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Assessing the Changing Nature of Authority in the Web Age: 
The Citation Practices of Minnesota Supreme Court

Rebecca Sherman

Submitted to
Professor Penny A. Hazelton

May 13, 2013
I. INTRODUCTION

It has been twenty years since researchers gave up the right to patent the World Wide Web and made the source code publicly available.¹ Since entering the public domain, the web has revolutionized the way people get information. Although electronic databases such as Westlaw and Lexis have been around since the 70s, they have been transformed to keep pace with developments on the web. Google searching has become so popular that electronic databases are now being redesigned to emulate Google.² Consider the Google-like search boxes in WestlawNext and Lexis Advance. As a result of the web and increasingly sophisticated databases, attorneys today no longer need to sift through heaps of books at the library. They have virtual access to information anytime and anywhere.

Law is a profession that is highly dependent on information. The medium through which information is conveyed undoubtedly has effects on the way the law is understood. Where legal information once existed in a self-contained domain, today it can be found online amidst a universe of information.³ This change of access has raised some concerns. Professor Ellie Margolis suggests that, without a print-based frame of reference, distinctions between legal and nonlegal information are becoming blurry and changing our common understanding of authority.⁴ In 2004, for example, the New York Times reported

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³ F. Allan Hanson, From Key Numbers to Keywords: How Automation Has Transformed the Law, 94 LAW LIBR. J. 563, 572 (2002) (“Another way that legal information—its management and transmission—reflects and contributes to the notion of ‘the law’ as a distinct domain is in legal education. Traditionally, law schools tended to keep aloof from other schools in the university. Law schools usually have their own buildings. The law library is separate from other university libraries and contains almost exclusively legal materials. The segregation of students has been nearly total. . . . In my own institution at least, law courses are listed in a separate timetable and the law school even follows a different academic calendar from the rest of the university.”).
that more than 100 judicial opinions cited to Wikipedia. Will this be a new source of legal authority? “The shift from print to electronic information technologies provides the law with a new environment, one that is less fixed, less structured, less stable and, consequently, more versatile and volatile.” As the legal community becomes increasingly reliant on the Internet for research, we will likely see a greater numbers of citations to a broader array of sources.

This paper will explore the concept of “authority” in legal analyses by examining citation patterns of the Minnesota Supreme Court from 1992 and 2012. It will suggest that expansion of the web and electronic resources have made access to nonlegal information easier and that in turn, nonlegal materials are increasingly cited as authority in legal opinions. This Paper will proceed in five parts. Part II discusses the nature of primary, secondary, and nonlegal authority and examines concerns that technology may be blurring distinctions between them. Part III describes the methodology used in the citation study and Part IV summarizes the results. The use of nonlegal and interdisciplinary sources as authority will be addressed in Part V. Lastly, Part VI concludes that nonlegal information can be valuable sources of authority. Rather than remaining tied to convention, future lawyers should be taught nonlegal research skills and the legal community should adopt guidelines about appropriate use of nonlegal authority.

II. PRIMARY AUTHORITY, SECONDARY AUTHORITY, AND NONLEGAL AUTHORITY?

“[T]he law’s practice of using and announcing its authorities—its citation practice—is part and parcel of law’s character. . . . Contemporary controversies about citation practice turn out, therefore, to be controversies about authority, and as a result they are controversies about the nature of law itself.”

Law is an authoritative practice. “Anything which a court says or cites in its opinion, as leading to its decision in a given case, is authority of a kind, but the weight to be given it varies.” To better understand contemporary notions of authority, one can look to the citation practices of a court; and to fully appreciate how traditional authority is changing, it is important recognize our collective understanding of the meaning of authority.

A fundamental principle of authority is that its force derives from its source rather than its content. A judicial opinion issued by a state supreme court, for example, is binding on all lower courts in that state, not because of the strength of legal reasoning but because of its origin. Legal authority is often classified as primary or secondary authority. Primary materials can be mandatory or persuasive whereas secondary materials are only ever persuasive. Judges are expected to comply with mandatory authority regardless of their own assessment or the outcome that it may have on a particular case. In contrast, judges have discretion to follow or cite to persuasive authority. Thus, a court may rely on persuasive authority but is under no obligation to do so.

Occasionally, opinions reference nonlegal materials, which do not fall within the traditional framework of primary and secondary authority. Nonlegal sources are being cited with greater frequency yet there are no clearly defined boundaries on how or when they should be used.

A. Traditional Authority

1. Primary Authority

The United States federal government and fifty autonomous state governments have legislative, executive, and judicial branches that, in essence, make law. The authoritative statements created by these governmental bodies are considered primary authority and include court opinions (case law), constitutions, legislation, rules of court, and the regulation and opinions of administrative agencies. Where a source of primary authority applies to a case, it is considered binding or mandatory, and the decisionmaker must follow it.

Constitutions are bodies of principles by which a state or nation governs itself. They give power to legislative bodies to enact statutes. A legislature can, in turn, grant power to administrative agencies to create rules and regulations. Courts are ultimately responsible for interpreting these sources of law and applying them to different fact patterns. Precedent requires that a court’s

9 Schauer, supra note 7, at 1935.
10 Margolis, Authority Without Borders, supra note 4, at 914.
11 Schauer, supra note 7, at 1937.
12 Id.
13 Id.
14 Id.
17 BARKAN, supra note 14, at 7.
18 Id. at 9.
19 Id. at 7.
interpretation of law be applied to subsequent cases.\textsuperscript{20} Judicial precedent is a court decision that “furnishes a basis for determining later cases involving similar facts or issues.”\textsuperscript{21} Under the doctrine of \textit{stare decisis}, courts must adhere to applicable precedent. This means that when a point of law has been decided, it will no longer be considered by the same court, or by those that are bound to follow it.\textsuperscript{22} Lower courts follow decisions of higher courts in the same jurisdiction and courts follow their own prior decisions unless there is some compelling reason not to do so. The doctrine of precedent encourages predictability, efficiency, and fairness in that similar cases will reach similar results.\textsuperscript{23}

2. Secondary Authority

Secondary authority has not always been viewed as authoritative. In the early 1900s, secondary sources were negatively perceived as shortcuts to the law and were deemed to lack the integrity of primary authority.\textsuperscript{24} As prominent figures in the legal community voiced support for secondary authority, however, it eventually began creeping into judicial opinions.\textsuperscript{25} Between 1900 and 1978, citations to secondary authority by the United States Supreme Court rose by a whopping 1,635% per case.\textsuperscript{26}

Secondary authority is generally used to interpret, explain, or develop primary authority.\textsuperscript{27} It includes legal periodicals, treatises, legal dictionaries, legal encyclopedias, legislative histories, and restatements, among others. Judges might turn to secondary sources when confronted with ambiguous or emerging areas in the law or when they need more context.\textsuperscript{28}

B. Nonlegal Authority

“\textit{[N]}onlegal authority is information that is not explicitly \textquote{about the law} and not directed at a legal audience but that is nonetheless used as authority in support of legal analysis.”\textsuperscript{29} While citations to cases, statutes, and regulations remain the bread and butter of judicial opinions, there is concern that the

\textsuperscript{20} \textit{Id.} at 8.
\textsuperscript{21} \textit{BLACK'S LAW DICTIONARY} (9th ed. 2009).
\textsuperscript{22} \textit{Id.} (citing \textit{WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS} 321 (3d ed. 1914)).
\textsuperscript{23} \textit{BARKAN, supra} note 14, at 6.
\textsuperscript{24} Joseph E. Brooks, \textit{Jurisprudence: The "New Haven School" and the Emergence of Secondary Authority-Is Number Two Trying Harder?}, 41 FLA. L. REV. 1031, 1042 (1989).
\textsuperscript{25} \textit{Id.} at 1043.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{BARKAN, supra} note 14, at 2.
\textsuperscript{28} Friedman et al., \textit{supra} note 16, at 793.
\textsuperscript{29} Ellie Margolis, \textit{Authority Without Borders, supra} note 4, at 919.
distinctions between traditional and nonlegal sources are becoming less apparent as nonlegal sources are cited with greater frequency.\textsuperscript{30} According to Lawrence Friedman, this trend “may be nothing more than a stylistic shift or it may be a real movement in the direction of more substantive rationality.”\textsuperscript{31}

Because judicial citations reflect what judges view as legitimate and authoritative, a rise in citations to nonlegal sources has raised concerns about judicial reasoning and about the world of legal information as a whole.\textsuperscript{32} Frederick Schauer and Virginia Wise posit that traditional canons of legal information are beginning to wane as nonlegal sources are increasingly cited as acceptable authority.\textsuperscript{33} They refer to this theory as the “delegalization” of law.\textsuperscript{34}

There is no single cause for the increase in nonlegal citations. Lawrence Friedman suggests that multiple factors such as changes in judicial workload, greater reliance on law clerks or librarians, and substantive claims of the parties could influence citation practices.\textsuperscript{35} Scholars suggest that competition and conglomeration in the publishing industry\textsuperscript{36} and the emergence of online resources have attributed to this development.\textsuperscript{37}

\section*{III. METHODOLOGY}

This study examines the citation practices of the Minnesota Supreme Court. Minnesota was chosen because there have been few recent studies on state court citation practices and because the court has traditionally “maintain[ed] a centrist, slightly populist-progressiv[e] approach to government . . .”\textsuperscript{38} “Minnesotans have traditionally prided themselves on being progressive, but

\begin{thebibliography}
\item \textsuperscript{30} Id. at 911.
\item \textsuperscript{32} John Hasko, \textit{Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions}, 94 LAW LIBR. J. 427, 457 (2002).
\item \textsuperscript{33} Frederick Schauer & Virginia Wise, \textit{Nonlegal Information and the Delegalization of Law}, 29 J. LEGAL STUD. 495, 495 (2000).
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Lawrence M. Friedman et al., supra note 16, at 794-95.
\item \textsuperscript{36} Robert C. Berring, \textit{Legal Information and The Search for Cognitive Authority}, 88 CAL. L. REV. 1673, 1677 (2000).
\item \textsuperscript{37} Schauer & Wise, supra note 33, at 1108; Michael Whiteman, \textit{The Death of Twentieth-Century Authority}, 58 UCLA L. REV. DISCOURSE 27, 30 (2010).
\end{thebibliography}
practical and predictable”39 as well. While the Minnesota Supreme Court may not be the first to start citation trends, it would not be the last to follow them either. Because the court is neither on the bleeding edge nor traditional, it offers a telling look at how citation patterns in judicial opinions have changed over the last 20 years. This study looked at opinions published during the years 1992 and 2012. These years are significant because 1992 predates access to the World Wide Web, which became publicly available in 199340; and 2012 provides a current assessment of the Court’s citation practices.

I developed the methodology for this study by examining a body of existing citation studies.41 This study analyzes citations to primary and secondary

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40 Goldstein, supra note 1.
sources and to non-legal sources. For the purposes of this study, primary sources include judicial opinions and administrative decisions. The study counts majority, concurring, and dissenting opinions separately. Several types of opinions were not reviewed for the purposes of this study including unpublished opinions, per curiam opinions, bench memos, opinions shorter than one page in length, and opinions of original actions such as extraordinary writs and governance of the bar. Citations to constitutions, statutes, and regulations were not included in the study as they are more often the topic of dispute rather than the authority cited to resolve a case. As one scholar noted, “If a statute is relevant to the case, the opinion writer has little choice but to cite it.”

Secondary legal sources include treatises, legislative history, legal encyclopedias, legal dictionaries, legal periodicals, American Law Reports, Restatements, model codes, sentencing guidelines, and miscellaneous legal resources. Secondary “nonlegal authority is information that is not explicitly ‘about the law’ and not directed at a legal audience but that is nonetheless used as authority in support of legal analysis.” It includes such things as general interest newspapers, magazines, and web sites as well as academic and nonacademic materials. In the relatively few cases where it was unclear about whether a title should be categorized as legal or nonlegal, the study adopted a strategy employed by John Hasko using the Library of Congress Classification scheme. For close calls, I searched the University of Washington’s Gallagher Law Library catalog. Those that fell within Class K or any of its subclasses were treated as legal material. For example, the title *Strengthening Forensic Science in the United States* is somewhat law-related but it falls under Class H. Therefore it was counted as nonlegal material.

Using these guidelines, I manually examined 88 Minnesota Supreme Court cases from 2012 and 100 Minnesota Supreme Court cases from 1992. I
also used Westlaw’s Table of Authorities to verify citations to cases cited in each opinion. I noted the nature of the underlying dispute, the occurrence of concurring and dissenting opinions, and the authorities cited in each opinion. A source cited multiple times in the same opinion by the same Justice was counted only once, the first time that it appeared in the opinion, concurrence, or dissent. Citations appearing in footnotes and string citations were also counted. Case citations referring to the procedural history of an opinion were not counted because they are not cited for authoritative purposes.

Due to the relatively small scope of this study, a number of topics are not addressed. The study does not count references to sources that are not explicitly cited in an opinion. Thus, the extent to which the Court relies on certain types of authority may be greater than the data suggests. Further, the study does not include citations to various types of primary authority; therefore it is impossible to determine the citation frequency of a particular source in comparison with the overall number of citations. While the study is subject to human error, about 25% of the cases were reread to test for accuracy in the citations coding. Although the representative sample of cases studied was relatively small, there were perceivable changes in citation patterns.

IV. RESULTS

Table 1 pictured above shows the number and types of opinions that were analyzed for this study. The Minnesota Supreme Court wrote 331 opinions in 1992 and 155 opinions in 2012. Unpublished opinions, per curiam opinions, opinions shorter than one page in length, and opinions of original actions were excluded from this study. This left over 200 remaining opinions from 1992 and only 88 from 2012. Data in this study is derived from majority, dissenting and concurring opinions. Partial concurrences and dissents are counted as both

49 John Hasko, supra note 32, at 431.
concurring and dissenting opinions. Due to time limitations, I examined only the last 100 published decisions from 1992. This included 20 dissenting and 6 concurring opinions. I reviewed the 88 opinions from 2012, which included 37 dissents and 15 concurrences. One of the most notable changes is the increase in the number of dissenting opinions, nearly doubling in the last twenty years. Roughly 20% of cases examined from 1992 include dissenting opinions, compared to nearly 42% of the cases examined in 2012. Former Justice Esther Tomljanovich had the greatest number of dissenting opinions in 1992, with 6 dissents. Justice Alan Page surpassed that number in 2012 with 11 dissents. Although this study is a mere representative sample of published cases, it suggests that dissenting opinions of the Minnesota Supreme Court have more than doubled over the last twenty years.

The rise in dissenting opinions supports findings of previous studies. Where dissenting opinions were once criticized for undercutting predictability and legitimacy in courts, today justices appear more willing to dissent. One citation study looked at citation practices of 16 State Supreme Courts between 1870 and 1970 and found that the number of dissenting opinions gradually increased from 6.4% in 1900-1910 to 12.8% in 1960-1970. The study found that cases deemed important had a higher dissent rate. Since most states now have intermediary appellate courts and have discretion to select the most important cases, it is not surprising that the number of dissenting opinions is increasing.

<table>
<thead>
<tr>
<th>1992 Authors of Concurring &amp; Dissenting Opinions</th>
<th>2012 Authors of Concurring &amp; Dissenting Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justices</td>
<td>Justices</td>
</tr>
<tr>
<td>Rosalie Wahl</td>
<td>Lorie Skjerven</td>
</tr>
<tr>
<td>John Simonett</td>
<td>Gildea</td>
</tr>
<tr>
<td>M. Jeanne</td>
<td>Alan Page</td>
</tr>
<tr>
<td>Coyne</td>
<td>Barry Anderson</td>
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<tr>
<td>Alexander</td>
<td>Paul Anderson</td>
</tr>
<tr>
<td>Keith</td>
<td>Christopher</td>
</tr>
<tr>
<td>Esther Tomljanovich</td>
<td>Dietzen</td>
</tr>
<tr>
<td>1992 Authors of Concurring &amp; Dissenting Opinions</td>
<td>2012 Authors of Concurring &amp; Dissenting Opinions</td>
</tr>
<tr>
<td>Sandra Gardebring</td>
<td>David Stras</td>
</tr>
<tr>
<td>Lawrence Yetka</td>
<td>Helen Meyer</td>
</tr>
<tr>
<td></td>
<td>Wilhema Wright</td>
</tr>
</tbody>
</table>

50 Friedman et al., supra note 16, at 785-86.
51 Id. at 787.
52 Id. at 787-88.
53 Id. at 788 (discussing a study which found a strong correlation between court discretion in selecting cases and dissenting opinions).
As is evident from Table 2, the Minnesota Supreme Court cites more cases today in its majority opinions than it did twenty years ago. Case citations account for the bulk of authorities cited by the Court. In 1992, the Court cited to 1,000 cases in their majority opinions; and in 2012, that number rose to 1,838 cases. The 2012 Court cited in-state and federal cases more frequently than the 1992 Court, however, there has been a slight decrease in the number of out-of-state opinions cited. This overall increase in citations to judicial opinions could be the result of various factors such as improved access to caselaw, more complex cases, lengthier opinions, judicial workload, increased numbers of mandatory cases, or perhaps to more stringent citations. Some studies suggest that dissenting opinions also increase the overall number of citations because they indicate more controversial cases that require more authority.

The majority of cases cited in 1992 and 2012 were to Minnesota opinions. Most state high courts prefer to cite instate opinions. In 1992, 646 or roughly 65% of the judicial opinions cited were to in-state cases. In 2012, the number of

<table>
<thead>
<tr>
<th>1992 Total Number of Citations to Judicial Opinions</th>
<th>2012 Total Number of Citations to Judicial Opinions</th>
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<tbody>
<tr>
<td>MN</td>
<td>State</td>
</tr>
<tr>
<td>----------------</td>
<td>--------</td>
</tr>
<tr>
<td>Majority</td>
<td>646</td>
</tr>
<tr>
<td>Dissent</td>
<td>69</td>
</tr>
<tr>
<td>Concurrence</td>
<td>13</td>
</tr>
</tbody>
</table>

56 Id. at 127.
in-state cases cited more than doubled to 1,348 cases. In spite of this increase, the 2012 in-state cases comprise only a slightly larger proportion of the total number of citations at 73%.

The number of citations to federal cases is increasing but not in proportion to the increase of cases cited overall. In 1992, the Court cited 245 federal cases; 155 of these were to the United States Supreme Court and 90 were to lower federal courts. Federal cases made up 25% of all the cases cited in 1992. Today, the number of citations to federal opinions is increasing. In 2012, there were 401 citations to federal opinions. While the overall ratio of federal opinions has dropped to roughly 13%, the number continues to increase. This increase correlates to an increased number of criminal cases that invoke federal laws, which have been interpreted at the federal level.\(^\text{58}\)

Citations to other state opinions have dropped slightly from 11% in 1992 to 5% in 2012. Due to the growth and preference for in-state citations, there are fewer occasions for courts to look at out-of-state cases.

\(^{59}\)

**Table 3. Recency of Cases cited by Minnesota Supreme Court**

<table>
<thead>
<tr>
<th></th>
<th>0-2 Years</th>
<th>2-12 Years</th>
<th>Older than 12 Years</th>
</tr>
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<tbody>
<tr>
<td>Majority</td>
<td>66</td>
<td>487</td>
<td>447</td>
</tr>
<tr>
<td>Dissent</td>
<td>5</td>
<td>60</td>
<td>70</td>
</tr>
<tr>
<td>Concurrence</td>
<td>0</td>
<td>15</td>
<td>15</td>
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<table>
<thead>
<tr>
<th></th>
<th>0-2 Years</th>
<th>2-12 Years</th>
<th>Older than 12 Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Majority</td>
<td>151</td>
<td>745</td>
<td>942</td>
</tr>
<tr>
<td>Dissent</td>
<td>41</td>
<td>183</td>
<td>381</td>
</tr>
<tr>
<td>Concurrence</td>
<td>8</td>
<td>16</td>
<td>75</td>
</tr>
</tbody>
</table>

Not only have the number of citations to judicial opinions generally increased over the last twenty years, the number of citations to more recent opinions has also increased. In 1992, the Court cited to 553 cases published

\(^{58}\) *Id.* at 129.
\(^{59}\)
between 1980 and 1992. In comparison, the 2012 Court cited to 896 judicial opinions published between 2000 and 2012. The study shows that the Court is citing to more recent judicial opinions with greater frequency. In both 1992 and 2012, however, citations to more recent judicial opinions comprise roughly half of all the case citations.\footnote{60}

\begin{table}[h]
\centering
\caption{Number of Citations to Secondary Sources in Minnesota Supreme Court Ruling Opinions of 1992 and 2012}
\begin{tabular}{|c|c|c|c|c|c|c|c|c|c|c|}
\hline
 & \multicolumn{3}{|c|}{1992} & \multicolumn{3}{|c|}{2012} \\
 & Majority & Dissent & Concurrence & Majority & Dissent & Concurrence \\
\hline
Legislative History & 10 & 1 & 1 & 5 & 1 & 0 \\
ALR & 3 & 1 & 0 & 2 & 0 & 0 \\
Treatise & 23 & 4 & 2 & 19 & 11 & 1 \\
Legal Periodical & 34 & 6 & 1 & 11 & 34 & 0 \\
Legal Encyclopedia & 3 & 0 & 0 & 4 & 0 & 0 \\
Legal Dictionary & 1 & 0 & 0 & 17 & 6 & 0 \\
Restatements & 6 & 2 & 0 & 9 & 2 & 0 \\
Miscellaneous Legal & 7 & 0 & 0 & 24 & 6 & 0 \\
Nonlegal & 11 & 2 & 0 & 36 & 9 & 1 \\
\hline
\end{tabular}
\end{table}

This study also examined citations to secondary legal and nonlegal authority.\footnote{61} As Table 4 shows, the numbers of citations to sources such as

\footnote{60} The percentage of case citations to newer opinions has remained relatively consistent with 54\% in 1992 and 49\% in 2012.

\footnote{61}
legislative history, American Law Reports, treatises, legal encyclopedias, and restatements, have changed little over the last twenty years. Therefore, I will touch on a few these sources briefly. In 1992, the most commonly cited treatises were Search and Seizure, Substantive Criminal Law, and The Law of Workmen’s Compensation. The most commonly cited treatises in 2012 include The Law of Torts, Prosser & Keeton on the Law of Torts, and once again, Substantive Criminal Law. While there were very few citations to encyclopedias or to restatements, American Jurisprudence and Restatement (Second) of Torts were the most frequently cited in both 1992 and 2012.

There have also been some notable changes. Citations to legal periodicals in majority opinions have declined from 36 in 1992 to 11 in 2012. The most commonly cited journals in 1992 were general law reviews and included Columbia Law Review, Minnesota Law Review, and William Mitchell Law Review. In 2012, there were no oft-cited journals. Interestingly, citations to periodicals in dissenting opinions have dramatically increased from 5 in 1992 to 34 in 2012. Twenty-eight of the 34 periodicals cited, however, are from two dissenting opinions written by Justice Meyer.

There has been a sharp increase in citations to legal dictionaries from 1 in 1992 to 19 in 2012. The most frequently cited is Black’s Law Dictionary. There are also citations to Bouvier’s Law Dictionary, A Dictionary of Modern Legal Usage, and to a specialized legal dictionary, Schmidt’s Attorneys’ Dictionary of Medicine.

The number of citations to miscellaneous legal citations has also increased. This could be due various factors such as a proliferation of resources or to improved online access to legal information. The most commonly cited resource in this category was the Minnesota Practice Series.

Finally, the results show a growing number of citations to nonlegal sources from 11 in 1992 to 36 in 2012. Nonlegal citations made up over 25% of the all of the citations to secondary authority in 2012. While the majority of nonlegal citations were to dictionaries such as Webster's Third New International Dictionary, Merriam–Webster's Collegiate Dictionary, and American Heritage Dictionary of the English Language, there were also citations to nonlegal journals, web sites, and books. Historically, there have been relatively few citations to nonlegal sources. A case citation study of sixteen State Supreme Courts from 1940-1970 concluded:

One might well have guessed that, over the years, citation patterns would broaden considerably, that judges would pay more attention to social science, and that they would take in a wider range of premises and more diverse knowledge as food for decisionmaking. . . . Our data, however, suggest that while the judges may be absorbing broad learning at the present time, any such learning is hardly reflected in citation patterns. This rarity is reflected by the great fuss which was made over one footnote in Brown v. Board of Education which cited, in support of the decision, a number of social science studies. Whether the readings cited actually influenced the outcome is very doubtful. In any event, SSCs rarely go outside the law for authority. Social science, economic, or technical studies were cited in only 0.6% of the 1940-1970 SSC cases.

As citation studies at the federal level and more recently at the state level suggest, the increase in citations to nonlegal materials is growing steadily.

V. ANALYSIS: DELEGALIZATION

The most notable findings of this study are the increasing numbers of dissenting opinions and citations to nonlegal materials. Studies have long confirmed that dissent rates are gradually creeping upward, especially since states established intermediary appellate courts. Conversely, citation studies of state supreme courts from 1970 and 1990 found very few citations to nonlegal sources. The trend toward nonlegal citations has been emerging gradually over the last two decades. Therefore this analysis will focus on this more recent trend of court citations to nonlegal sources.

The rise in citations to nonlegal or nontraditional authorities in judicial opinions raises concerns about judicial reasoning and the weakening of traditional legal authority. While citations to cases, statutes, and regulations remain central to judicial opinions, an increase in citations to nonlegal authority may be blurring the distinctions between the authoritativeness of sources. “[T]he law's practice of using and announcing its authorities--its citation practice-- is part and parcel of law’s character. The various contemporary controversies about citation practice turn out, therefore, to be controversies about authority, and as a result they are controversies about the nature of law itself.” Concerns regarding citations to nonlegal authority therefore warrant further examination. This analysis will explore some of these concerns and look at various causes contributing to the

64 Friedman et al., supra note 16, at 816-17 (study including the Minnesota Supreme Court).
65 Id. at 787.
66 Id. at 816-17.; James Leonard, An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990, 86 LAW LIBR. J. 129 (1994).
67 Frederick Schauer, supra note 7, at 1934-35.
increase in nonlegal citations. Lastly, it suggests that nonlegal authority is increasingly valued in the legal profession and that future attorneys should be prepared to do nonlegal research.

A. Endorsement of Nonlegal Resources by Courts

“[L]aw, itself an authority-soaked practice, had traditionally drawn a distinction between good and bad authority, privileged and nonprivileged authority, and authorities that rank higher or lower in the hierarchy of authorities. Just as a recent decision of the highest court within the same jurisdiction as the deciding court ranks at or near the top of this hierarchy, so too are authorities outside of the traditional legal canon traditionally understood to be at or even below the bottom of the hierarchy of acceptable authority. But legal authority norms are clearly in flux.”

The emerging presence of nonlegal sources in judicial opinions became readily apparent in federal court opinions in the early 1990s. A Federal Courts Study Committee, appointed in 1990, noted that federal court litigation was becoming increasingly complex and that nonlegal information from a variety of disciplines was becoming more important. Since then, the increasing use of nonlegal sources by the United States Supreme Court has been well documented. One study of Supreme Court citations from 1989 to 1998 found that nonlegal materials were cited in 40% of signed opinions. Another Supreme Court citation study from 1950 to 1998 found a substantial increase in the frequency of nonlegal citations beginning in the early 90s, and noted that the types of nonlegal sources cited varied greatly.

Citation studies confirm that the use of nonlegal sources in Supreme Court judicial opinions is increasing. Although courts can be slow to change, this study of Minnesota Supreme Court opinions confirms that this trend may also be occurring on the state level. Therefore, it is worthwhile to examine why judges turn to nonlegal authority and what effects this might have on traditional canons of law.

Judges cite to authority that they feel bound to or that they regard as useful in resolving a legal issue. Citations to nonlegal sources serve a variety of purposes: “(1) in the form of background assumptions about such matters as what

69 Hasko, supra note 32, at 428.
70 Id. at 430.
71 Schauer & Wise, supra note 33, at 502.
73 Leonard, supra note 66, at 129.
motivates human behavior; (2) ‘clarificatory or heuristic,’ i.e., using theories from philosophy, economics, or political science to suggest what law would result from application of such theories; (3) ‘motivational,’ or ‘to provide a reason to decide a case in a particular way,’ such as to promote economic efficiency; or (4) to justify or legitimate decisions reached on other bases.” Further, traditional legal writing prefers some source of authority to none.\textsuperscript{74}

A citation to a new source in a judicial opinion legitimizes that source as an acceptable authority.\textsuperscript{75} As John Merryman suggests, “citation by a court, in the public mind, puts the stamp of judicial approval on the work.”\textsuperscript{76} As nonlegal sources are increasingly cited, they are “changing the face of judicial opinions and possibly the law itself.”\textsuperscript{77} Frederick Schauer and Virginia Wise posit that decreased costs and ease of access to information online have spurred the increased use of nonlegal authorities in judicial opinions.\textsuperscript{78} They believe that this trend signifies a change in what courts deem acceptable authority and weakens the dominance of traditional authority.\textsuperscript{79} They refer to this concept as the “delegalization” of law.\textsuperscript{80}

\section*{B. From Print-Based to Online Research}

“Where we once researched in a set of common textbooks, most notably the digests, we now search the universe of information. Its effect on our context is marked.”\textsuperscript{81}

Prior to the emergence of the Internet and electronic resources, the world of legal research was contained in “accepted textbooks of the field” such as treatises, encyclopedias, law review articles, codes, and digests.\textsuperscript{82} Law was treated as a distinct domain grounded in a definable body of information. Over the last several decades, however, the world of legal information has changed dramatically. Today, most legal practitioners do their research online and have access to an infinite amount of information.\textsuperscript{83} More resources are being produced digitally, and lawyers and judges are turning to the Internet to conduct their research.

\textsuperscript{74} Milles, \textit{supra} note 72, at 409-10.  
\textsuperscript{75} Margolis, \textit{Authority Without Borders, supra} note 4, at 921.  
\textsuperscript{76} Whiteman, \textit{supra} note 37, at 41-2.  
\textsuperscript{77} John Henry Merryman, \textit{The Authority of Authority What the California Supreme Court Cited in 1950, 6 STAN. L. REV. 613, 616 (1954).}  
\textsuperscript{78} Margolis, \textit{Authority Without Borders, supra} note 4, at 911-12.  
\textsuperscript{79} Schauer & Wise, \textit{supra} note 33 at 495.  
\textsuperscript{80} Id.  
\textsuperscript{81} Id.  
\textsuperscript{83} Id. at 90.  
\textsuperscript{84} Id. at 82.
Some scholars suggest that the shift from print-based to online research has affected the nature of legal authority, effectively relaxing the boundaries between primary, secondary, and nonlegal sources. Rather than searching through law books or sorting through indexes where everything has been hierarchically arranged, practitioners can now do keyword searches to access a universe of legal and nonlegal information. Improved access to information “feeds the trend toward interdisciplinary studies” and toward delegazation. The proximity of information available on the web makes the distinction between law and nonlaw sources less palpable. Many scholars agree that the medium through which information is conveyed has a substantial impact on how people understand the information. Medium theory, for example, suggests that mediums are not neutral in communicating information and it “support[s] the idea that changing the medium through which legal researchers encounter the law will impact their understanding and practice of law.”

While the increase in citations to nonlegal sources raises concerns regarding the authenticity, credibility, and permanence of information, there are also some benefits to this trend. It allows judges and practitioners to refer to a wider base of authority and supports the notion that the law does not exist in a vacuum. As Professor Ellie Margolis states:

Used as authority, nonlegal information can play a valuable role in advancing legal reasoning, particularly in cases of first impression, first-time statutory interpretation, and constitutional litigation. Lawyers can rely on this kind of information to help judges understand the real-world context and implications of legal arguments in our complex and fast changing world. Judges relying on electronic information can establish the relevance and credibility of judicial opinions. Since the reality of today’s society is that the majority of information is accessed online, the legal profession will seem increasingly anachronistic if it continues to resist reliance on Internet sources.

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85 Ellie Margolis, *Authority Without Borders*, supra note 4, at 923.
86 Hanson, *supra* note 3, at 584-85.
87 Blintliff, *supra* note 82, at 80.
88 Hanson, *supra* note 3, at 587.
89 *Id.*
90 *Id.* at 586.
92 See, e.g., Mary Whisner, *Researching Outside the Box*, 95 LAW LIBR. J. 467, 472 (2003) (explaining the various ways in which practitioners benefit from the resources of other disciplines).
C. Preparing Practice-Ready Students: Nonlegal Research

Internet research is here to stay. As digital natives enter the legal field, reliance on electronic information will continue to grow and citations to nonlegal sources can be expected to increase. Nontraditional sources can play a valuable role in advancing legal reasoning but they can also raise issues of authenticity, credibility and permanence. Therefore, it is important that future lawyers not only learn how to do nonlegal research but also learn how to discern the quality of nonlegal sources.

It is becoming an asset in the legal field to have expertise and research skills outside the area of law. Courts are regularly looking to disciplines such as economics, political science, psychology, and sociology for support, and attorneys, law librarians, and law clerks are routinely required to do nonlegal research. Today’s practitioner cannot afford to ignore it. In areas of complex litigation, the ability to conduct interdisciplinary and nonlegal research lends distinct advantages. Nonlegal sources can bolster legal reasoning, lend support to emerging areas of the law, and put information into context. They can also provide information about decisionmakers, stakeholders, and parties. “Judges, prosecutors, and other government officials do not make decisions in a vacuum; advanced researchers dig deeper to find out information about what makes these individuals tick.”

As citation studies indicate, nonlegal sources are becoming increasingly valued in law, which means that today’s law students should be prepared to do different types of research. With the proliferation of online resources, students also have the added burden of determining what sources are credible and authentic. Therefore, it is incredibly important that students have training in nonlegal research and in information literacy. With the world of information at their fingertips, students must learn to be critical evaluators of information and must be able to discern what is relevant and credible. Information literacy is becoming increasingly important as more information is made freely accessible

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94 Diamond, supra note 68, at 89.
96 Sarah Valentine, Legal Research As A Fundamental Skill: A Lifeboat for Students and Law Schools, 39 U. BALTIMORE L. REV. 173, 174-75 (2010); Hanson, supra note 3, at 587.
98 Id. at 93 (2005).
99 Heise, supra note 95, at 313.
100 Valentine, supra note 96, at 174-75.
online and practitioners move away from fee-based legal databases.\textsuperscript{101} While it is doubtlessly impossible to provide law students with in-depth nonlegal research training, students can learn some general nonlegal research skills, which they can later build on in their careers.\textsuperscript{102}

Law schools have a responsibility to their students to ensure that they are practice ready for a field that is increasingly relying on nonlegal and interdisciplinary research. This responsibility has not escaped attention. Law schools have begun introducing nonlegal and interdisciplinary research as part of the curriculum. In 2006, for example, Stanford Law School announced a new “3D” JD program, to provide students with an interdisciplinary education beyond the typical law school curriculum. According to the school, this change was instituted to address the increasingly complex and interdisciplinary nature of law. “To serve clients capably or address major social and political issues, lawyers now must work in cross-disciplinary/cross-professional teams, particularly given that they work in increasingly sophisticated industries and fields—engineering, medicine, biotech, the environment.”\textsuperscript{103} Today, an increasing number of law schools offer interdisciplinary learning through joint degree programs and specialized classes.\textsuperscript{104} Topics such as business research, health, medicine, and social policy are being added to advanced legal research courses.\textsuperscript{105} Rather than simply offering optional courses, law schools should consider adding nonlegal research into substantive courses or making it a required part of the curriculum.

VI. CONCLUSION

New technology has made legal research vastly different. Today, judges and practitioners use mobile apps, web sites, and databases for their research and print collections are slowly dwindling. The shift from print to online research is subtly impressing upon our collective notion of the meaning of authority. The law is no longer physically isolated but exists within a universe of information. Judges are not only finding the law online, but a lot of other valuable information

\textsuperscript{101} Id. at 186-87.
\textsuperscript{102} Id.
as well. The resolution of cases and the development of specialized areas of the law increasingly depend on nonlegal information. Judges, and in turn practitioners, are routinely departing from traditional sources of legal authority to support legal reasoning. To better prepare students to compete in a field where nonlegal research is becoming more important, law schools should develop curriculum to teach students some basic nonlegal research skills that they can build upon later in their careers. As the trend toward nonlegal citations continues, it may also be time to establish some guidelines about when and what sorts of nonlegal sources are appropriate.\textsuperscript{106}

\textsuperscript{106} Margolis, \textit{It's Time to Embrace the New}, supra note 93, at 219.
## Appendix

### 2012 Citations to Nonlegal Sources in Majority Opinions

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<th>Dictionaries (22)</th>
<th>Newspapers (4)</th>
<th>Government-related (6)</th>
<th>Other (4)</th>
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### 1992 Citations to Nonlegal Sources in Majority Opinions

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<th>Government-related (3)</th>
<th>Other (4)</th>
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