

THE DEATH OF TWENTIETH-CENTURY AUTHORITY

Michael Whiteman^{*}

INTRODUCTION	27
I. TRADITIONAL AUTHORITY FADES	29
A. A Shift Away From the Old	30
B. Lifting the Veil	32
C. The Disappearing Act	33
D. Authentication	37
II. THE RISE OF NEW SOURCES OF AUTHORITY	41
A. Cautious Acceptance of New Authority	42
B. Changes to the Secondary Sources Guard	47
C. Hatching the New Authority: Wikipedia as an Example of the New	48
1. Disdain for Wikipedia	50
2. The Growing Acceptance of Wikipedia	52
D. Judicial Notice and the New Authority	53
III. AFTER DEATH, WHERE TO NOW?	59
A. The Democratic Effect of the Internet	60
CONCLUSION	63

Authority: A legal writing taken as definitive or decisive; esp., a judicial or administrative decision cited as a precedent.¹

“Respect Ma Authoritah!”²

INTRODUCTION

The case of *Bush v. Gore*³ stands out as the seminal decision that decided the disputed presidential election of 2000. For legal researchers, it was a herald of a different sort. With the citation in the per curiam opinion to an online newspaper article,⁴ *Bush v. Gore* fired the first salvo

^{*} Professor of Law and Associate Dean for Law Library Services and Information Technology at Northern Kentucky University Chase College of Law. This Article was first presented at the 2010 American Association of Law Schools' Annual Meeting.

1. BLACK'S LAW DICTIONARY 142–43 (8th ed. 2004).

2. *South Park: Chickenlover* (Comedy Central television broadcast May 20, 1998) (paraphrasing COOL HAND LUKE (Warner Bros. 1967)). With thanks to Kris Franklin for first quoting this. Kris Franklin, *The Rhetorics of Legal Authority Constructing Authoritativeness, the “Ellen Effect,” and the Example of Sodomy Law*, 33 RUTGERS L.J. 49, 49 n.1 (2001).

3. 531 U.S. 98 (2000).

4. The Court cites to “Ho, *More Than 2M Ballots Uncounted*, AP Online (Nov. 28, 2000).” *Id.* at 103. Thanks to Kent Olson, Director of Reference, Research, and Instruction at the University of Virginia Law Library for suggesting this as the tipping point for the death analogy.

in the death of twentieth-century authority.⁵ While courts in the past relied on a select group of print resources, legal researchers today are moving towards a more internet-based research platform.

This Article will focus on the shift from traditional print-based authority to a more online and democratic⁶ way of using authority to create law.⁷ There are still pitfalls in this new world, but the death of traditional authority can be seen with some cautious optimism, because it allows practitioners to choose from a much larger base of authority than what used to be available.

This shift in authority is not new.⁸ In the twentieth century, courts shifted away from just using judicial opinions as their only authority and started using the growing number of regulations and statutes.⁹ And in the twenty-first century, the shift is happening within the broader realm of secondary authority. The reliance on traditional sources such as legal encyclopedias and law reviews is giving way to citation to blogs,¹⁰ Wikipedia articles,¹¹ and other general web sources. Does this mean that these new sources of authority should be ignored or derided? The answer

5. One of the first instances of the U.S. Supreme Court citing to the internet was in the 1996 case of *Denver Area Education Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 777 n.4 (1996).

6. The internet provides everyone with an opportunity to access legal information in a relatively cost-free manner. This broader access will allow more people to have input into how our laws are used and how they are made.

7. It is inevitable that this trend will continue, at least because the overwhelming majority of Americans are using the internet. Seventy-nine percent of all Americans are internet users. Pew Internet & American Life Project, *Internet Adoption*, <http://www.pewinternet.org/Trend-Data/Internet-Adoption.aspx> (last visited June 28, 2010). This number has risen rapidly over the past ten years. *Id.* (finding that in March of 2000, only 40 percent of Americans reported using the internet).

8. In one study that looked at the citation practice in U.S. Supreme Court opinions over the last one hundred years, it found that the trend was already occurring, albeit slowly, as far back as 1899. See Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1683–91 (2000). In 1899, the Court was primarily citing to the traditional primary sources of law: cases and statutes. See *id.* at 1683–87. Even back then, the Court still cited to a small number of secondary sources. See *id.* at 1686–87. But the Court's citation practice radically changed over the twentieth century; by 1999, the Court was citing to a plethora of secondary sources, including historical treatises, law journal articles, and other academic papers. See *id.* at 1688–91.

9. See Paul Douglas Callister, *Beyond Training: Law Librarianship's Quest for the Pedagogy of Legal Research Education*, 95 LAW LIBR. J. 7, 21–22 (2003).

10. According to the *Law Blog Metrics*, up through August 2006 there have been thirty-two judicial opinions in which legal blogs have been cited. Law X.O, *Cases Citing Legal Blogs—Updated List* (Aug. 6, 2006), http://3lepiphany.typepad.com/3lepiphany/2006/08/cases_citing_le.html.

11. See Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES, Jan. 29, 2007, at C3. See generally Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1 (2009).

is clearly no, for the people who create this new authority are the new generation of lawyers, law students, experts, and judges.¹²

This Article will explore the death of twentieth-century authority. First, this Article traces the shift away from traditional authority. It outlines some of the problems associated with this shift, including the disappearance of online sources after their use and the trouble with the authentication of online legal materials. Second, I examine what these new authorities are, and I consider the growing use of these new sources, including the varied reactions from the courts. Finally, this Article concludes with a look at the positive impact that these new sources of authority are having on the judicial system.

I. TRADITIONAL AUTHORITY FADES

The legal world is based on a set of stable and (at times) easily discernable legal precedents that enable those who research the law to, in theory, understand what it means. The notion of *stare decisis* is based on the theory that future courts should look back to previous cases to keep order and stability in the legal system.¹³ This predictable structure enables human beings to act within the boundaries of societal norms. For this stability to occur, decisionmakers have to agree upon a standardized set of authoritative legal authorities.

Legal authority has always been evolving. The Ten Commandments, Hammurabi's Code, the Magna Carta, the U.S. Constitution, and the judicial decisions form the basis of the common law. These sources

12. Judges have already begun blogging. See, e.g., Gary Becker & Richard Posner, THE BECKER-POSNER BLOG, <http://uchicagolaw.typepad.com/beckerposner> (last visited Aug. 31, 2010); see also Jonathan Saltzman, *Off the Bench, Judge Blogs Her Mind*, BOSTON GLOBE, May 27, 2008, at A1.

13. See BLACK'S LAW DICTIONARY 1443 (8th ed. 2004). Moreover, this order and stability will keep society from drowning in anarchy. Ironically, Grant Gilmore, paraphrasing Justice Holmes, had a more ominous view of the law's role in society:

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

GRANT GILMORE, THE AGES OF AMERICAN LAW 110-11 (1977).

gained legitimacy because they were the sources that practitioners turned to most often in formulating their legal arguments.¹⁴

These traditional sources of authority remained essentially unchanged until well into the twentieth century. What changed? Or did anything change at all?

A. A Shift Away From the Old

At least since the famous Brandeis Brief,¹⁵ courts have used social, political, and historical data as authority for their decisions. Over time, the courts routinely used a growing, but stable, group of authorities to bolster the primary sources used within an opinion. Law review articles, legal encyclopedias, government reports, and other print sources now regularly appear in legal decisions. Over the past ten years, a shift has been occurring away from these old sources toward more ephemeral, but easily accessible, internet sources. Is it bad that legal researchers are moving away from the traditional sources of authority?¹⁶ Maybe these new habits will allow for the introduction of more authority that decisionmakers will consider in forming their opinions.

However, caution is needed because a plethora of new sources can potentially lead to information overload. Back in the 1880s for instance, West's National Reporter System rose to prominence as the repository of published opinions from across the country. Attorneys now could easily locate all appellate court decisions. The legal profession, according to Grant Gilmore, "found itself in a situation of unprecedented difficulty. There were simply too many cases, and each year added its frightening harvest to the appalling glut."¹⁷ Consequently, there was a rise in new

14. As Frederick Schauer argues, "the status of a source as an authority is the product of an informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted." Frederick Schauer, Essay, *Authority and Authorities*, 94 VA. L. REV. 1931, 1956–57 (2008).

15. The Brandeis Brief was submitted by Louis D. Brandeis in the case of *Muller v. Oregon*, 208 U.S. 412 (1908). This was one of the first examples of a legal brief containing numerous references to nonlegal authority in support of a legal argument.

16. One prominent legal scholar has argued that the rise of new sources of authority in the computer age has led to direct "competition for the case as the building block of the legal process." M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 47–48 (1989).

17. GILMORE, *supra* note 13, at 59. In 1969, there was a cry for vigilance as "sources of the law grew more and more numerous." Morris L. Cohen, *Research Habits of Lawyers*, 9 JURIMETRICS J. 183 (1969). One prominent commentator warned lawyers to be aware of this dramatic increase in the sources

sources of authority—such as law reviews and academic literature—in response to the creation of the National Reporter System.¹⁸ Today, there is a growing backlash from relying on law reviews and academic literature, which has grown so voluminous and costly to access,¹⁹ that researchers are moving away from these sources to free online sources. Indeed, one legal commentator has opined that “[a] lawyer who fails to research on the web will not find all of the relevant sources and will likely fall below the standard of competence”²⁰

Further, the producers of primary legal information are increasingly turning to the web to deliver this information. According to the U.S. Government Printing Office (GPO)—the federal agency that publishes, prints, and distributes information from the three branches—primary legal sources will soon be available exclusively online.²¹ The GPO has stated that “as many as 50% of all U.S. Government documents are now born digital, published to the Web and will never be printed by the Federal government.”²²

While this shift to online legal research may seem ominous, the reality is that information is now far more accessible to the public. As early as 1997, the United Nations highlighted the “importance of disseminating legal information via the Internet”²³ and expressed the

of the law and urged the legal profession to continue to use “great skill” in selecting from among the wide range of sources lest an argument be “diffuse and sloppy.” *Id.* at 185. The number of sources, both legal and nonlegal, available to an attorney has grown exponentially over the past twenty years. An example of this can be found in the Westlaw Database Directory that is published annually. In 1999, the Directory had 571 pages; ten years later, the Directory had ballooned to 1288 pages. See generally Westlaw Database Directory, <http://directory.westlaw.com> (last visited Aug. 9, 2010).

18. GILMORE, *supra* note 13, at 60 (“[T]he new literature can be taken as a response to the pressures generated by the floods and torrents of the published case reports.”).

19. The major print publishers continue to increase the cost of legal publications each year. The cost has risen to the point where even the “standard” texts are proving too pricey for all but the largest law firms and academic law libraries. For example, *Nimmer on Copyright* costs \$2,138.00 for a new set with an annual upkeep cost of over \$1,000.00. *Larson’s Workers Compensation Law* costs \$3,981.00 for a new set with an upkeep cost of close to \$2,000.00 annually.

20. Ellie Margolis, *Surfin’ Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 111 (2007).

21. U.S. GOV’T PRINTING OFFICE, A STRATEGIC VISION FOR THE 21ST CENTURY 1 (2004), available at <http://www.gpo.gov/pdfs/fdsys-info/04strategicplan.pdf>.

22. *Id.* In the 111th Congress, a bill was introduced to eliminate the mandatory printing of bills and resolutions by the Government Printing Office for the use of the House of Representatives and Senate. H.R. 4640, 111th Cong. (2010).

23. Mary Rumsey, *Gauging the Impact of Online Legal Information on International Law: Two Tests*, 35 SYRACUSE J. INT’L L. & COM. 201, 203 (2008).

opinion that “dissemination of information via the Internet was a cost-effective way of allowing a larger number of States to gain access to a variety of legal material.”²⁴

The dissemination of primary and secondary authority via the internet has opened up a universe of once hard-to-find information. A simple Google search allows access to documents that were once unavailable to most researchers, including reports by small nonprofits, environmental groups, and nongovernmental organizations.²⁵

While there is no doubt that attorneys are turning in greater numbers to the internet for sources, caution needs to be taken to ensure that the information used can be retrieved by future generations. Unlike the traditional sources of authority, the new authority has yet to find a stable, enduring platform that can assure similar access to future generations.

B. Lifting the Veil

One of the stable aspects of traditional legal authority was the confidence that an attorney would be able to retrieve the authority upon which a judge relied in formulating her opinion. Not only could the researcher retrieve the authority, she also had the ability to retrieve the underlying sources of the authority. In other words, she could look behind the authority and lift the veil to see what sources the judge or legislators used to create the authority.

Lifting the veil on judicial cases is important because judges can make new law through judicial pronouncements or by interpreting statutes and the U.S. Constitution. Courts may also invalidate laws, which can often force other authority creators to react.²⁶ Thus, it is important

24. The Secretary-General, *Report of the Secretary-General on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law*, ¶ 111, delivered to the General Assembly, U.N. Doc. A/52/524 (Oct. 24, 1997).

25. See Randy Diamond, *Advancing Public Interest Practitioner Research Skills in Legal Education*, 7 N.C. J.L. & TECH. 67, 90 (2005) (“As Internet legal and law related information sources grow, the loosening of traditional notions of acceptable legal authority creates new advocacy opportunities for attorney[s].”). For a discussion of the growth in the use of NGO reports in international adjudications, see generally Rumsey, *supra* note 23.

26. This does not mean that politicians will agree with the courts. For example, legislatures often create new laws with the purpose of complying with or overriding a court ruling. See, for example, Section 7 of Ohio S.B. No.20, which states:

It is the intent of the General Assembly in amending division (A)(2) of section 3937.18 of the Revised Code to supersede the effect [sic] of the holding of the Ohio Supreme Court in the

for practitioners to be able to discern what authority a court used to make its decisions. In a sense, the authority underlying the case law itself becomes authority, which makes it important for those researching the law to see why a court ruled as it did. If the authority upon which a court relies disappears, then a component of a court's decision disappears as well.

What if future generations cannot determine upon what authority an opinion rests?²⁷ When a judge writes an opinion, she makes decisions based on those authorities that will help support the opinion. According to Kris Franklin, “[d]ecisions about how authority can be used to support a particular position are not made lightly. But they are not inevitable either: legal arguments are *constructed* on a foundation of supporting authorities, and, like any construction, they can fail if their foundation is not secure.”²⁸

C. The Disappearing Act

In the internet age, the underlying authority for a court's decision is becoming harder to discover. As more primary authority is constructed by looking at sources found on the internet, the likelihood that this information can be retrieved by future generations decreases with time.

In numerous studies regarding the use of internet citations in legal and nonlegal documents,²⁹ one conclusion is evident: Citations to materials born on the internet or cited from the internet disappear over time. According to Wallace Koehler, “[w]eb pages and sites may be

October [sic] 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500, relative to [sic] the application of underinsured motorist [sic] coverage in those situations involving accidents where the tortfeasor's bodily injury liability limits are greater than or equal to the limits of the underinsured motorist coverage.

S.B. 20, 120th Gen. Assem, Reg. Sess. (Ohio 1994).

27. One of the benefits of the traditional sources of authority is that they are easily retrieved. Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 LAW LIBR. J. 148, 148 (1982) (“A legal citation serves two purposes. First, it indicates the nature of the authority upon which a statement is based. Second, it contains the information necessary to find and read the cited material.”).

28. Franklin, *supra* note 2, at 52.

29. For a review of this problem in other disciplines, see Robert Dellavalle et al., *Going, Going, Gone: Lost Internet References*, SCIENCE, Oct. 31, 2003, at 787; Carol Ann Germain, *URLs: Uniform Resource Locators or Unreliable Resource Locators*, 61 C. & RES. LIBR. 359 (2000); John Markwell & David W. Brooks, “Link Rot” *Limits the Usefulness of Web-Based Educational Materials in Biochemistry and Molecular Biology*, 31 BIOCHEMISTRY & MOLECULAR BIOLOGY EDUC. 69 (2003).

recorded, but most either disappear or their content is modified and overwritten, leaving no trace of the earlier document.³⁰ Either of these occurrences creates problems for the legal researcher.³¹ Studies of case law and other legal research sources confirm this statement. For example, one study that looked at law reviews published between 2001 and 2003 found that 40 percent of internet citations within these articles had broken links by 2006.³² This high percentage of broken links means that close to half of the online authority cited in these articles can no longer be verified by future researchers.³³

This problem is not limited to secondary materials; primary materials are riddled with these same dead links. As more courts are turning to the internet not only for their research but for citing authority, the disappearance of citations within a case is even more disturbing. One study on the use of internet citations within case law discovered that there was an alarming 84.6 percent rate of link rot for federal cases from 1997.³⁴ When the same study looked at decisions from 2001, it found that 34 percent of the internet citations within a case were already unavailable by 2002.³⁵ A more recent study found that 64 percent of cited URLs in

30. Wallace Koehler, *An Analysis of Web Page and Web Site Constancy and Permanence*, 50 J. AM. SOC'Y FOR INFO. SCI. 162, 162 (1999). In his research, Koehler tracked 361 websites. He found that 99 percent of all web pages recorded some change within the year of the study. See *id.* at 179.

31. Susan Lyons, *Persistent Identification of Electronic Documents and the Future of Footnotes*, 97 LAW LIBR. J. 681, 684 (2005) ("An article with dead sources is a dead end.").

32. Helane E. Davis, *Keeping Validity in Cite: Web Resources Cited in Select Washington Law Reviews, 2001-03*, 98 LAW LIBR. J. 639, 646 (2006).

33. "Link rot" is the term used to describe the effect of a Uniform Resource Locator (URL), sometimes referred to as the "web address" of an internet site, that no longer works. "Link rot" is the result of a website being removed from the web, moved to a different site, or of content appearing at the chosen URL no longer reflecting the material that was once there. Law review articles have been studied for link rot. These sources, which were once well respected for their accuracy due to law review staffs' painstaking efforts to doublecheck every footnote in an article, are now slipping away. "In 1994, there were just four instances of Web citations in three law review articles. By 2003 there were at least 96,946 citations to the Web in law review footnotes." *Id.* at 681. A 2001 study of internet citations in law review articles found that only 30.27 percent of internet citations in law review articles from 1997 were still working, and only 61.80 percent of internet citations in law review articles from 2001 were still working. See 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, 35 tbl.1 (2002).

34. See Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 438 (2002).

35. *Id.*

Washington Supreme Court and Washington Court of Appeals decisions issued between 1999 and 2005 no longer reflected the cited materials.³⁶

The unavailability of the sources cited in a court decision should raise some red flags as to the continued weight of an opinion. Coleen Barger explains:

When . . . a court purportedly bases its understanding of the law or the law's application to case facts upon a source that cannot subsequently be located or confirmed, the significance of the citation to that source becomes more ominous. If present readers of the opinion cannot determine how much persuasive weight was or should be accorded to the unavailable source, they have little reason to place much confidence in the opinion's authoritativeness.³⁷

A judge's opinion citing a dead-end source either loses some of its authoritativeness or the system becomes one in which we no longer try to tease out a judge's reasons for a decision.³⁸

Does this disappearing act caution against using internet sources? The appropriate response is not to dispense with these new sources, but to come up with ways to ensure their accessibility by future researchers. One way to deal with this is to freeze in time the material cited from an internet source in a case opinion. The U.S. Supreme Court handles this issue by requiring the clerk's or reporter's office to maintain a hardcopy of any internet source cited in the opinion.³⁹ This solution would allow future researchers access to an online source even if the website disappears.⁴⁰

36. See 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, 389, 396–97 (2007). This problem is not found solely in the United States. After looking at a recent Supreme Court of Canada opinion (*R v. S.J.L.*, 2009 SCC 14), a study found that of the six URLs listed in the opinion, only two were still operational. Shaunna Mireau, *Link Rot in Court Decisions*, SLAW, May 7, 2009, <http://www.slaw.ca/2009/05/07/link-rot-in-court-decisions>.

37. Barger, *supra* note 34, at 429–30.

38. This new order would have the rebirth of authority with every new opinion because attorneys will have to take at face value what the judge has written as there is little chance they will be able to identify the underlying sources. The rebirth of authority with every judicial decision is not a novel concept and has faced criticism in the past. See, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), in which Justice O'Connor opined:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.

39. See William R. Wilkerson, *The Emergence of Internet Citations in U.S. Supreme Court Opinions*, 27 JUST. SYS. J. 323, 334 (2006). As an ironic twist, on the author's most recent visit to the U.S. Supreme

The Judicial Conference of the United States has recognized that disappearing websites are a growing problem and has begun to address the issue.⁴¹ The Judicial Conference noted in a memorandum that “[j]udges are citing to and using Internet-based information in their opinions with increasing frequency. Unlike printed authority, Internet information is often not maintained at a permanent location, and a cited web page can be changed or deleted at any time.”⁴² The Judicial Conference urges chief judges to adopt the proposed guidelines⁴³ as a way to preserve the cited internet sources within judicial opinions.⁴⁴ If something is not done to preserve the information cited by judges, the current system will, as one commentator has cautioned, do “a disservice to clients, and posterity, to create a body of precedent written on the wind.”⁴⁵

Court’s website, the link titled “*Problem With Out of Date Information?*” at the following URL <http://www.supremecourt.gov/problemwithoutofdateinfo.aspx>, turned out to be a dead link. U.S. Supreme Court, *Problem With Out of Date Information*, <http://www.supremecourt.gov/problemwithoutofdateinfo.aspx> (last visited July 22, 2010).

40. There are some helpful resources that might serve to recall broken links and disappearing web pages: the *Internet Archive* (<http://www.archive.org>), the *Memento Project* (www.mementoweb.org), and *WebCite* (<http://www.webcitation.org>). The *Internet Archive* attempts to archive the web by permanently capturing web images. See *Internet Archive*, *About the Internet Archive*, <http://www.archive.org/about/about.php> (last visited June 28, 2010). By using the *Internet Archive’s Wayback Machine*, a researcher can attempt to view a web page that is no longer active. See *Internet Archive*, *Frequently Asked Questions*, <http://www.archive.org/about/faqs.php> (last visited June 28, 2010). The *Internet Archive* claims to have archived up to 150 billion web pages going back to 1996. See *Internet Archive*, *About the Wayback Machine*, <http://www.archive.org/web/web.php> (last visited June 28, 2010). While this might be one solution to vanishing web pages, the *Wayback Machine* is not comprehensive and not every page comes up when a particular time period is searched. The *Memento Project* is an alternative source for searching for and retrieving web pages as they appeared at a specific point in time. See *Memento Project*, <http://www.mementoweb.org> (last visited June 28, 2010). *WebCite* is an online archive that allows users to make a local copy of a cited webpage/web material, and archive the cited URL in *WebCite*, providing readers with permanent access to the cited material. See *WebCite*, <http://webcitation.org> (last visited June 28, 2010).

41. *Internet Materials in Judicial Opinions and Orders*, May 22, 2009, available at <http://www.inbar.org/LinkClick.aspx?fileticket=hptDW9DIhFY%3D&tabid=356> (on file with author).

42. *Id.*

43. The *Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions* suggest the following procedures be taken for preserving online authority cited in a judicial opinion: “[A]n Internet resource to be cited in an opinion is to be captured, . . . downloaded and preserved as closely as possible to the time it is viewed by chambers, to ensure that the exact version of the Internet resource that was relied upon by the judge will be preserved.” *Id.* at 3 [hereinafter *Guidelines*]. The *Guidelines* suggest that the downloaded internet resource be placed together with the opinion on the court’s CM/ECF system. *Id.*

44. The Judicial Conference plans to follow up within one year to see what progress courts have made in addressing this issue. *Id.*

45. Ken Strutin, *Written on the Wind: Be Cautious When Citing Internet Sites in Legal Documents*, N.Y. L.J., June 29, 2004, at 5.

Preventing internet sources from disappearing is an important step in building confidence in their continued use. Another important step is to ensure that—at least as regards to primary authority—the online information is both an official and authenticated version of the law.

D. Authentication

Since the mid-nineteenth century, lawyers could be confident that sources of authority were inherently trustworthy and authoritative on their face. Reports were denoted as official and authoritative by the issuing body. Printed statutes and regulations were published by the issuing agency, and secondary sources came from established publishers with histories of producing credible and value-added products. However, the credibility and authoritative value of online resources can sometimes be questionable.

Although traditional sources of secondary authority are seldom challenged for their authenticity since they are backed by respected legal publishers and editorial safeguards, newer sources do not have such safeguards. While this lack of authenticity may be a source of frustration for the courts, it is not as troubling because courts are never bound by the secondary sources. If, for example, an attorney cites to an online secondary source with questionable authenticity, since the courts are not bound by the opinions of said source, its authenticity is less troubling than a citation to a primary source.

The lack of authentication for primary sources is the most troubling phenomenon. There is no question that many attorneys are researching almost exclusively online for primary authority. But how do we know that the information is actually authentic and official? Should anyone even care about this?⁴⁶

46. For example, not everything on Westlaw and Lexis is accurate, but if both parties to a litigation and the court are relying on the same version of the primary material, then whether it is accurate or not becomes irrelevant, because de facto it becomes the correct version of the material. “For several years the Westlaw version of *Diffenderfer v. Diffenderfer*, 491 So.2d 265 (Fla. 1986), contained a typographical error changing the phrase ‘her interest in the pension’ to ‘his interest in the pension,’ causing some citing courts to misapply its holding. Sixteen years later, *Acker v. Acker*, 821 So.2d 1088, 1091 (Fla. Dist. Ct. App. 2002), *aff’d*, 904 So.2d 384 (Fla. 2005), held that the version of the case published in the bound reporter was authoritative. See Mary M. McCormick, Differences Between Electronic and Paper West Reporters, Posting to Law-Lib@ucdavis.edu (Sept. 5, 2003) <http://listproc.ucdavis.edu/archives/law-lib/law-lib.log0309/0102.html>.” KENT C. OLSON, PRINCIPLES OF LEGAL RESEARCH 220 n.8 (2009).

Primary authority remains the same as it always has; the difference lies in the ways that authority is disseminated. Primary authority creators are relying on the online world to publish and disseminate their information. This is being done for a number of reasons, including the low cost of publishing online. Historically, the official versions of most primary sources were found in print, and the online versions of these documents lacked authoritiveness. Now creators of primary authority have recognized not only a shift in what is considered authority in general, but that primary sources can be published online without losing authoritiveness.

The federal government recognizes that most users of primary authority are accessing it online. In response to this reality, the federal government is moving to create “official” online versions of its primary law. Additionally, in attempting to replicate the trust that accompanies its print products, the GPO is experimenting with placing authenticated law online.⁴⁷ This is especially important for documents that are born digital.⁴⁸ The issue of born-digital information will grow over time as local, state, and federal governments realize that publishing and disseminating information online is far more cost effective.

One of the troubling issues with born-digital materials is that they suffer from the same fluctuations and stability issues as other digital materials. Born-digital primary materials, such as draft documents of regulations, statutes, restatements, and model laws, are especially in need

See also Mark H. Kolter, *And the Lion Shall Lay Down With the Lamb: Third-Party Actions Under Vermont Workers' Compensation Law*, 28 VER. B.J. & L. DIG. 30, 35 n.47 (2002); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 932 n.141 (2008).

47. The GPO states:

In early 2008, the GPO launched its first authenticated databases on GPO Access. For the first time, the GPO digitally signed and certified the PDF files in the online federal budget released in February 2008. The beta Authenticated Public and Private Laws for the 110th Congress database were incorporated into the live Public and Private Laws application on GPO Access in March 2008. Both applications provide users with no-fee access to digitally signed PDF content. The digital signature provides assurances that an electronic document has not been altered since the GPO disseminated it, verifying document integrity and authenticity of GPO online federal documents.

U.S. GOV'T PRINTING OFFICE, DIGITAL PRESERVATION AT THE U.S. GOVERNMENT PRINTING OFFICE: WHITE PAPER 5 (2008), available at http://www.gpo.gov/pdfs/fdsys-info/documents/preservation-white-paper_20080709.pdf.

48. As far back as 1995, the federal government was anticipating that federal primary law would soon be distributed exclusively in an electronic format. In an inaccurate prediction, the then-Chief of the GPO Depository Administration Branch reported that she was working with the Law Revision Counsel and Electronic Dissemination Service to improve the CD version of the United States Code, anticipating that it would be distributed in electronic format only by the year 2000. 16 *Admin. Notes* 4 (Apr. 15, 1995).

of preservation. Many of these draft documents aid in the understanding of authority since printed versions can be consulted long after the drafts have become finalized. “In law, examining these successive versions is often critical to understanding a policy’s evolution. . . . When drafts are born digital, however, publisher disinterest or desire to provide only the most current information may compel it to overwrite the draft document(s).”⁴⁹

Some governmental entities have already discontinued their print publications and switched to an online-only format.⁵⁰ But even for federal primary sources born in the print age, some of these sources have now been designated as official in both their online and print versions.⁵¹

According to the latest study done on authentication of online legal sources,⁵² some states and the federal government have begun to recognize that their primary legal materials are frequently accessed online; thus, an official and authenticated version of these primary materials should be made available online.⁵³ Unfortunately, while some of these sources are found in an official version online, very few of them are authenticated online.⁵⁴ The problem therefore lies in the question: Is there a difference between official⁵⁵ and authentic⁵⁶ sources?

49. Michelle M. Wu, *Why Print and Electronic Resources Are Essential to the Academic Law Library*, 97 LAW LIBR. J. 233, 239 (2005).

50. Indiana Code § 4-22-8-5(c) calls for the Indiana Administrative Code to be published in electronic form only. IND. CODE § 4-22-8-5(c) (2009). The code is published with an electronic “Certificate of Authenticity” to provide the user with a level of confidence in the document that existed with the previously published print version of the code.

51. For example, on the Government Printing Office’s federal digital system website, <http://www.gpo.gov/fdsys/search/home.action>, a researcher can find authenticated legal information including the Public and Private Laws of the United States from the 104th Congress forward. See U.S. Gov’t Printing Office, FDSys, <http://www.gpo.gov/fdsys/search/home.action> (last visited June 28, 2010). One can also find an authenticated version of the Federal Register from 1994 forward as well as a large number of other federal primary sources. See *id.*

52. RICHARD J. MATTHEWS & MARY ALICE BAISH, AM. ASS’N OF LAW LIBRARIES, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES (2007).

53. *Id.*

54. See *id.* at 65–66.

55. “An online *official* legal resource is one that possesses the same status as a print *official* legal resource. The concept of an *official* legal resource applied to print publications is well established. Print *official* legal resources have generally served as a touchstone for authoritative and reliable statements of the law. The working definition of *official* legal resource, drawn from the latest editions of *Black’s Law Dictionary* and *Fundamentals of Legal Research*. . . . reads: An *official* version of regulatory materials, statutes, session laws, or court opinions is one that has been governmentally mandated or approved by statute or rule. It might be produced by the government, but does not have to be.” *Id.* at 19 (emphasis in original).

An example of this problem can be found with the online version of the Code of Federal Regulations found on the GPO's website. The GPO deems the regulations to be the official version.⁵⁷ But there are few measures in place to authenticate the information found on the website.⁵⁸ The same problem exists with official primary sources found on state websites.⁵⁹

The federal government has recognized the authentication problem and has begun to address this issue.⁶⁰ According to the GPO, the first authenticated database was launched in early 2008 and included a number of authenticated laws.⁶¹ Since that time, the GPO has launched its Federal Digital System, which is a collection of authenticated, digitally-signed documents, including the Congressional Record from 1999 to 2001, and the United States Statutes at Large from 2003 to 2006.⁶²

At the state level, the National Conference of Commissioners of Uniform State Laws has begun to address this issue. A drafting committee has been established to come up with proposed uniform laws⁶³ to deal with authentication and preservation of state electronic legal materials. The proposed law mandates authentication of electronic legal

56. "An *authentic* text is one whose content has been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator. Typically, an *authentic* text will bear a certificate or mark that conveys information as to its certification, the process associated with ensuring that the text is complete and unaltered when compared with that of the content originator. An *authentic* text is able to be *authenticated*, which means that the particular text in question can be validated, ensuring that it is what it claims to be." *Id.* at 21 (emphasis in original).

57. 1 C.F.R. § 5.10 (2009); *id.* § 8.6 (stating that the CFR on the GPO website is an official version).

58. There are no digital signatures or encrypting software in place to authenticate these resources so that the user knows she is viewing a complete and unaltered version of an approved text.

59. Utah is an example of a state that has placed both an official and an authenticated version of some of its primary authority online. The official version of the *Utah Administrative Code* can be found online at <http://www.rules.utah.gov/publicat/code.htm>. There is also an explanation on the website of how a user can download an authenticated version of the document. See *Utah Administrative Code*, <http://www.rules.utah.gov/publicat/code.htm> (last visited June 28, 2010). The New Mexico Administrative Code is a born-digital and official document, but there is no true authentication system associated with it. For a listing of all official sources of online primary sources from the various states, see MATTHEWS & BAISH, *supra* note 52, at app. A.

60. One way the GPO is dealing with the authentication problem is by putting digital signatures in the document. U.S. GOV'T PRINTING OFFICE, *supra* note 47, at 5 ("The digital signature provides assurance that an electronic document has not been altered since GPO disseminated it, verifying document integrity and authenticity of GPO online federal documents.")

61. *Id.*

62. The FDsys URL is <http://www.gpo.gov/fdsys/search/home.action>.

63. The working title of the law is *Authentication and Preservation of State Electronic Legal Materials Act*.

documents, including “certification that establishes a chain of custody,”⁶⁴ and “protection of the transmission of the document by security measures to prevent corruption of or tampering.”⁶⁵ Along with measures to ensure authentication, the law also mandates preservation of,⁶⁶ and permanent public access⁶⁷ to, the legal documents. States’ adoption of these laws would help address the concerns associated with the shift to practitioners using online legal authority exclusively.

Although there are still authentication issues, are these real concerns for practitioners? For most attorneys, reducing research costs seems to be their guiding force, so accuracy and authenticity fall behind their desire for free legal information. There are few instances in which a lawyer has been faulted for relying on the online version of a primary source. As one attorney has written, “perhaps the first lawyer to get sanctioned in court for using an electronic slip opinion that doesn’t actually reflect the court’s ‘real’ opinion will stop and ponder this question. Until that time, I seriously doubt most lawyers even care. Just as long as it doesn’t cost them anything.”⁶⁸

Whether or not the courts and legislatures begin to address the issues surrounding the growth of online authorities, the reality is that practitioners are using them frequently. This raises the question: What are these new online sources, and will courts be willing to accept them as an alternative to the traditional sources?

II. THE RISE OF NEW SOURCES OF AUTHORITY

Whatever the drawbacks surrounding these new sources of authority, the real question is: To what extent are courts willing to accept these newer sources of information like law blogs and Wikipedia articles? If old authority is dying, then, like the phoenix, something must rise to take its place. As more attorneys and judges cite to newer sources of authority, these authorities grow in acceptance. According to Frederick Schauer,

64. AUTHENTICATION AND PRESERVATION OF STATE ELECTRONIC LEGAL MATERIALS ACT § 4(1)(a) (Committee Meeting Draft 2010).

65. *Id.* § 4(1)(b).

66. *Id.* § 6.

67. *Id.* § 7.

68. See Jason Wilson, *Screw Authenticity. I Just Want It for Free*, RETHINK.K, July 10, 2009, <http://www.jasnwilson.com/?p=344>.

“[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.”⁶⁹ In the past, lawyers have been hesitant to cite to online blogs, websites, wikis, and other online sources because they were embarrassed.⁷⁰ Lawyers used to view these sources as the equivalent to a tabloid newspaper such as the *National Enquirer*, or as one judge put it, “voodoo information.”⁷¹ However, as more attorneys turn to these sources, this sense of embarrassment fades, and the acceptability of citing these sources grows.

A. Cautious Acceptance of New Authority

People are slow to adapt to all changes. And in the judicial system, change comes even slower. So while lawyers have wholeheartedly embraced the internet as a place to start their research, the courts have been more cautious but are still embracing the internet. For example, in an Indiana Court of Appeals case, a party that tried to serve notice on an opposing party had not used the internet in attempting to locate them.⁷² The court’s reasoning encouraged attorneys to use online resources:

69. Schauer, *supra* note 14, at 1957 (emphasis omitted).

70. *See id.* at 1946–47.

71. *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999). The judge admonished the plaintiff for relying on information found on the internet over materials that could have been discovered in traditional print sources. The court noted:

Plaintiff’s electronic “evidence” is totally insufficient to withstand Defendant’s Motion to Dismiss. While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant’s Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in FED.R.CIV.P. 807. Instead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form from the United States Coast Guard or discover alternative information verifying what Plaintiff alleges.

Id. at 774–75.

72. *Munster v. Groce*, 829 N.E.2d 52 (Ind. App. 2005).

[T]here is no evidence in this case of a public records or internet search In fact, we discovered, upon entering “Joe Groce Indiana” into the Google™ search engine, an address for Groce that differed from either address used in this case, as well as an apparent obituary for Groce’s mother that listed numerous surviving relatives who might have known his whereabouts.⁷³

A similar scenario happened in a Florida case in which the plaintiff’s use of directory assistance was not considered sufficient due diligence in attempting to find and serve the opposing party.⁷⁴ Chiding the plaintiff for relying on old ways to find people, the court noted that “advances in modern technology and the widespread use of the Internet have sent the investigative technique of a call to directory assistance the way of the horse and buggy and the eight track stereo.”⁷⁵

The position taken by these two courts seems to demonstrate that the internet is not only acceptable, but actually preferable, to the old methods of finding people. However, some courts do not seem ready to cross over into this new frontier. In a Pennsylvania case, the defendant attempted to contact the plaintiff to notify him of a judicial sale of her property.⁷⁶ One of the methods used was a Google search that failed to produce a valid phone number or address for the plaintiff.⁷⁷ The court found that a Google search alone was not sufficient to meet the statutory requirements for giving notice.⁷⁸ The court went on to comment that “checking the telephone book seems to qualify as an ordinary common sense business practice when one is seeking to obtain an address.”⁷⁹ Thus, the court rejected the internet in favor of the phonebook.

The lesson from these competing opinions is that the prudent attorney should still check more than one source when attempting to locate

73. *Id.* at 61 n.3.

74. *Dubois v. Butler*, 901 So.2d 1029 (Fla. Dist. Ct. App. 2005).

75. *Id.* at 1031. A further twist on this scenario occurred in Australia, where a justice on Australia’s Supreme Court allowed lawyers to serve court papers on a defendant through the social networking site Facebook after the lawyers could not find proper contact information for him through traditional means. See Rebecca Thomson, *Court Papers Served Over Facebook*, COMPUTERWEEKLY.COM, Dec. 16, 2008, <http://www.computerweekly.com/Articles/2008/12/16/233938/court-papers-served-over-facebook.htm> (on file with author).

76. *Fernandez v. Tax Claim Bureau of Northampton County*, 925 A.2d 207 (Pa. Commw. Ct. 2007).

77. *Id.* at 211.

78. *Id.* at 213.

79. *Id.* at 214 n.17.

information, be it for finding addresses, providing proper service, or searching for primary legal authority. Covering all bases is the only way to ensure that the court will find that an attorney has met her due diligence burden “even if it means a ‘horse and buggy’ search of the telephone book instead of an online Google search.”⁸⁰

While the courts may be directing attorneys either to turn to the internet or to rely on traditional sources, judges themselves are citing online sources. The material cited might simply be a reflection of information in the record of the case, or, as often happens, the judge goes outside the record to find information on her own to supplement the record. Judges’ use of the internet to go outside the record has not been universally accepted. In a heated dissent in a California Supreme Court case⁸¹ in which the majority based part of its ruling on material found outside the record, a justice lambasted the majority’s reliance on this material: “[T]he majority, rushing to judgment after conducting an embarrassing Google.com search for information outside the record, has tied the hands of the Legislature, to the likely peril of judges, bailiffs, and ordinary citizens called upon to do their civic duty.”⁸²

Some appellate courts have also chided lower courts for using an internet site that is outside the record to decide cases. One trial court nullified a tax sale after the court determined that the government had not provided the plaintiff (the holder of the mortgage on the property) with procedural due process when it failed to notify him of the pending sale of his property.⁸³ The government claimed that it attempted to notify the plaintiff by sending two notices to the property and by running two newspaper notices as required by law.⁸⁴ Following a hearing, the trial judge ran his own internet search in an attempt to locate contact information for the plaintiff. Based on the results of that search, the judge ruled that the plaintiff was reasonably identifiable and

80. Carole Levitt & Mark Rosch, *Is There a “Duty to Google?”*, INTERNET FACT FINDING FOR LAW, May–June 2007, at 2, <http://www.ali-aba.org/doc/IFF0705.pdf>.

81. *People v. Mar*, 52 P.3d 95 (Cal. 2002).

82. *Id.* at 116 (Brown, J., dissenting). The majority found that the trial court could not require a defendant to wear a stun belt in the court over the defendant’s objection. The dissent found that this ruling, based in part on research found on the internet, made it harder for courtroom personnel to ensure safety within the courtroom.

83. *Weatherly v. Optimum Asset Mgmt., Inc.*, 928 So. 2d 118 (La. Ct. App. 2005).

84. *Id.* at 120.

that the government had failed to take the appropriate steps to notify the plaintiff.⁸⁵ While the appellate court upheld the lower court's judgment, finding that the internet search resulted in harmless error, the court did point out that "[a] finder of fact may not consider evidence outside the record in making its findings. More particularly, it is well settled that the resolution of disputed issues by judicial notice is improper."⁸⁶

Not all appellate courts have been as unforgiving. The Supreme Court of New York in *NYC Medical & Neurodiagnostic, P.C. v. Republic Western Ins. Co.*,⁸⁷ chastised the lower court for "initiating its own investigation into the facts when, based upon the insufficient submissions of plaintiff, the court should have dismissed the complaint."⁸⁸ The lower court went outside the record and looked at the internet to come to its findings. The appellate court found this deprived the litigants of their rights:

In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality. Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance.⁸⁹

Interestingly, one of the dissenting judges wrote:

[I]t was a proper exercise of discretion for the court below to have sua sponte referred to a matter of public record, in order to ascertain the fact of defendant's status as an insurer. There is no logical reason not to include within the category of public records, such records when they are available from reliable sources on the Internet.⁹⁰

The proper role for the internet within the judiciary is still undetermined. But it is clear that courts should remain vigilant in their internet use lest blind acceptance of online authority leads to degradation in the reliability and respectability of the common law. If future

85. *Id.* at 121.

86. *Id.* at 121–22 (citations omitted).

87. 798 N.Y.S.2d 309 (App. Div. 2004).

88. *Id.* at 313.

89. *Id.*

90. *Id.* at 314.

generations are unable to examine the underlying rationale for judicial opinions, it will become more difficult to create harmony in the law. This does not mean that lawyers and judges should turn away from the newer sources of authority. Rather, they should institute policies to preserve the authority cited, as well as take precautions that they are not blindly following authority with questionable accuracy.⁹¹

The legal community has responded to the judicial use of the internet to perform searches outside the record. A 2007 change in the ABA Model Code of Judicial Conduct addressed the growing use of electronic sources by the courts. The comment to Rule 2.9: "Ex Parte Communications" was changed to read "[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including *electronic*."⁹² The explanation of the comments points to the ease with which a factual investigation can be done online, which is why the comments caution judges about using the internet in violation of the rule.⁹³

Members of the bar have also chimed in with some wariness about overreliance on the internet as a way to find information and check facts.⁹⁴ The ease of using Google can lull an attorney into a false sense of security, but attorneys should be cautious because "search engine returns are incomplete for research purposes."⁹⁵

Attorneys and judges alike are clearly turning to online sources as they litigate issues and decide cases. The degree to which they should be turning to these sources is still an open question. As can be seen in the cases discussed above, one segment of legal authority, secondary sources,

91. The issue of judicial notice will be expanded on further in Part II.D below.

92. MODEL CODE OF JUDICIAL CONDUCT R. 2.9 cmt. 6 (2008) (emphasis added).

93. *Id.* at app. B, R. 2.9 cmt. 6. Lee F. Peoples has reached a similar conclusion as to the meaning of this change. See generally Peoples, *supra* note 11.

94. Molly McDonough, *In Google We Trust? Critics Question How Much Judges, Lawyers Should Rely on Internet Search Results*, A.B.A. J., Oct. 2004, at 30.

95. *Id.* In a letter dated August 3, 2004, the Chairs of the Council on Judicial Administration, the Committee on Professional and Judicial Ethics, and the Committee on Government Ethics of the Association of the Bar of the City of New York sent comments to the ABA committee working on the changes to the Model Code of Judicial Conduct. The Chairs supported the proposed change to Rule 2.9, writing that "[b]ecause facts obtained on the Internet and in other electronic media are often incomplete or incorrect, we support this important principle." Letter From Barbara S. Gillers, Chair, Comm. on Professional and Judicial Ethics, Daniel Murdock, Chair, Council on Judicial Admin. & Joan R. Salzman, Chair, Comm. on Gov't Ethics, to Mark I. Harrison, Attorney, Osborn Maledon, P.A. (Aug. 3, 2004), available at http://www.abanet.org/judicialethics/resources/comm_rules_abcny_080304.pdf.

is moving decidedly toward the online world. These newer sources of secondary authority are rapidly supplanting the old guard. While assurances need to be in place to ensure accuracy of these sources, it can be argued that this change is having a beneficial impact on the judicial system as more information is now available to all litigants to present to the courts.

B. Changes to the Secondary Sources Guard

Courts have routinely turned to secondary sources—such as the *New York Times* and the *Oxford English Dictionary*—in order to explain nonlegal concepts.⁹⁶ The courts have had to turn to these sources for many reasons, but the majority of secondary sources used—whether an established newspaper, a respected medical journal, or a venerable encyclopedia—were considered reliable sources of authority. The major challenge facing the current and future generations of practitioners is to assure that the same checks and balances that have ensured accuracy in traditional, secondary sources are applied to online sources of legal information.

One particular source, the academic law journal, has been cited less frequently over the years in favor of blogs and other online sources that are shorter and have more targeted reviews of legal issues.⁹⁷ Judges have complained that law reviews are too theoretical and have relied on them less than a source that hones directly in on a particular case or legal doctrine.⁹⁸ The judges' pleas have been answered in part by the internet. The *New York Times* legal correspondent Adam Liptak writes that “[o]n blogs like the Volokh Conspiracy and Balkinization, law professors analyze legal developments with skill and flair almost immediately after they happen.”⁹⁹ These blogs are being written largely by law professors,

96. There are many articles that have studied the use of these sources by various courts. See, e.g., John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW. LIBR. J. 427 (2002); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999).

97. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8.

98. See John Doyle, *The Law Reviews: Do Their Paths of Glory Lead But to the Grave?*, 10 J. APP. PRAC. & PROCESS 179, 196–200 (2009).

99. Liptak, *supra* note 97. The Volokh Conspiracy blog can be found at <http://volokh.com>; the Balkinization blog can be found at <http://balkin.blogspot.com>.

the very same actors who write traditional law review articles. So while the format of their work has changed, law professors are changing with the times.¹⁰⁰

One reason this shift can be seen in a positive light is that it increases the ability of nonlawyers to reach information sources with the same ease as practitioners without having to go to legal libraries or expensive databases. Information found in law reviews was not always easy to access; you either needed to visit a law library or pay for access on Westlaw, LexisNexis, or HeinOnline. However, blogs are freely available online. To some extent, law reviews have recognized that limiting the accessibility of their articles to physical locations or online databases limits their audience, and now many law reviews are placing their content online for free.¹⁰¹

While practitioners are still looking to seasoned secondary authority like law reviews, newer sources are gaining momentum as the preferred sources for information. Blogs, wikis, and general internet pages are rising to the top of any researcher's preferred online destination. One particular source that embodies much of the promise of the new authority, along with most of the pitfalls, is the online encyclopedia Wikipedia.

C. Hatching the New Authority: Wikipedia as an Example of the New

To survive in the world of online authority, the traditional sources will have to become widely accessible and freely available. One particular source that has these characteristics is Wikipedia.¹⁰² It is freely available, easy to access, and varies widely in its reliability and accuracy. In some ways, it is like the Wild West: a place full of great opportunities that is growing in popularity and that may soon be tamed by the legal gunslingers of the online age.

100. Margaret A. Schilt, *The Future of Legal Scholarship*, LEGAL TIMES, July 9, 2007, at 26 (suggesting that law professors "see the Internet as a way to reach more readers in a less ritualized format").

101. For example, the *UCLA Law Review's* recent articles can be freely accessed at <http://www.uclalawreview.org>. And many law reviews, including UCLA's, are creating articles, like this one, that can only be accessed online and will always be free to access. See *UCLA Law Review Discourse*, <http://www.uclalawreview.org/?display=2> (last visited July 22, 2010). The ABA Legal Technology Resource Center has created a website with a listing of over three hundred law journals that place their content on the web for all to access at no additional charge. This site can be found at <http://www.abanet.org/tech/ltrc/lawreviewsearch.html>.

102. Wikipedia may be accessed at <http://www.wikipedia.org>.

Wikipedia began in 2001 and has since grown to include over three million English language articles.¹⁰³ A primary question that courts should be asking about Wikipedia is: How can a court cite and trust information that has been posted by anyone with little editorial control?¹⁰⁴ One of the basic frameworks that has allowed traditional authorities to remain trustworthy has been the checks and balances that the publishing world has incorporated into its editorial process. Content editors routinely verify the information published in their dictionaries, encyclopedias, journal articles, and newspapers. In the new world of online publishing, the same checks and balances are often missing.¹⁰⁵

Wikipedia as an open-source publication can be edited by anyone with access to the internet. By its own admission, Wikipedia advises readers that they should not “be afraid to edit—anyone can edit almost any page, and we encourage you to be bold!”¹⁰⁶ Furthermore, the rapid fluidity of information being posted and changed on Wikipedia means that when courts cite to a Wikipedia article, there is little guarantee that future readers of the opinion will find the exact same article.¹⁰⁷ With few safeguards in place to ensure the accuracy of information on this collaborative online encyclopedia,¹⁰⁸ courts need to use great caution when citing to Wikipedia. Yet, the lack of safeguards has not stopped courts from citing Wikipedia.¹⁰⁹

103. According to Wikipedia, as of July 2010, there were more than 3.3 million articles in English on the website. Wikipedia, http://en.wikipedia.org/wiki/About_Wikipedia (last visited July 22, 2010).

104. This question has been asked and answered by at least one government agency. On August 15, 2006, the patents commissioner of the U.S. Patent & Trademark Office removed Wikipedia from the Office’s accepted sources of information. The commissioner stated that “[t]he problem with Wikipedia is that it’s constantly changing.” Lorraine Woellert, *CITINGS: Kicking Wiki Out of the Patent Office*, BUSINESS WEEK, Sept. 4, 2006, at 12.

105. In an ironic twist, a study completed by the respected scientific journal *Nature* found that Wikipedia performed almost as well as the Encyclopedia Britannica. According to the study, the average science entry in Wikipedia had four inaccuracies compared with three for the Encyclopedia Britannica. Jim Giles, *Internet Encyclopedias Go Head to Head*, 438 NATURE 900, 900–01 (2005).

106. Wikipedia: Introduction, <http://en.wikipedia.org/wiki/Wikipedia:Introduction> (last visited June 28, 2010) (emphasis omitted).

107. Wikipedia does provide a history tab that should allow users to trace back changes made to the article over time. See Diane Murley, *In Defense of Wikipedia*, 100 LAW LIBR. J. 593, 597 (2008).

108. The number of safeguards in place to ensure accuracy is open to interpretation. Some commentators note that Wikipedia does claim to have a review process to correct errors and that adding a new article is limited to registered users (but anyone can become a registered user). See *id.* at 594–95.

109. A December 2009 search for the term “Wikipedia” conducted in the *Federal and State Cases, Combined* database on the LexisNexis online service yielded close to five hundred results.

Courts' use of Wikipedia provides an excellent example of how far internet sources have to go before they gain universal acceptance. While caution still reigns, judges are allowing the use of Wikipedia partly because the information sought would otherwise be unavailable or too costly to uncover. In some instances, the courts are disclaiming the reliability of sources like Wikipedia, while on the other hand are relying on these sources themselves.

An examination of the courts' use of Wikipedia reveals how divided the legal world is on the usefulness of these new, open-authority sources. While some courts are willing to go so far as to practically bestow Wikipedia with judicial notice of the information found therein, others are loathe to trust a source that has little editorial oversight. Whatever the courts' decision on how to treat these newer sources of authority, the current state of affairs lies somewhere between judicial disdain and cautious acceptance of these sources.

1. Disdain for Wikipedia

Courts were initially concerned about attorneys' citation to Wikipedia. In *Badasa v. Mukasey*,¹¹⁰ the Department of Homeland Security offered evidence to show that an applicant for asylum had failed to properly prove her identity, which ultimately led to a denial of her application for asylum. The evidence included information from Wikipedia about the meaning of a document used by the asylum seeker. In reviewing the decision of the immigration judge (IJ), the Board of Immigration Appeals (BIA) ruled that the IJ's decision was not clearly erroneous and thus upheld the denial of the application for asylum.

In reviewing the IJ's use of Wikipedia in its decision, the BIA was troubled¹¹¹ but ultimately upheld the decision and found that the decision "was supported by enough evidence to find no clear error."¹¹² The Eighth Circuit Court of Appeals was far more troubled by the IJ's and BIA's reliance on Wikipedia. The court reviewed Wikipedia's notoriously open

110. 540 F.3d 909 (8th Cir. 2008).

111. "The BIA stated that it did 'not condone or encourage the use of resources such as Wikipedia.com in reaching pivotal decisions in immigration proceedings,' and commented that the IJ's decision 'may have appeared more solid had Wikipedia.com not been referenced.'" *Id.* at 910.

112. *Id.*

system for adding and editing entries and was clearly uncomfortable with Wikipedia as a source of evidence in legal proceedings. The court spent close to a third of a very short opinion detailing the unreliable nature of Wikipedia¹¹³ and in the end remanded the issue because the BIA did not adequately explain why the asylum seeker had failed to establish her identity.

Why did the court spend so much of its opinion on the inadequacy of Wikipedia as a source? One possible answer is that as a growing number of litigants turn to sources like Wikipedia, the courts are becoming increasingly wary of relying on these unproved sources of information. Courts may be increasingly frustrated by the apparent lack of research by attorneys during case preparation.¹¹⁴

113. In the relevant portion of the court's decision, it stated:

We conclude that the case must be remanded for further proceedings, because the BIA failed adequately to explain its conclusion that Badasa did not establish her identity. See *SEC v. Chenery Corp.*, 318 U.S. 80, 94–95, 63 S. Ct. 454, 87 L. Ed. 626 (1943). The BIA did not adopt the entirety of the IJ's reasoning for rejecting Badasa's claim. Rather, the BIA acknowledged that it was improper for the IJ to consider information from Wikipedia in evaluating Badasa's submission on remand, and the government does not dispute that conclusion here. Wikipedia describes itself as "the free encyclopedia that anyone can edit," urges readers to "[f]ind something that can be improved, whether content, grammar or formatting, and make it better," and assures them that "[y]ou can't break Wikipedia," because "[a]nything can be fixed or improved later." Wikipedia: Introduction, <http://en.wikipedia.org/wiki/Wikipedia:Introduction> (last visited Aug. 7, 2008). Wikipedia's own "overview" explains that "many articles start out by giving one—perhaps not particularly evenhanded—view of the subject, and it is after a long process of discussion, debate, and argument that they gradually take on a consensus form." Wikipedia: Researching With Wikipedia, http://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia (last visited Aug. 7, 2008). Other articles, the site acknowledges, "may become caught up in a heavily unbalanced viewpoint and can take some time—months perhaps—to regain a better-balanced consensus." *Id.* As a consequence, Wikipedia observes, the website's "radical openness means that any given article may be, at any given moment, in a bad state: for example, it could be in the middle of a large edit or it could have been recently vandalized." *Id.* The BIA presumably was concerned that Wikipedia is not a sufficiently reliable source on which to rest the determination that an alien alleging a risk of future persecution is not entitled to asylum. See also *Campbell v. Sec'y of Health and Human Servs.*, 69 Fed. Cl. 775, 781 (Fed. Cl. 2006) (observing that a review of the Wikipedia website "reveals a pervasive and, for our purposes, disturbing set of disclaimers"); R. Jason Richards, *Courting Wikipedia*, 44 *Trial* 62 (Apr. 2008) ("Since when did a Web site that any Internet surfer can edit become an authoritative source by which law students could write passing papers, experts could provide credible testimony, lawyers could craft legal arguments, and judges could issue precedents?"). *Id.*

114. This frustration can be seen in the court's citation, *id.*, to the article by R. Jason Richards in which the author opines that "[l]awyers, judges, and other legal professionals who rely on Wikipedia as an authoritative source of information do an injustice to the legal system in general and to the parties in particular." R. Jason Richards, *Courting Wikipedia*, *TRIAL*, Apr. 2008, at 62.

2. The Growing Acceptance of Wikipedia

While some judges continue to disapprove of Wikipedia and other online sources, a growing number of judges see these sources in a more positive light. In a direct challenge to traditional sources, a Seventh Circuit judge relied on Wikipedia over established dictionaries in determining the meaning of the phrase “wear and tear.”¹¹⁵ Ultimately, the case was decided based on the judge choosing the Wikipedia definition of “wear and tear” over the definitions found in more well-established dictionaries.¹¹⁶ In response to the judge’s use of Wikipedia, one leading commentator wrote:

If the judges wanted to argue based on their experience, based on logic, or based on contrary lexicographic authorities—including, for instance, the use of the phrase in other sources—that’s fine, and they did that in some measure. But they cited Wikipedia as the lead authority supporting their conclusion, and as the source for their important and controversial definition; and this strikes me as troubling.¹¹⁷

In another example, a court, in reviewing expert witness testimony, found fault with the attorney who used information from Wikipedia to try to discredit an opposing expert witness.¹¹⁸ The court commented on the reliability of Wikipedia, stating that “[a]lthough we conclude that the information [the attorney] obtained from Wikipedia was not wholly reliable and not persuasive in the instant case, we make no findings regarding the reliability, persuasiveness, or use of Wikipedia in general.”¹¹⁹ There appears to be no reason why the court felt the need to insert this language about Wikipedia. The court may have desired to send a message that Wikipedia is a welcome source in the court, but litigants should be aware that the court may or may not be persuaded by what is found on Wikipedia. This example shows a growing acceptance of the internet as an acceptable source for finding authority to bolster arguments.

Courts are becoming more comfortable with attorneys using these newer sources of authority. More telling as to the acceptability of

115. *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 666 (7th Cir. 2008).

116. *Id.* at 666.

117. THE VOLOKH CONSPIRACY (July 30, 2008, 13:02 PST), <http://volokh.com/posts/1217437325.shtml>.

118. *Gagliardi v. Comm’r of Internal Revenue*, 95 T.C.M. (CCH) 1044 (2008).

119. *Id.* at n.18.

these newer sources is the court's willingness to include them in the legal research lexicon of sources that can be given judicial notice. More and more courts are extending actual or quasi-judicial notice to these newer sources of authority. Once a source has reached this level of acceptability, it is here to stay as legal authority.

D. Judicial Notice and the New Authority

While judges might criticize attorneys for using these new sources of authority, they themselves are beginning to rely on this authority to write their judicial opinions.¹²⁰ In gauging the level of acceptability of these newer sources of authority, one can look to see whether courts are willing to give deference to online information in much the same way they give deference to information found in the *Oxford English Dictionary* without further inquiry.¹²¹ Judicial notice¹²² was routinely accorded to these traditional sources of information. If this same judicial notice or a modified form of judicial notice is now given to online sources, then the shift in authority becomes easier for attorneys because they will no longer have to persuade judges to accept the online sources that they are citing.

The Federal Rules of Evidence allow for judicial notice of certain facts as long as they are "one[s] not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."¹²³ Some courts have been willing to extend judicial notice to information found on the internet, especially if the information comes from government websites.

120. A question arises as to whether courts should even be looking to the internet in formulating their opinions. 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 A.B.A. PROF. LAW. 2 (2005). Courts that look to the internet to find facts outside the record may tie the hands of litigants who never had the opportunity to challenge the findings of often unreliable web sources.

121. For a few examples of the Supreme Court giving deference to the *Oxford English Dictionary*, see *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009); *District of Columbia v. Heller*, 128 S. Ct. 2783, 2828 (2008); *United States v. Santos*, 553 U.S. 507, 511 (2008); *United States v. Williams*, 53 U.S. 285, 308 (2008); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007).

122. Judicial notice is defined as, "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well known and indisputable fact; the court's power to accept such a fact." BLACK'S LAW DICTIONARY 863-64 (8th ed. 2004).

123. FED. R. EVID. 201(b).

As far back as 1999 and 2000,¹²⁴ the Eleventh Circuit took explicit judicial notice of facts found on the Federal Reserve Board's and the United States Naval Observatory's websites.¹²⁵ It should be noted, as discussed above in Part I.C, that both of the websites of which the Court took judicial notice are no longer accessible as of the time of the writing of this Article. This lack of continuity poses a problem for those who wish to find this same information in the future.

A court's blind reliance on these online sources can have a detrimental impact on litigants. In one example, the court relied on a simple statement of fact found on an unverified website to judge the location of the defendant's methamphetamine lab.¹²⁶ No proof was offered as to the validity of the website consulted, nor was the identity of the website even discussed. Thus the statement of the court possibly raised the website to the level of authority that can be given judicial notice as to its accuracy with no further proof offered to the court.

In another example,¹²⁷ the court reviewed the findings of the U.S. Sentencing Commission (Commission), which had adopted a conversion ratio for a drug based on a report from the Drug Enforcement Agency Office of Diversion Control (DEA). According to the Commission, the report was initially found on the website of the Office of National Drug Control Policy (ONDCP). The report was not included in the record of the case, and the court could no longer find the report on the ONDCP website. So the court searched for the report on its own. The court reported that "[a] document that appears to be the report, however, remains available through another publically accessible website. See Gene Haislip, *Methamphetamine Precursor Chemical Control in the 1990's* (1996), <http://www.erowid.org/archive/rhodium/chemistry/dojmeth3.txt>

124. When speaking about the internet, 1999 seems like a long time ago.

125. See *United States v. Bervaldi*, 226 F.3d 1256, 1266 n.9 (11th Cir. 2000) ("According to the charts calculated by the United States Naval Observatory, the sun rose in Miami on March 10, 1998, at 6:35 a.m. See Astronomical Applications Department, U.S. Naval Observatory, *Sun or Moon Rise/Set Table for One Year*, (accessed Aug. 7, 2000) <<http://aa.usno.navy.mil/AA/data/docs/RSONEYEAR.html>>. We take judicial notice of this fact. See Fed. R. Evid. 201."); *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1235 n.12 (11th Cir. 1999) ("We take judicial notice of the Prime Rate on February 14, 1989, the date on which BFC issued its prospectus. This figure was provided by the Federal Reserve Board, and cannot reasonably be disputed. See The Fed. Reserve Bd., Federal Reserve Statistical Release (visited Sept. 8, 1999) <http://www.bog.frb.fed.us/releases/H15/data/d/prime.txt>.").

126. *United States v. Whited*, 473 F.3d 296, 299 (6th Cir. 2007).

127. *United States v. Martin*, 438 F.3d 621 (6th Cir. 2006).

(stating that '[a]ctual yield in clandestine labs is typically in the range of 50 to 75 percent')."¹²⁸

Nowhere in the opinion does the court address the accuracy of the website. Whether the report found on the internet is in fact the same one that was originally used by the Commission remains a mystery. The report was simply taken at face value: The court assumed that the information on the website was the same information upon which the Commission relied to create its guidelines. Thus, once again, it appears that the court took judicial notice that the information located on the website, which specializes in illegal drug information, was accurate.

The federal courts¹²⁹ and state courts¹³⁰ seem to have an easier time extending judicial notice to online information produced by government entities than information found on private websites. Historically this is consistent with how courts usually treat information. Authority from government sources has generally been accorded judicial notice over authority from the private sector. The test for new online sources, such as Wikipedia, will be to gain acceptance so that their accuracy cannot be reasonably questioned.¹³¹

128. *Id.* at 625.

129. See *Wallace v. Fed. Emergency Mgmt. Agency*, No. C 99-1471 VRW, 2001 U.S. Dist. LEXIS 1547, at *5-*6 (N.D. Cal. Jan. 26, 2001) ("Plaintiffs ask the court to take judicial notice of various publications on the FEMA web site. . . . Defendant has not opposed plaintiffs' request for judicial notice and the court finds plaintiffs' request appropriate. Thus, the court takes judicial notice of the announcement cited by plaintiffs in their opposition brief."); *In re Agribiotech Sec. Litig.*, No. CV-S-990144 PMP (LRL), 2000 U.S. Dist. LEXIS 5643, at *4-5 (D. Nev. Mar. 2, 2000) ("Judicial notice of the proffered public SEC filings is also not precluded by the inability of Defendants' computer printers to print some of the more complex numeric tables and graphic charts which make up portions of the documents available from the official SEC website. In this new technological age, official government or company documents may be judicially noticed insofar as they are available via the worldwide web."):

130. See *Harrisburg Sch. Dist. v. Hickok*, 762 A.2d 398, 401 n.1 (Pa. Commw. Ct. 2000) ("The Court takes judicial notice of the legislative history of Senate Bill 652, as set forth on the website of the Pennsylvania Senate. The specific URL of the Bill's history may be found at <http://www.legis.state.pa.us/WU01/LI/BH/1999/0/SB0652.HTM>."); *Nat'l Info. Servs., Inc. v. Gottsegen*, 737 So. 2d 909, 916 n.2 (La. Ct. App. 1999) ("Similarly, the Index on which the interest rate changes are based is a public document of which we may take judicial notice. (FN2) Our research found the Index on the Internet at the website of the Federal Housing Finance Board at http://www.fhfb.gov/idx_hist.htm."); *Lambrecht v. Estate of Kaczmarczyk*, 623 N.W.2d 751, 757 & n.9 (Wis. 2001) ("According to the Old Farmer's Almanac, of which we take judicial notice, on February 8, 1996, sunset was at 5:15 p.m. Central Standard Time. (FN9). See <http://www.almanac.com> (last visited March 15, 2001); Wis. Stat. § 902.01(2)(b) authorizing judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

131. In the New Jersey case *Palisades Collection, L.L.C. v. Graubard*, No. A-1338-07T3, 2009 N.J. Super. Unpub. LEXIS 1025 (N.J. Super. Ct. App. Div. Apr. 17, 2009), the court refused to recognize the trial court's judicial notice of a fact presented from Wikipedia. The court stated that "[t]he trial

Some courts simply refuse to extend judicial notice to items found on sources like Wikipedia. In one case, the attorney asked the court to take judicial notice of information found on Wikipedia.¹³² The court specifically declined “to take judicial notice of [a] Wikipedia entry.”¹³³ The court cited a *Wall Street Journal* article that pointed out that Wikipedia’s greatest strength and greatest weakness was that anyone could edit a Wikipedia article anonymously.¹³⁴ The court italicized the words “its greatest weakness”¹³⁵ to emphasize its disapproval.

One commentator views the court’s rejection of the Wikipedia entry as reasonable. The commentator also posits that Wikipedia should not always be dismissed:

For certain uncontroversial matters (such as that the capital of Armenia is sometimes spelled Erevan), citing Wikipedia is probably fine, given that the time of judges, staff attorneys, and law clerks is valuable and best not spent on tracking down The Perfect Source. But when the matter is subject to reasonable dispute, there should either be a hearing—as with other facts about the details of a case—or a more elaborate discussion (as with so-called legislative facts that a court uses to determine the meaning of statutory language, develop various common-law rules, and the like).¹³⁶

court’s acceptance of Wikipedia was . . . contrary to the principle that judicial notice must be based upon ‘sources whose accuracy cannot be reasonably questioned.’ N.J.R.E. 201(b)(3). We come to this conclusion after reviewing Wikipedia’s own self-assessment.” *Id.* at *7. The court went on to explain how anyone can add and/or edit an entry in Wikipedia, including a party in litigation who can then offer it to the court in support of any given position. Accordingly, “[s]uch a malleable source of information is inherently unreliable, and clearly not one whose accuracy cannot be reasonably questioned.” *Id.*

This very issue led one court to reject Wikipedia for anything other than proving general background information. The court’s reasoning centered around “the ease with which wikipedia entries can be altered and . . . that others have edited entries for improper reasons.” *Randy Disselkeon Properties, LLC v. Charter Twp. of Cascade*, No. 1:06-cv-141, 2008 WL 114775, at *4, n.12 (W.D. Mich. Jan. 9, 2008).

132. *Flores v. Texas*, No. 14-06-00813-CR, 2008 Tex. App. LEXIS 8010 (Tex. App. Oct. 23, 2008).

133. *Id.* at *5 n.3; *see also* *Steele v. McMahon*, No. CIV S-05-1874 DAD P., 2007 WL 2758026, at *8 n.5 (E.D. Cal. Sept. 21, 2007) (“Plaintiff requests that the court take judicial notice of ‘In the Shadows of the War On Terror’ and the Wikipedia article. Defendant objects on the grounds that both are irrelevant, not the appropriate subject for judicial notice, hearsay and not authenticated. (Def.’s Dec. 21, 2006 Objs. at 1–3.) The objection is well-taken. Neither the report nor the article meet the requirements of Fed. Rule Evid. 201. . . . Accordingly, the court will deny plaintiff’s request.”)

134. *Flores*, 2008 Tex. App. LEXIS 8010, at *5 n.3 (quoting from James Glerick, *Wikipedians Leave Cyberspace, Meet in Egypt*, WALL ST. J., Aug. 8, 2008, at W1).

135. *Id.*

136. THE VOLOKH CONSPIRACY (Nov. 13, 2008, 11:18 PST), <http://www.volokh.com/posts/1226596691.shtml>.

Another commentator noted that while citing Wikipedia might be valid for incidental items, it should not be used to prove matters that are best left for experts.¹³⁷

Allowing a source like Wikipedia to be used in proving a noncontroversial fact would have the same effect as using a standard encyclopedia to prove noncontroversial facts, such as basic facts about the Liberian Civil War,¹³⁸ or using an atlas to show the distance between two cities.¹³⁹ Holding private websites up to a high standard when they are used to prove controversial facts is no different than holding a traditional source up to higher scrutiny in the same circumstance. The one difference is that allowing noncontroversial facts to be proved with online sources will save litigants time and money, which helps level the playing field among litigants.

An excellent example of how courts can examine online sources to determine their credibility is provided by a Nevada Supreme Court decision.¹⁴⁰ This case explains that an internet source failed to meet an evidentiary burden because of the lack of editorial control over the source's content. In this case, the court examined the Department of Motor Vehicles' (DMV) denial of an application to renew a personalized license plate. The court began by explaining that when reviewing an

137. Richards, *supra* note 114, at 63 (“[T]here is an important difference between courts taking judicial notice of a Wikipedia entry to define phrases like ‘jungle juice’ and a court accepting it as scientifically reliable evidence on which an expert may base an opinion.”).

138. See *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 278 n.2 (S.D.N.Y. 1999) (“Unless otherwise indicated, the facts in this section are drawn from the materials submitted by the parties as well as the following: Joseph Tellewyan, *The Liberian Civil War* (visited Mar. 29, 1999) <http://pages.prodigy.net/jtell/Civilwar.html>; *Liberia*, Encarta Multimedia Encyclopedia (Microsoft 1997); *CNN News Articles: Elections Archive Articles* (posted Feb. 25, 1997 to Jul. 22, 1997) <http://www.geocities.com/Athens/Delphi/9352/Elections.html>; *CNN News Reports: Mid War Articles* (posted Apr. 8, 1996 to Aug. 18, 1996) <http://www.geocities.com/Athens/Delphi/9352.midwar.htm>. Pursuant to Fed.R.Evid. 201(b)(1), I am permitted to take judicial notice of adjudicative facts ‘generally known’ within the territorial jurisdiction of this Court, including facts pertaining to matters of history and politics. See Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 50, at 263–64 (2d ed.1994). Accordingly, I take judicial notice of the facts contained in these sources for purposes of resolution of this dispute.”).

139. See *In re Extradition of Gonzalez*, 52 F. Supp. 2d 725, 731 n.12 (W.D. La. 1999) (“Mileage computed by MapQuest (<http://www.mapquest.com>) as shortest driving distance between Abbeville, La. and Puebla, Mexico. Judicial notice can be taken of facts ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’ Rule 201(b)(2) Fed.R.Ev. While it is possible MapQuest’s exact computation might be questioned, the government concedes that there is a great distance between Abbeville and Puebla, and the mileage is not seriously disputed.”).

140. *Order of Affirmance*, Nev. Dep’t of Motor Vehicles v. Junge, No. 49350 (Nev. July 7, 2009) [hereinafter *Order of Affirmance*], available at <http://www.aclunv.org/files/DMV%20Order%20of%20Affirmance.pdf>.

administrative hearing officer's decision, the main focus is on whether the officer's determination is based on substantial evidence.¹⁴¹ The court explained that in Nevada, "[s]ubstantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'"¹⁴²

The court found that the DMV's denial was based solely on the use of a website called the Urban Dictionary.¹⁴³ It turned out that the DMV based all of its decisions as to the appropriateness of a personalized plate by referring to the Urban Dictionary.¹⁴⁴ The reasons articulated by the court are a useful example of the kind of analysis that is necessary when a court is dealing with online sources with questionable reliability. According to the court, the Urban Dictionary definitions are contributed anonymously, the definitions may be personal to the contributor, and the definitions may not be generally accepted.¹⁴⁵ The Urban Dictionary website readily admits that it cannot control all content posted, and it does not guarantee the accuracy, integrity, or quality of the content.¹⁴⁶ Based on these observations, the court ruled that "a reasonable mind would not accept the Urban Dictionary entries alone as adequate to support a conclusion."¹⁴⁷

The wisdom of the Nevada Supreme Court in handling online sources has been echoed by other judicial bodies. The Judicial Conference of the United States, recognizing the growing use of online authorities by judges and attorneys, addressed the issue of the reliability of websites in a set of 2009 guidelines.¹⁴⁸ The Guidelines address two specific issues: 1) whether to cite to an internet source in a judicial opinion, and 2) whether to capture and preserve an internet resource used.¹⁴⁹

141. *Id.* at 2.

142. *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

143. The Urban Dictionary is available at <http://www.urbandictionary.com>. According to the Terms of Service for the website, Term 6 specifically disclaims any warranty that the site is free of errors: "The Website is provided 'as is' and 'as available'. You assume complete responsibility and risk for your use of the Website. The Company does not warrant that (i) the Website will meet your requirements, (ii) you will be satisfied with the Website, (iii) you will at all times be able to use the Website, (iv) the Website will be without errors, (v) or that any errors will be corrected." Urban Dictionary, Terms of Service, <http://www.urbandictionary.com/tos.php> (last visited June 28, 2010).

144. Order of Affirmance, *supra* note 140, at 3.

145. *Id.* at 3-4.

146. *Id.*

147. *Id.* at 4.

148. See generally *Guidelines*, *supra* note 43.

149. See *supra* Part I.C.

The Judicial Conference guidelines on whether to cite to an internet source cautions judges to “apply the same evaluation criteria to the Internet sources they cite in their opinions as they would apply to more traditional media.”¹⁵⁰ When evaluating an internet source, the judge should look to the accuracy, scope of coverage, objectivity, timeliness, authority, and verifiability of the information.¹⁵¹ Regardless of whether judges are applying these standards to websites, they are increasingly using online sources, which can affect the outcome of cases.

As online sources of authority continue to emerge and supplant traditional sources, these sources still need to pass muster under the evidentiary rules. Practitioners will not (and should not) exclusively rely on anonymously edited content with no claim of responsibility or accuracy. For these newer sources to claim the same legitimacy as traditional sources, they need to utilize many of the same editorial safeguards that traditional sources use. For example, a source like Wikipedia should be treated like any other general information source. If a lawyer or judge is to rely on Wikipedia to prove the matter asserted, then they should be prepared to do additional research to uncover sources that support their conclusions.

III. AFTER DEATH, WHERE TO NOW?

The shift to newer online sources has led to greater availability of information, but there are serious challenges to the preservation, reliability, and authenticity of online sources. While these challenges can eventually be met, one issue that needs to be addressed is whether this shift to online sources will change the way the legal profession uses information. Is this change a benefit or a detriment for those using the information and for the legal system as a whole?

A whole body of literature has tracked how research habits have changed with this shift to online sources and how computers have created a generation of researchers who are better at searching for facts than they are at finding legal concepts.¹⁵² Studies have looked at how attorneys

150. *Guidelines*, *supra* note 43, at 1.

151. *See id.* at 3–4.

152. *See* Robert C. Berring, *Full-Text Databases and Legal Research: Backing Into the Future*, 1 HIGH TECH. L.J. 27 (1986); Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the*

have moved away from the venerable West Digest system,¹⁵³ how lawyers and judges have relied more on nonlegal sources,¹⁵⁴ and how this shift to online sources has led to a new way of analyzing the law.¹⁵⁵

Yet, we do not need any studies to prove that the online world has leveled the field so that all practitioners start, by and large, with the same access to online information. While this leveling effect waters down the possible strength of the authority, at least all sides will be relying on the same authority. Furthermore, the authority is created in a more democratic fashion. In the internet age, anyone can post material online; thus, everyone can become a creator of legal commentary.

A. The Democratic Effect of the Internet

The internet makes it easier for individuals to access information. Whereas in the past, litigants had to rely on authority that could only be found in a law library or through expensive databases, the playing field is leveled when information can be created, shared, and retrieved for free online.¹⁵⁶ As the Supreme Court noted, “[t]he Web is thus comparable . . . to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.”¹⁵⁷ A good example of the democratic effect of the internet is the growing use of unpublished judicial opinions. While rules of court

Computer Age, 88 LAW LIBR. J. 338 (1996); Daniel P. Dabney, *The Curse of Thamus: An Analysis of Full-Text Legal Document Retrieval*, 78 LAW LIBR. J. 5 (1986); F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563 (2002); Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85 (1998).

153. The death of the digest was prophesied as early as 1990 by Erwin C. Surrency in his book *A History of American Law Publishing*. “The digest in the form it is now printed may become obsolete, much to the regret of the legal bibliophile.” ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 127 (1990). See generally Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?*, 97 LAW LIBR. J. 661 (2005).

154. See John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427 (2002); Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegation of Law*, 29 J. LEGAL STUD. 495 (2000).

155. See Berring, *supra* note 8.

156. The newest entrant into the field of providing free online legal information is Google Scholar, <http://scholar.google.com> (last visited June 28, 2010). As of November 2009, researchers can search on Google Scholar for opinions from state appellate and supreme court cases since 1950; U.S. federal district, appellate, tax, and bankruptcy courts since 1923; and U.S. Supreme Court cases since 1791. With the power of Google, there is little doubt that Google Scholar’s search platform will soon become a major force in the legal research market.

157. *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

once limited the use of unpublished opinions, now these same opinions are available for all to see at the click of a mouse. In response to this reality, the rules were changed to allow for their use.¹⁵⁸ Internet sources are gaining prominence as litigants and judges gain more access to these sources of information, making the entire research process far more democratic.¹⁵⁹ The playing field levels considerably once parties have equal access to traditional sources as well as the new sources of authority that appear to be guiding the courts in their decisionmaking process.

Moreover, the availability of the internet may help courts make quicker decisions. An example of the time-saving function of the internet is exemplified in some recent trademark dispute cases. When determining the meaning of words or their usage, an online search allows a court to see how users around the world view a particular word, term, or trademark. In one case, the judge did both a Google and Yahoo search for the word “johnny’s” (finding over 200,000 hits) as a way to show that there is lack of confusion over the use of the word.¹⁶⁰ In another case, the court conducted a Google search of the plaintiff’s trademark and determined that based on the amount of results (over 500,000 hits), there was an issue of material fact as to the distinctiveness of the trademark.¹⁶¹ What is interesting about this case is that the judge used a blend of new and old authority to come to his conclusion. He used both print dictionaries and the venerable *Oxford English Dictionary* alongside a Google search to find facts for his decision.¹⁶² These cases show that the use of Google in trademark cases “is a remarkable and more

158. See FED. R. APP. P. 32.1. See generally Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705 (2006); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Court of Appeals*, 3 J. PRAC. & PROCESS 199 (2001); Patrick J. Schlitz, *Much Ado About Little: Explaining the Sturm und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005); J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419 (2005).

159. “As a consequence of all of this, it is both demonstrable and uncontroversial that nonlegal materials are now far more available to lawyers and judges, at virtually no increase in cost (defined expansively, to include time and effort as well as monetary price) than was the case even ten years ago.” Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1107–08 (1997).

160. *Johnny’s Fine Foods, Inc. v. Johnny’s Inc.*, 286 F. Supp. 2d 876, 890 (M.D. Tenn. 2003). There are numerous other cases where Google or Yahoo was used to determine common usage and meaning of words. See, e.g., *Fairbanks Capital Corp. v. Kenney*, 303 F. Supp. 2d 583 (D. Md. 2003).

161. *Hi-Tech Pharamcal Co. v. Hi-Tech Pharms., Inc.*, No. 05-CV-2674 (ARR) (SMG), 2007 WL 1988737 (S.D.N.Y. July 5, 2007).

162. *Id.* at *8.

objective tool to find out how people use words . . . That opens up a world of wonderful possibilities.”¹⁶³

While the availability of these new authorities has definite advantages, some commentators bemoan that in the internet age, facts take precedent over legal analysis. Katrina Fischer Kuh explains:

Scholars have also posited that the shift makes it difficult to research abstract concepts and thus encourages an emphasis on case facts at the expense of principles, leads to “rapid rule extraction” and shallow legal reasoning and analysis, causes judicial opinions to become less cryptic and stylized, and results in greater citation to non-law sources in judicial decisions. Finally, some have argued that the shift replaces existing institutional sources of cognitive legal authority like the National Reporter System and *Shepard’s* citators with new, market-selected sources of cognitive legal authority (possibly including search systems themselves), imposes higher standards of conduct that require online searching to assess the adequacy of a lawyer’s research, and causes lawyers to specialize.¹⁶⁴

Despite this concern, electronic research will inevitably lead to greater diversity of results and possibly arguments. This diversity of material would give the decisionmaker a greater spectrum of knowledge from which to make her decision. According to Kuh, this enlarged spectrum could also be seen as a negative because the availability of this information may cause attorneys to be “more likely to advance marginal cases, theories, and arguments.”¹⁶⁵

This downside might be true, but judges may also gain greater understanding of an issue by hearing a greater variety of arguments. Ethan Katsh finds that “[a]s a greater variety of information becomes available to us without our going anywhere for it, new opportunities and ways to use information arise that were not previously available Even more important, pressure for social and institutional change builds.”¹⁶⁶

Whatever the fallout from the increased use of online sources, one thing is certain: More information is now flowing to judges, which requires them to be more open to varied types of information rather than

163. Declan McCullagh, *Search Engines Take the Stand*, CNETNEWS.COM, May 13, 2004, http://news.cnet.com/2100-1032_3-5211658.html (internal quotations omitted).

164. Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J.L. & TECH. 223, 237–38 (2008).

165. *Id.* at 261.

166. M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 54 (1995).

just using information from a limited group of publishers. The normally slow-changing judicial process is going to have to continue to adapt to these new authorities.

CONCLUSION

No matter what the downsides of the new authority are, there is no question that these new ways of publishing and creating authority are here to stay. However, those involved in the judicial system should not stand by and allow this change to occur without establishing similar checks and balances for online sources that have worked for printed secondary sources in the past.

Indeed, federal and state governments need to ensure that online primary authorities that governments create are preserved for future accessibility. Specifically, governments need to make sure their sources are official and authenticated so practitioners can use online sources without hesitation. Even with these safeguards, judges should still use their wisdom in choosing online sources by asking the same questions about an online source's credibility that they would ask of traditional sources.

This Article argues that the new online authorities have leveled the playing field and changed the paradigm of legal research. Regardless of economic disparity between litigants, everyone can access online sources, creating a more democratic approach to authority because now everyone can create legal commentary. As a result, greater diversity of information can make its way into a judge's hands.

The death of twentieth-century authority was by no means a radical death, but rather a logical progression in how society looks at authority to shape and regulate our legal interactions. Many positive effects have come out of the death of the old legal authority and the birth of the new. Although caution is needed before rushing head first into using the internet for all legal research, the internet has created an open research platform that is important for a judicial system to function smoothly.