih, *Downturn Dims Prospects Even At Top Law Schools*, N.Y. TIMES, Aug. 26, 2009, at B1; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1; Kathy Kristof, *The Great College Hoax*, FORBES MAGAZINE, Feb. 2, 2009, available at <http://www.forbes.com/forbes/2009/0202/060.html>; Catherine Rampell, *Judges Compete For Law Clerks on a Lawless Terrain*, N.Y. TIMES, Sept. 24, 2011, at B1; *Portland Law Firm Listings*, MARTINDALE-HUBBELL, <http://www.martindale.com/corporate-law/s-oregon/Portland-law-firms.htm> (last visited Jan. 28, 2013); *Firm Salaries & Other Statistics*, FIND LAW, <http://www.infirmation.com/shared/insider/payscale.tcl?state=OR> (last visited Jan. 28, 2013); Elie Mystal, *The Student-Loan Racket: Now in One Easy-to-Understand Graphic*, ABOVE THE LAW (Sept. 3, 2010, 11:26 AM), <http://abovethelaw.com/2010/09/the-student-loan-racket-now-in-one-easy-to-understand-graphic/>; Stanley Fish, *The Bad News Law Schools*, N.Y. TIMES OPINIONATOR (Feb. 20, 2012, 09:00PM), <http://opinionator.blogs.nytimes.com/2012/02/20/the-bad-news-law-schools/>.

<sup>131</sup> See, e.g., *Kane v. Winn*, 319 F. Supp. 2d 162, 167 (D. Mass. 2004) (citing *Consensus Development Conference Statement-Management of Hepatitis C: 2002* (June 10-12, 2002), NAT'L INSTS. OF HEALTH, <http://consensus.nih.gov/2002/2002hepatitisc2002116html.htm> (last visited Jan. 28, 2013)); *In re A.A.*, 885 A.2d 974, 977 (N.J. Super. Ct. Ch. Div. 2005) (citations omitted);

*Mousseau v. Schwartz*, 756 N.W.2d 345, 347-48 nn. 1-10 (S.D. 2008) (citing numerous websites regarding the medical condition in question); *Alcantara v. Astrue*, 667 F. Supp. 2d 262, 266-67, nn. 3-4, 8, 10-11 (S.D.N.Y. 2009) (citing *High Blood Pressure*, MEDLINE PLUS HEALTH TOPICS, <http://www.nlm.nih.gov/medlineplus/highbloodpressure.html> (last updated Jan. 8, 2013); *Glucose Test*, MEDLINE PLUS HEALTH TOPICS, <http://www.nlm.nih.gov/medlineplus/glucose.html> (last updated Jan. 8, 2013)).

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sources for medical information is particularly problematic when it is used to define terms that are part of the adjudicative facts of the case, since this information could, and presumably should be provided by experts at the trial level.<sup>132</sup> However, where the record is devoid of such information, a court may feel it needs to turn to some source for information not provided by the record.<sup>133</sup>

For example, in *Jenkins v. Astrue*,<sup>134</sup> the court cited a number of different websites to explain terms used in the medical records of a litigant appealing the denial of Social Security Disability benefits.<sup>135</sup> The court did not take judicial notice of the cited medical facts, but instead used them as background to explain the facts on which its decision was based.<sup>136</sup>

Thus, the citation of electronic sources falls into several different categories. Those sources that are primarily legal are relatively easy to understand, while categorizing the great majority of nonlegal electronic sources is more complex. Part of

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gov/medlineplus/ency/article/003482.htm (last updated Jan. 24, 2013); *Antivert*, WEBMD, <http://www.webmd.com/drugs/drug-5337-Antivert+Oral.aspx?drugid=5337&drugname=Antivert+Oral> (last visited Jan. 28, 2013); *Proteinuria*, NAT'L KIDNEY & UROLOGIC DISEASES INFO. CLEARINGHOUSE, <http://kidney.niddk.nih.gov/kudiseases/pubs/proteinuria/> (last updated Sept. 2, 2010); *HbA1c*, MEDLINE PLUS MEDICAL ENCYCLOPEDIA, <http://www.nlm.nih.gov/medlineplus/ency/article/003640.htm> (last updated Jan. 24, 2013)).

<sup>132</sup> See Thornburg, *supra* note 55, at 185 (discussing independent fact research by judges).

<sup>133</sup> See *id.* at 185–88 (discussing scenarios where a judge might conduct independent research).

<sup>134</sup> *Jenkins v. Astrue*, 836 F.Supp. 2d 211 (M.D. Pa. 2011).

<sup>135</sup> *Id.* at 217 nn. 11–17 (citing *Valproic Acid and Sodium Valproate for Neuropathic Pain and Fibromyalgia*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0016227/> (last updated Aug. 8, 2011); *Celexa*, DRUGS.COM, <http://www.drugs.com/celexa.html> (last updated May 1, 2012); *Euthymic*, THE FREE DICTIONARY BY FARLEX, <http://medical-dictionary.thefreedictionary.com/euthymic> (last visited Jan. 28, 2013); *HIV, AIDS and the CD4 Count*, WEBMD, <http://www.webmd.com/hiv-aids/cd4-count-what-does-it-mean> (last visited Jan. 28, 2013); *HIV Viral Load—What Is It and Why Is It Important?*, ABOUT.COM, <http://aids.about.com/od/technical-questions/fl/viralload.htm> (last updated Oct. 11, 2007); *A Practical Guide to Clinical Medicine*, UNIVERSITY OF CALIFORNIA, SCHOOL OF MEDICINE, SAN DIEGO, <http://meded.ucsd.edu/clinicalmed/ros.htm> (last visited Jan. 28, 2013); W. E. Cunningham, et al., Constitutional Symptoms and Health-related Quality of Life in Patient with Symptomatic HIV Disease, 104 AM. J. MED. 129–36 (Feb. 1998), available at <http://www.ncbi.nlm.nih.gov/pubmed/9528730>; Rachel Ahmed, *Constitutional Symptoms of HIV*, LIVESTRONG.COM, (Sept. 2, 2010), <http://www.livestrong.com/article/220330-constitutional-symptoms-of-hiv/>).

<sup>136</sup> *Id.* at 217–18.

the difficulty with understanding how and when to cite nonlegal sources in legal writing is the lack of understanding of the real role they play. As with legislative facts, there are no rules governing how and when this kind of nonlegal information can be used, and no guidelines about what kind of source is considered to be the most reliable. In order to develop some kind of guidelines for lawyers and judges, we must first conceptualize the use of nonlegal materials.

### III. AUTHORITY AND THE LAW/FACT DISTINCTION

Much of the confusion regarding use of electronic nonlegal materials stems from the way facts are viewed in the context of legal analysis. The traditional distinction between law and fact exacerbates this confusion, as does the adjudicative/legislative fact distinction embodied in the Rules of Evidence.

From the beginning of their legal training, students are taught about the distinction between law and fact. Law is the material generated by courts, legislatures, and administrative bodies, along with related secondary sources designated as legal (legal encyclopedias, treatises, etc.).<sup>137</sup> Facts are brought in by the parties as a product of the adversarial process of litigation.<sup>138</sup> The two are described as wholly separate and performing different roles in the legal system.<sup>139</sup>

A key aspect of the conventional wisdom embodied in the law/fact distinction is that judges decide the law and juries decide the facts.<sup>140</sup> Categorizing a source as law or fact also has significant consequences for appellate review, as questions of law are generally reviewed *de novo*, while issues of fact are given varying levels of deference depending on how they were brought to the court's attention and the role they played in the decision.<sup>141</sup> The differing levels of review suggest that law and fact play very different roles in legal analysis.

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<sup>137</sup> *Margolis, Authority Without Borders*, *supra* note 1, at 914.

<sup>138</sup> *See Gorod*, *supra* note 86, at 4, 6 (“The adversarial myth . . . suggests that adversarial parties provide courts with all of the information they need to resolve legal disputes . . .”).

<sup>139</sup> *Thornburg*, *supra* note 55, at 174–75.

<sup>140</sup> *Id.* at 178–79.

<sup>141</sup> *See MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 14–18 (Vicki Been et al. eds., 3d ed. 2010) (explaining the various levels of the appellate standard of review including the clearly erroneous standard, *de novo* standard, and the abuse of discretion standard).



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Thinking of law and fact as distinct is appealing, because it feeds in to the myth that courts apply the law to the cases before them, while legislatures make law by reviewing facts more broadly and choosing among competing policy implications.<sup>142</sup> However, the law/fact distinction does not reflect the reality of the way sources are used in legal analysis. In practice, it is often difficult to draw a clear line between law and fact, and that line is as often based in policy as anything else.<sup>143</sup> Further dividing facts into the adjudicative and legislative categories adds to the confusion because, in practice, legislative and context facts are not used as facts, but as support for legal reasoning in an opinion or brief.<sup>144</sup> When electronic sources are cited to provide statistical information, or to explain the cultural context of a legal rule, or to clarify the role of technology, they are providing the reader with an understanding of how the legal rules are to be interpreted. In other words, factual information often plays the role of “law” in legal analysis.

The concerns raised in the literature over the use of extra-record factual information center around facts in the adjudicative sense. For example, concerns about the reliability of Internet materials relate directly to the standards for judicial notice.<sup>145</sup> Only adjudicative facts are subject to the judicial notice rules, and only adjudicative facts need to come from sources “whose accuracy cannot reasonably be questioned.”<sup>146</sup> Likewise, concerns about independent judicial research are most pressing in the context of factual research. When scholars raise ethical concerns about *sua sponte* and *ex parte* judicial research, the greatest fear is that judges will consider facts that the parties have not had

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<sup>142</sup> See Gorod, *supra* note 86, at 15–16 (“[T]he role of the courts is not to make law, but rather to apply it in the context of resolving disputes between adversarial parties.”). Courts may need more information than what has been provided for them by the legislature, however. See *Beyond Brandeis*, *supra* note 92, at 198 (“Analysis of existing rules may not clearly provide a direction for a court to take.”). This reasoning is what led to the term “legislative fact.” *Id.*; see Davis, *supra* note 93, at 402–04 (noting the difference between fact finding for the purpose of developing a law or policy and fact finding where specific parties to a particular dispute are involved).

<sup>143</sup> Thornburg, *supra* note 55, at 179.

<sup>144</sup> See *Beyond Brandeis*, *supra* note 92, at 198–99 (using legislative facts for justification purposes and relying on the record for facts specific to the case at hand).

<sup>145</sup> See *supra* notes 74–82 and accompanying text.

<sup>146</sup> FED. R. EVID. 201 (b)(2).

the opportunity to address.<sup>147</sup> Concerns about inequality between parties' access to information also centers on adjudicative facts.<sup>148</sup> Finally, procedural concerns about being bound by the standard of review to give deference to the lower court's view of the facts<sup>149</sup> are most relevant in the context of adjudicative facts.

Many of the calls for standards and procedures for the reliance on legislative facts are rooted in the broader conceptualization of the role facts play in litigation.<sup>150</sup> However, when electronic materials are cited as sources of legislative facts, context facts and definitions, they are playing the role of law—providing authority to make the legal analysis more clear and persuasive. Thus, a more apt distinction than fact/law would be fact/authority. Conceptualized this way, electronic information other than primary sources of law can be used as either adjudicative facts, subject to all of the standards developed for this category, or as authority.

Authority, broadly conceived, is any source employed in the support of legal analysis.<sup>151</sup> The hallmark of primary, binding legal authority is “content-independence”—a source is authoritative because of who said it (a higher court from the same jurisdiction) rather than for what it says.<sup>152</sup> Non-binding authority, on the other hand, gains its credence through a more complex combination of author, status of publication, and content.<sup>153</sup> The increasing reliance on empirical information in

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<sup>147</sup> Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 971–72 (2009); Lee, *supra* note 46, at 1558; Peoples, *Citation of Wikipedia*, *supra* note 1, at 19; Thornburg, *supra* note 55, at 137–38.

<sup>148</sup> See Lee, *supra* note 46, at 1557–58 (discussing the ex parte dangers of blogs targeted at judges).

<sup>149</sup> See Gorod, *supra* note 86, at 63–64 (discussing the concept of factual stare decisis).

<sup>150</sup> See, e.g., Davis, *supra* note 93, at 14–15, 17 (calling for the development of a research service to assist courts to ensure that the legislative facts they consider are reliable); Gorod, *supra* note 86, at 72–74 (calling for the regulation of the use of legislative facts to ensure that such fact finding is “subjected to meaningful testing”); Thornburg, *supra* note 55, at 169–71, 200–01 (suggesting that parties be given notice when a judge conducts independent research).

<sup>151</sup> See Margolis, *Authority Without Borders*, *supra* note 1, at 929–30 (describing the new view of authority which focuses on the content of the material rather than the source).

<sup>152</sup> Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935 (2008).

<sup>153</sup> See *id.* at 1956–59 (describing the process through which sources become authorities).

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judicial opinions suggests that substantive content is growing in importance as judges and lawyers choose what to rely on when constructing legal arguments.

Conceptualizing legislative and context facts as authority removes many of the concerns regarding lack of standards for citation of electronic, nonlegal materials. The fairness concerns raised in the context of judicial factual research are not present in research about authority. There is no hue and cry over the basic idea that a judge may engage in independent research for cases or other legal authority.<sup>154</sup> To the contrary, it is understood and expected that a judge (or her clerk) may do additional research to find sources not presented by the parties.<sup>155</sup> In the same way, given the easy access to the web, we should expect that judges and lawyers may conduct research on the web during the process of developing legal analysis, and that the citation of the results of those searches should be seen as the equivalent of citing a legal secondary source.<sup>156</sup>

This is not to say that the inequities inherent in the legal system are not a concern. Certainly unequal resources between litigants leading to varying capability to conduct research is a problem,<sup>157</sup> just not one unique to the use of electronic materials. And whether we should be or not, as a profession, we do not seem as concerned when this inequity relates to legal research as when it applies to factual research. Because most electronic citations operate more like legal authority, they should be viewed in the same way.

Similarly, the concern over evaluating the validity of nonlegal materials is not as pressing when they are viewed as a form of authority. Judges and lawyers are practiced at determining the value of persuasive authority. The discussion shifts from concern over the factual soundness of information and a judge's ability to interpret complex social science data<sup>158</sup> to broader questions

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<sup>154</sup> See Thornburg, *supra* note 55, at 173 (contrasting a judge's perspective on engaging in independent research with a doctrinal perspective).

<sup>155</sup> See Abramowicz & Colby, *supra* note 147, at 971–72 (noting that opinions are often based on judges', law clerks', and staff attorneys' extensive independent research of controlling legal authorities).

<sup>156</sup> Margolis, *Authority Without Borders*, *supra* note 1, at 919–20.

<sup>157</sup> See Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011, 1013 (1990) (noting that reliance on “extra-legal materials” is not something uniquely associated with a litigant's lack of resources).

<sup>158</sup> Barger, *supra* note 5, at 436–37; Gorod, *supra* note 86, at 57–58; Saks, *supra* note 157, at 1026; Thornburg, *supra* note 55, at 185–86.

about the use of nonbinding authority in legal writing. The problems don't go away, but the discussion more accurately reflects the way these sources are being used.

Finally, the concerns over standard of appellate review and "factual stare decisis"<sup>159</sup> are minimized if legislative and context facts are viewed as authority. It is generally understood that trial courts' findings of fact are reviewed for "clear error."<sup>160</sup> Scholars and judges have indicated great confusion over how to treat "factual findings" based on non-adjudicative facts.<sup>161</sup> It is not clear, for example, whether legislative facts should be subject to de novo review or a more deferential standard. And if subject to de novo review, there is little developed law on what that review would look like.<sup>162</sup> If legislative facts and other online information are viewed instead as a form of authority, then the concerns over review are replaced by questions of deference to one among a number of sources cited in support of a proposition. This, again, is something that lawyers and judges are already practiced at.

In addition to removing concerns about relying on electronic nonlegal sources by conceptualizing them as authority, there are many positive reasons to rely on nonlegal sources to support legal analysis. Used as authority, nonlegal information can play a valuable role in advancing legal reasoning, particularly in cases of first impression, first-time statutory interpretation, and constitutional litigation.<sup>163</sup> Lawyers can rely on this kind of information to help judges understand the real-world context and implications of legal arguments in our complex and fast changing world. Judges relying on electronic information can establish the relevance and credibility of judicial opinions. Since the reality of today's society is that the majority of information is accessed online, the legal profession will seem increasingly anachronistic if it continues to resist reliance on Internet sources.

#### IV. CONCLUSION

Electronic information is here to stay and, as digital natives continue to graduate from law school and enter the higher ranks

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<sup>159</sup> Gorod, *supra* note 86, at 63–65.

<sup>160</sup> *Id.* at 23.

<sup>161</sup> *Id.* at 22–24; *see also* Perry v. Brown, 671 F.3d 1052, 1075–76 (9th Cir. 2012) (indicating confusion over whether to characterize facts as adjudicative and legislative, as well as confusion over the appropriate standard of review).

<sup>162</sup> Gorod, *supra* note 86, at 45.

<sup>163</sup> *Beyond Brandeis*, *supra* note 92, at 218–21.

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of the profession, reliance on Internet materials is going to continue to grow. Rather than resist and express skepticism over electronic sources, the profession must develop clear norms about when citation to Internet sources is appropriate. We must recognize that Internet materials fall on a spectrum in which some uses are entirely benign and to be encouraged, while other uses should be viewed with great skepticism.

With the caveat that reliability, authenticity and permanence will always be important considerations in citing to web sources, we should recognize that citation to primary legal authority published online is always acceptable. On the other end of the spectrum, relying on the Internet for judicially noticed adjudicative facts should be done cautiously, with careful attention to both the standards for judicial notice and the relevant codes of ethics. In between are the great majority of types of information that are already being relied on in support of legal reasoning—definitions, context facts, legislative facts, online encyclopedias and blogs. If those sources are viewed as a form of non-binding authority and evaluated accordingly, their use should be encouraged, rather than hindered by concern that they are not a valid use of information.

While all legal professionals should be encouraged to take advantage of the vast resources the Internet has to offer, it will be up to judges to lead the way, setting the example for how Internet materials can be used in support of legal analysis. Lawyers will be understandably cautious to cite online materials for judges who may not be receptive to them, or understand the value of these sources. However, lawyers should not hesitate to incorporate the Internet into their research and recognize when citation to an online source will enhance the persuasive value of a legal argument.

The legal profession is conservative and is slow to adopt change, but change is inevitable. It is time to recognize that reliance on online sources is only going to increase, and act accordingly. It is time to embrace the new.