

7-1-1996

The Citation Practices of the Montana Supreme Court

Fritz Snyder

University of Montana School of Law, fritz.snyder@umontana.edu

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 Mont. L. Rev. (1996).

Available at: <https://scholarworks.umt.edu/mlr/vol57/iss2/9>

This Article is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

THE CITATION PRACTICES OF THE MONTANA SUPREME COURT

Fritz Snyder*

I. INTRODUCTION

This Article will discuss and analyze the authorities that the Montana Supreme Court relies on in its reported opinions. First, this study should help Montana lawyers know which authorities are particularly important to focus on in their research and also to include in their briefs to the Montana Supreme Court. Second, this study will help observers of the Montana Supreme Court understand how the court's citation practices have changed over time. Third, this Article should assist researchers in other states who are interested in comparative court citation practices. Finally, this Article will analyze the actual citation form the Montana Supreme Court uses and offer suggestions to ameliorate any confusion in the court's current citation form practices.

Our legal system is imbued with the tradition that judges are not supposed to create law in deciding a case. Rather, the judges are bound by the "law," and their judgment comes in applying the law enunciated in precedent to the facts before them. *Stare decisis* means to abide by, or adhere to, decided cases.¹ The primary sources of the "law" are found in the constitution (federal and state), statutes, administrative regulations, and prior cases. Secondary authorities—treatises, legal encyclopedias, restatements, law review articles—explain and analyze the "law."

In addition to being bound by the law, judges are expected to

* Law Librarian and Assistant Professor of Law, University of Montana School of Law. I wish to thank Justin Stark, my research assistant, for his valuable work on this project. He analyzed 300 cases and provided many helpful insights. His statistics were particularly useful in helping compile the tables at the end of the Article. He also interviewed three law clerks who worked for Justices of the Montana Supreme Court.

A number of kind individuals also took the time to read my manuscript and make valuable suggestions. I wish, in particular, to thank the following: Justice Karla Gray, Montana Supreme Court; Peter Schanck, Professor of Law, University of Kansas School of Law; Carl Tobias, Professor of Law, University of Montana School of Law; Kathleen Magone, Visiting Professor, University of Montana School of Law; Fran Wells, Computer Services Librarian and Assistant Professor, University of Montana School of Law; and Pat Chapman, Library Technician, University of Montana School of Law. Finally, I wish to thank Charlotte Wilmerton, Faculty Secretary, University of Montana School of Law, for her help in preparing the manuscript and particularly for her help in creating many of the tables.

1. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

justify their opinions. The citation in a judicial opinion refers to "authority"—a case, statute, treatise, or article. The opinion and its reasoning show what judges *think* is legitimate argument and legitimate authority.² It is fairer, more predictable, and expedient for judges to make decisions by applying available authorities instead of studying the whole case for its particular equities or determining anew what is the wisest rule. Also, judges recognize authorities must be followed to make the legal system stable. Thus, a customary reason given by judges for the need to follow precedent is that otherwise the law would be too uncertain.³ Finally, in relying on specific legal authority, judges do not merely seek authority for their decisions; they also legitimize the sources they cite.⁴

"Successful appellate advocacy depends in part on anticipating how an appellate panel will use legal authorities in resolving issues."⁵ Thus, it is critical to know which types of authority the Montana Supreme Court justices actually rely upon, for this is a strong indication of the authority that the court finds persuasive and reliable. This kind of empirical data is perhaps too seldom recognized in any organized way.

A systematic study can reveal patterns in a court's citation practice. The use of citation count to measure impact "is a respectable methodology which has been used in other disciplines."⁶ As judicial opinions are statements of *official* policy and rationale of the court, which indicate the court's future tendencies in policy-making, a study of these embodiments of the law is certainly justified.⁷

2. Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 793-94 (1981).

3. THOMAS B. MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM* 131 (1978).

4. Mary Anne Bobinski, *Citation Sources and the New York Court of Appeals*, 34 BUFF. L. REV. 965, 1002 (1985). However, this may not always be true. The issue of result-oriented decision-making may also impact citation practices. See, e.g., Sacco v. High Country Indep. Press, 271 Mont. 209, 896 P.2d 411 (1995) (ignoring a recent law review article on emotional distress, Randy J. Cox & Cynthia H. Shott, *Boldly Into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress*, 53 MONT. L. REV. 197 (1992) and citing an older article, Francis X. Clinch & Jodie L. Johnson, *Compensation of Emotional Distress in Montana: Distinctions Between Bystanders and Direct Victims*, 47 MONT. L. REV. 479 (1986)).

5. James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 L. LIB. J. 129, 129 (1994).

6. Richard A. Mann, *The Use of Legal Periodicals by Courts and Journals*, 26 JURIMETRICS J. 400, 401 (1986).

7. Charles A. Johnson, *Citations to Authority in Supreme Court Opinions*, 7 LAW & POL'Y 509, 509 (1985).

What sources of law and analysis does the Montana Supreme Court rely upon when providing authority for its decisions? What sources are seen as legitimate and thus given legitimacy by citation in court opinions? To the researcher interested in judicial decision making, a study of the court's citation practices can provide empirical evidence on the sources of the court's legal reasoning. To the practicing lawyer, such a study can illuminate those sources of legal reasoning that may best persuade the court.⁸

In addition to studying which particular authorities are cited, other aspects are of interest: the number of published opinions decided in different time periods;⁹ the role of discretion in deciding which to hear or which cases to write published opinions for;¹⁰ the rise and decline of citation to the legal encyclope-

8. Bobinski, *supra* note 4, at 965.

9. Before 1970, the supreme courts in the larger states sometimes issued 400 to 500 opinions a year. However, most of the medium and large states have created intermediate appellate courts to absorb much of the workload. Now, most supreme courts are given discretion to choose the appeals they wanted to hear. Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 998-99 (1978). The Montana Supreme Court handed down 445 published opinions in 1994.

10. Kagan et al., *supra* note 9, at 991 ("We might expect that courts with high discretion [to accept cases] and small caseloads would be able to devote more time to their decisions and, hence, to write longer opinions, cite more cases, and make more use of law review articles (an indication, perhaps, of more sophisticated scholarship)."). Kagan et al. noted that between 1940 and 1970, the state supreme courts with high discretion wrote fewer opinions than the other courts. Their opinions tended to be longer and cited more cases. They also reversed lower court decisions more often, and their opinions contained more dissenting and concurring opinions. *Id.* at 999.

The Montana Supreme Court has no discretion about accepting civil appeals, MONT. R. APP. P. 1, or criminal appeals, MONT. CODE ANN. § 46-20-103 (1995). The Supreme Court of Montana amended its Internal Operating Rules to allow for non-citeable, unpublished, abbreviated opinions in certain cases:

If an appeal presents no constitutional issues and no issues of first impression, does not establish new precedent or modify existing precedent, and would not be of future guidance for citation purposes to the citizens of Montana, the bench, or the bar, the court may classify that appeal as one for abbreviated opinion. The decision for the case will provide the ultimate disposition without a detailed statement of facts or law. The decision shall not be citeable as precedent and shall be published by its filing as a public document with the Clerk of this court and by a report of its result to State Reporter Publishing Company and West Publishing Company for publication as required by § 3-2-603(2), MCA.

MONT. SUP. CT. INTERNAL OPERATING R. § I, 3(c). The Montana Supreme Court issued 130 of these non-citeable, unpublished, abbreviated opinions in 1994.

"Basically, the appellate process involves only three types of review: review of the sufficiency of the evidence to meet the burden of proof required at the trial level; review of the exercise of the trial court's discretion; and plenary or de novo review of the choice, interpretation and application of controlling law." Hon. James C. Nelson,

dias and American Law Reports (A.L.R.) by the Montana Supreme Court;¹¹ and the actual form of citation for Montana legal authorities used by the Montana Supreme Court.¹²

This Article analyzes citations in Montana Supreme Court opinions in three time periods: 1914-15, 1954-55, and 1994. Other writers have done various kinds of citation analysis for other states: Arkansas,¹³ California,¹⁴ Kansas,¹⁵ Maryland,¹⁶ New York,¹⁷ North Carolina,¹⁸ and Ohio.¹⁹ Commentators have also undertaken two comparative studies of the citation practices of major state courts.²⁰

II. METHODOLOGY

Although Montana did not become a state until 1889, the first reported Montana Supreme Court decision was in 1868. For the purposes of this analysis, this study divides Montana Supreme Court history into three approximately equal segments. A sufficient number of cases for each of these time periods was selected. Accordingly, this study took 100 cases each from 1914-

A View From the Bench: How to be Ready for Your Day in Court, MONT. LAW., Sept. 1995, at 10.

11. See *infra* notes 128-130 and accompanying text.

12. See *infra* notes 131-160 and accompanying text.

13. George R. Smith, *The Current Opinions of the Supreme Court of Arkansas*, 1 ARK. L. REV. 89 (1947).

14. John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977).

15. William L. Turner, Comment, *Legal Periodicals: Their Use in Kansas*, 7 U. KAN. L. REV. 490 (1959).

16. William L. Reynolds, *The Court of Appeals of Maryland: Roles, Work and Performance. Part II: Craftsmanship and Decision-Making*, 38 MD. L. REV. 148 (1978).

17. William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 BUFF. L. REV. 121 (1995). Manz did not consider constitutions, statutes and regulations in his analysis: "[T]he subject matter of the case often requires citation of these sources and is not an exercise of judicial discretion." *Id.* at 123. Manz' very nice study covers the longest period of time for a single state; see also Bobinski, *supra* note 4.

18. Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39 (1979).

19. Leonard, *supra* note 5.

20. For a study of the changes in citation patterns from 1870 to 1970 for Alabama, California, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and West Virginia, see Friedman et al., *supra* note 2.

For an analysis of 569 criminal cases from Missouri, California, New York, and the United States Supreme Court and their use of secondary materials, see John Scurlock, *Scholarship and the Courts*, 32 U. MO. KANSAS CITY L. REV. 228 (1964).

15,²¹ and from 1954-55.²² However, because so many more opinions were handed down in 1994 (445) as compared to the previous time periods (less than 100 in each of the other years), the larger sample of 200²³ proved more reliable. For each of the 400 cases, the study noted the kind and number of citations, including the dates of the cases cited. The study also analyzed all parts of the opinions: the majority opinion and any concurrences or dissents.

The methodologies used by other commentators in similar studies have varied greatly. The 1995 New York study analyzed all majority, concurring, and dissenting published opinions for the New York Court of Appeals.²⁴ The study focused on every tenth year beginning with the year 1850 and ending with the year 1990, and added 1993 for currency.²⁵ It did not include citations to statutes, constitutions, or regulations.²⁶ Whereas, a 1985 New York study analyzed a total of sixty-eight cases from three different subject areas (criminal, constitutional, negligence) from three different years (1963, 1973, 1983) decided by the New York Court of Appeals.²⁷

A study of the Ohio court system was published in 1994.²⁸ The Ohio study analyzed the majority opinions of fifty of the Ohio Supreme Court's decisions and fifty of the Ohio Court of Appeals opinions from the year 1990.²⁹ A North Carolina study analyzed the majority, concurring, and dissenting opinions for all decisions handed down by the North Carolina Supreme Court in 1977 (125 decisions).³⁰

Other studies have compared the citation practices of various states. A sixteen-state study took a sample of 5,900 cases from state supreme courts between the years 1870 and 1970. Its

21. The 100 cases began with 49 Mont. 1 (1914) and ended with the case at 50 Mont. 289 (1915). Eighty-two cases came from 1914 and eighteen cases came from 1915. We ignored lawyer disciplinary cases as being atypical.

22. The 100 cases began with 127 Mont. 374 (1954) and ended with 129 Mont. 228 (1955). Sixty-eight cases were decided in 1954, and 32 cases were decided in 1955. We ignored lawyer disciplinary cases as being atypical.

23. The 200 cases began with 263 Mont. 170 (1994) and ended with 267 Mont. 107 (1994). We ignored lawyer disciplinary cases as being atypical.

24. The highest appellate court in New York.

25. Manz, *supra* note 17, at 122. The number of opinions the study analyzed varied between 482 (for 1890) and 293 (for 1980). *Id.* at 124.

26. *Id.* at 123. Manz explained that "the subject matter of the case often requires citation of these sources and is not an exercise of judicial discretion." *Id.*

27. Bobinski, *supra* note 4, at 969-70.

28. Leonard, *supra* note 5.

29. Leonard, *supra* note 5, at 132-33.

30. Mann, *supra* note 18, at 39, 52 tbl. III A.

findings included data on opinion length, dissents and concurrences, and citation patterns. It analyzed eighteen cases per state supreme court for every five years.³¹ Another study focused on secondary materials and analyzed 569 criminal cases from Missouri, California, New York, and the United States Supreme Court.³²

A 1968 United States Supreme Court study analyzed the secondary source materials cited in the majority, concurring, and dissenting opinions in the 107 decisions handed down by the United States Supreme Court in the 1965 term.³³ A decade later, a United States Supreme Court study analyzed the opinions to see how many of the cases cited were originally mentioned in the parties' briefs or in their oral arguments.³⁴ Finally in 1985, a United States Supreme Court analysis used data from a sample of majority opinions from fifty-six United States Supreme Court decisions "composed of two randomly selected cases per term from the 1946 term through the 1974 term."³⁵ This Article will use these earlier studies of the various courts for comparative purposes to highlight the practices of the Montana Supreme Court.

The present study of the Montana Supreme Court has followed the general methodologies of these prior studies and should distill the citation practices of the court into a meaningful and workable summary. It analyzes 400 Montana published decisions in three different time periods. Because the practitioner is interested in all sources of persuasive authority, the study includes majority, concurring and dissenting opinions. Limiting the study to only majority opinions would be unduly restrictive.³⁶

31. Friedman et al., *supra* note 2, at 774-75.

32. Scurlock, *supra* note 20, at 228.

33. Neil N. Bernstein, *The Supreme Court and Secondary Source Material: 1965 Term*, 57 GEO. L.J. 55, 56 (1968).

34. Marvell, *supra* note 3, at 132. He found that but one-sixth of the cases mentioned by the attorneys were later cited in the opinions. He also cited the study by V. Rosenblum et al., *Report on the Uses of Social Science in Judicial Decision Making* 7-16 (1977) (unpublished manuscript, Northwestern University Law School) which had studied Supreme Court opinions for every five years from 1954 through 1974 and found that the opinions cited social science sources in 10 percent of the some 600 cases studied. *Id.* at 365-66 n.7.

35. Johnson, *supra* note 7, at 512. Johnson excluded citations "contained in footnotes as well as citations in appendices if they were part of the majority opinion. Analyzing citations only in the body of the majority opinion is consistent with other studies of this nature and introduces no bias to the analysis." *Id.*

36. Leonard concluded that the inclusion of concurring and dissenting opinions

III. CITATIONS TO OPINIONS

A. *Numbers of Citations*

The number of citations to judicial opinions compared to total number of all citations in the Montana Supreme Court have been remarkably constant over the three time periods studied: 62.3% in 1914-15; 61.3% in 1954-55; and 62.5% in 1994.³⁷ This is true even though the total number of citations has varied rather dramatically: 1,588 in 1914-15 (for 100 cases); 2,237 in 1954-55 (for 100 cases); and 2,794 in 1994 (for 200 cases—or an average of 1,397 per 100 cases). However, the total number of pages in the 1954-55 opinions increased significantly: 933 compared to 597.5 in 1914-15 and 1,534 for 1994 (for 200 opinions—an average of 767 per 100 opinion). The average citations per page has decreased over time, from 2.66 in 1914-15, to 2.40 in 1954-55, and finally to 1.82 in 1994.³⁸ Clearly, the supreme court has become significantly busier in 1994, handing down 445 published opinions compared to 110 in 1914; 112 in 1915; ninety in 1954; and ninety-seven in 1955.³⁹ This may well account for both the shorter opinions and the fewer citations-per-page count when compared to 1954-55.

The average number of cases cited per judicial opinion by the Montana Supreme Court was 9.9 in 1914-15, 13.7 in 1954-55, and 8.7 in 1994.⁴⁰ Compare these figures to the average number

would not be helpful because his study was only concerned with how courts use authority to resolve legal issues. He noted that concurrences and dissents either supplement or contradict the majority's theories and that non-controlling opinions tend not to review all legal issues raised in an appeal. Leonard, *supra* note 5, at 135.

In each reported decision, we counted each cited source only once. For citations to the Montana Code, we counted only the first parenthetical subdivision as separate code sections. Hence, citations to 72-31-225(1) and 72-32-225(2) were treated as separate sources, while references to sections 72-31-225(4)(a) and 72-31-225(4)(b) were counted only once. I followed Leonard in both these respects. Leonard, *supra* note 5, at 134-35.

37. See *infra* p. 485 tbl. 3.

38. See *infra* p. 485 tbl. 2. Manz found the following cites per page for majority opinions for the New York Court of Appeals:

1910: 1.5 1920: 2.4 1950: 2.0 1960: 2.3 1993: 1.6

Manz, *supra* note 17, at 151 tbl. 3.

Johnson found the mean total citations per page for United States Supreme Court opinions to be 2.00. Johnson, *supra* note 7, at 513 tbl. 1.

39. See *infra* p. 483-84 tbl. 1. As far as work load is concerned, the number of justices on the court is significant. There were three justices in 1914-15; five justices beginning in 1918; and seven justices beginning in 1980; see also Johnson, *supra* note 7, at 518 tbl. 1.

40. See *infra* p. 485 tbl. 4.

of cases cited per judicial opinion in other jurisdictions:

| | | | |
|---|-----------------|----------------|----------------|
| Idaho: ⁴¹ | 9.7 (1930-35) | 18.2 (1940-70) | |
| South Dakota: ⁴² | 5.8 (1930-35) | 8.9 (1940-70) | |
| Selected states (small caseloads): ⁴³ | 9.6 (1930-35) | 13.7 (1940-70) | |
| Sixteen state supreme courts: ⁴⁴ | 9.8 (1915-25) | 14.0 (1945-55) | 14.3 (1960-70) |
| U.S. Supreme Court: ⁴⁵ (to other United States Supreme Court cases) | 12.38 (1946-74) | | |

The Ohio study noted that the most commonly cited form of authority was judicial opinions, which accounted for 63.4% of the citations in the overall sample from the courts.⁴⁶ The 1985 New York study noted that two-thirds or more of the citations for the New York Court of Appeals cases referred to other judicial opinions.⁴⁷

The Montana Supreme Court thus seems to be on a par with supreme courts from other jurisdictions in terms of cases cited per judicial opinion. Another factor in the lower citation count for the 1994 Montana Supreme Court is that string cites are no longer predominantly used. The 1914-15 court regularly wrote opinions that had more than six cites in a string.⁴⁸ The 1954-55 court continued to use string cites.⁴⁹ As a rule, however, the court did not string cite in every citation as the 1914 court did. Whereas, the longest string cite by the 1994 court in our sample was eight cites.⁵⁰ In fact, the 1994 Montana Supreme Court rarely used string cites.

41. Friedman et al., *supra* note 2, at 802 (tbl.8).

42. *Id.*

43. *Id.*

44. *Id.* at 796; see also William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1977). Landes and Posner found that the smallest number of citations occurred in non-constitutional criminal cases and the greatest number of citations in land condemnation cases. *Id.* at 258.

45. Johnson, *supra* note 7, at 513 (tbl. 1).

46. Leonard, *supra* note 5, at 136.

47. Bobinski, *supra* note 4, at 986.

48. As a rule, every citation sentence included at least three citations in a string. The court wrote string cites that were twelve cites long three times, eleven cites long once, ten cites long at least twice, and cites nine long at least twice. The longest string cite was eighteen cites. *Williams v. Johnson*, 50 Mont. 7, 18, 144 P. 768, 770 (1914).

49. The longest string cite included 19 cites. *In re Woodburn's Estate*, 128 Mont. 145, 157, 273 P.2d 391, 396 (1954). Another string cite included 15 cites, and two others included 13 cites. The court regularly used cites with 7 cites per string.

50. See, e.g., *State v. Mummey*, 264 Mont. 272, 277-78, 871 P.2d 868, 871 (1994) (listing the jurisdictions that have considered whether shoes are "weapons").

B. Sources of Case Citations

1. Montana Citation of Montana Opinions

Of its citations to judicial opinions, the Montana Supreme Court's citations to Montana cases have increased dramatically: 38.3% in 1914-15; 52.8% in 1954-55; and 85.3% in 1994. This increase is not in large part unexpected because the number of Montana published decisions has grown rather dramatically as well—particularly in the last thirty years.⁵¹ As Irving Younger has said, "Judges will be mildly interested in cases from an inappropriate court. Cite them a case from an appropriate court and they're on fire."⁵²

Statistics from other states are useful for comparison. An analysis of California cases noted that a relatively constant two-thirds of all cases cited in the California Supreme Court in 1950, 1960, and 1970 were from within the state.⁵³ California, of course, has many more in-state cases from which to choose than Montana does. The New York study reveals that in 1993 the New York Court of Appeals (of all case citations) cited to its own opinions 53% of the time and to intermediate New York appellate court decisions 18.6% of the time: a total of cites to New York cases of 71.6%.⁵⁴ It cited to other state cases 6.1% of the time (compared to Montana's 7.0% in 1994) and to federal cases 22.3% of the time (compared to Montana's 7.7%).⁵⁵ "Since 1970,

51. See *infra* p. 483-84 tbl. 1 showing the published cases per year from 1945 through 1994. Between 1955 and 1993, the Montana Supreme Court handed down over 8,900 published opinions.

52. Irving Younger, *Citing Cases for Maximum Impact*, A.B.A. J., Oct. 1, 1986, at 112.

53. Merryman, *supra* note 14, at 399.

54. Manz, *supra* note 17, at 153 tbl. 6.

55. See *infra* p. 485 tbl. 4. The case citation percentages for other years for the New York Court of Appeals are as follows:

| | <u>New York</u> <u>Ct. App.</u> | <u>Other</u> <u>New York</u> | <u>Other</u> <u>States</u> | <u>Federal</u> <u>Cases</u> |
|------|------------------------------------|---------------------------------|-------------------------------|--------------------------------|
| 1910 | 57.1 | 19.2 | 14.2 | 6.6 |
| 1920 | 45.6 | 13.1 | 19.9 | 16.6 |
| 1950 | 65.4 | 15.3 | 5.8 | 13.2 |
| 1960 | 57.3 | 24.2 | 8.7 | 9.2 |

Manz, *supra* note 17, at 153 tbl. 6.

In 1914-15 of all citations to judicial opinions, the Montana Supreme Court cited to federal opinions 11% of the time and to other state cases 50.1 percent of the time.

in-state cases have comprised a smaller proportion of the total number of citations in New York Court of Appeals cases.⁵⁶ This contrasts markedly with the trend in Montana to rely on local cases with greater frequency.

The Ohio study shows that in 1990 the Ohio Supreme Court referred to Ohio cases 67.8% of the time.⁵⁷ Additionally, the comparative sixteen-state study noted that “[t]he tendency to cite more in-state as compared to out-of-state cases might reflect the relative decline of common law cases on [state supreme court] dockets and the growth of statutes as a source of law.”⁵⁸ The growth of statutes as a source of law is clearly a factor in citation practices of the Montana Supreme Court. As a percentage of all cites, cites to statutory, constitutional, regulatory laws or rules of court increased from 26.7% in 1954-55 to 35.1% in 1994.⁵⁹ Thus, the Montana Supreme Court in 1994 was predominantly citing to either Montana cases or to Montana statutes.

2. Montana Citations to Other State Opinions

Differences in citation rate to other state decisions have been ascribed variously to such factors as relative geographic proximity, population size, migration patterns, level of urbanization and industrialization, amount of accumulated precedent, and prestige.⁶⁰ “[C]ourts apparently turn to out-of-state sources only when in-state cases are absent or ambiguous. As the pool of in-state precedents grows, there are fewer occasions for out-of-state cases.”⁶¹ Of all citations to judicial opinions in Montana Supreme Court cases in 1994, only 7% were to out-of-state cases—down from 39% in 1954-1955 and 50.1% in 1914-1915.⁶²

In 1954-55 the Montana Supreme Court cited to federal opinions 8.1% of the time and to other state cases 39% of the time. *See infra* p. 485 tbl. 4.

56. Manz, *supra* note 17, at 128. However, this does not mean that New York opinions are being cited less. The number of New York citations per majority opinion since 1980 is higher than ever. But since the court of appeals is citing to more federal cases, the overall state court share of the citations has decreased. *Id.*

57. Leonard, *supra* note 5, at 136.

58. Friedman et al., *supra* note 2, at 797.

59. *See infra* p. 485 tbl. 3.

60. *See* Friedman et al., *supra* note 2, at 804-07.

61. *Id.* at 798.

62. *See infra* p. 485 tbl. 4. In a letter to the author, Justice Trieweller of the Montana Supreme Court said: “I can assure you that when we are dealing with an issue for which Montana precedent does not exist, or for which we conclude that Montana precedent is unsatisfactory, we are not the least bit reluctant to consider well-reasoned decisions from other states.” Letter from Justice Terry N. Trieweller, Justice Montana Supreme Court, to Fritz Snyder, Law Librarian and Assistant Pro-

One should note that modern technology plays a role in the court's citation practices. Historically, the prevalence of cites to the court decisions of neighboring states could be explained by the easy access provided by the *Pacific Reporter*. This preference has now disappeared. A law clerk of the Montana Supreme Court reported that the clerks make extensive use of Westlaw in case searching.⁶³ This probably accounts for the fact that the out-of-state cases are spread throughout the United States and not concentrated in the states collected within the *Pacific Reporter 2d Series*, which would perhaps be the case if the manual *Pacific Digest* were used as a finding tool. Out of the 122 out-of-state cases cited in the 200 cases analyzed for 1994, cites to California were most predominant with ten cites, and Michigan was second with seven cites, both states with lots of cases. The court cited to cases from Maryland, Missouri, Oregon, and Washington each six times in the sampled cases. Montana's neighbors (North Dakota, South Dakota, Wyoming, and Idaho) had twelve cites among them. The Montana Supreme Court does appear to pay some deference to the supreme courts of its geographical neighbors.

Other recent studies have focused on courts' out-of-state citation practices in an attempt to discover reliance on certain jurisdictions. The sixteen-state comparative study noted that the percentage of out-of-state cases cited by the state courts "has declined over time, from 57% of all cites in 1870-1900 to 43% in 1905-1935 and 33% in 1940-1970."⁶⁴ For the more limited period of 1960-70, the out-of-state percentage had fallen to 23.4%.⁶⁵ The study of New York opinions claims that for the New York Court of Appeals there has been "[a] relatively stable rate in the citations to the decisions of other states, with a preference for large nearby jurisdictions and California . . ."⁶⁶ The 1995 New York study noted that in 1993, 19% of the majority opinions of New York Court of Appeals cases had out-of-state citations.⁶⁷

fessor of Law, University of Montana (Aug. 7, 1995) (on file with author).

63. Telephone Interview with Maria Roberts, Law Clerk to Justice James C. Nelson, Montana Supreme Court (Aug. 10, 1995).

64. Friedman et al., *supra* note 2, at 801. Two of Montana's neighboring states were included in the study. Idaho cases in the 1905-1935 period had cites to out-of-state cases 63% of the time; in the 1940-1970 period, the out-of-state percentage was 54%. South Dakota cases in the 1905-1935 period had cites to out-of-state cases 59% of the time; in the 1940-1970 period, the out-of-state percentage was 43%. *Id.* at 802 tbl. 8.

65. *Id.* at 797.

66. Manz, *supra* note 17, at 148.

67. *Id.* at 154 tbl. 8. In 1950, the out-of-state percentage for the New York

Whereas in 1994, 21% of the Montana Supreme Court cases (majority, concurring, and dissenting opinions) had out-of-state citations.

The Ohio study indicated that, "when faced with more difficult issues, the Ohio Supreme Court is more likely to cite older sources, non-binding foreign (other jurisdictions than Ohio) sources, and secondary authorities."⁶⁸ The 1995 New York study noted which out-of-state courts the New York Court of Appeals cited, concluding that Massachusetts was the most cited state court through 1950. Pennsylvania replaced Massachusetts as the most cited state court in 1960. Since then, California and New Jersey have been the leaders. Citations by the New York Court of Appeals to cases from "the Dakotas, Montana and Wyoming have been particularly rare."⁶⁹ The sixteen-state study noted that in the 1945-1970 period, California Supreme Court cases were cited the most by other states.⁷⁰ Thirteen percent of all out-of-state cites were California cites compared to 8% for New York.⁷¹ "The [state supreme courts] of New Jersey, Illinois, and Texas were also cited with special frequency by other courts. California's total was high, in part, because it was cited so often by Idaho, Nevada, and Oregon."⁷²

The low percentage of out-of-state cases cited by the Montana Supreme Court is notable.⁷³ The data reveals that the court increasingly relies on its own cases. Out-of-state cases thus play a very small role in the resolution of issues by the Montana Supreme Court; whether this is due in part to the fact that few Montana lawyers cite to out-of-state cases in their briefs, one may only speculate.

3. Montana Citation to Federal Opinions

Civil cases with constitutional or regulatory questions may include numerous citations to federal opinions. The use of federal opinions is tied also to the increase in the number of opinions

Court of Appeals (majority opinions) was 17.1% and in 1960 it was 22.8%. *Id.* In the 1954-1955 period, 67% of the Montana Supreme Court cases had out-of-state cites. See *infra* p. 485 tbl. 4.

68. Leonard, *supra* note 5, at 152.

69. Manz, *supra* note 17, at 130. Montana cases were cited five times between 1850 and 1993 by the New York Court of Appeals. *Id.* at 155 tbl. 10.

70. Friedman et al., *supra* note 2, at 805.

71. *Id.*

72. *Id.*

73. See *infra* p. 485 tbl. 4.

involving criminal issues. In 1994, of all cited judicial opinions, the Montana Supreme Court cited to federal opinions 7.7% of the time.⁷⁴ Of the federal cites, 49% of them were to the United States Supreme Court, 27.6% were to federal courts of appeals decisions, and 23.4% were to district court decisions. Of the court of appeals cites, 35.1% of the Montana Supreme Court's cites were to the Ninth Circuit Court of Appeals. Of the district court cites, 27.3% of these citations were to the United States District Court for the District of Montana.

The 1995 New York study noted that for the New York Court of Appeals since 1960, "one-quarter to one-third of all federal citations have been to lower federal courts."⁷⁵ For the New York Court of Appeals, federal cases did not account for over 10% of all case citations until 1920.⁷⁶ For the New York court, federal citations trailed citations to other states until 1940.⁷⁷ In New York for the 1970-1993 sample years, "federal citations appear in over half of all the court's majority opinions."⁷⁸

For the Montana Supreme Court in 1914-15, cites to federal cases accounted for 11% of all case citations. For the period of 1954-55, 8.1% of the Montana cites were to federal opinions; in 1994, 7.7% of the cites were to federal opinions. For the Montana Supreme Court in 1994, 26% of all published decisions had at least one cite to a federal case.

For the Ohio Supreme Court in 1990, 22.7% of all cases cited were to federal cases. Of these federal cites, 55% of them were to the United States Supreme Court; 35% of them were to the federal courts of appeals, and 10% of them were to federal district courts.⁷⁹

For the Montana Supreme Court, the number of cases cited as a percentage of overall cites has stayed constant at about 62%. The number of citations has declined over time, but the number of opinions has increased. The percentage of cites to in-state cases has increased dramatically. Compared to the heavily-populated states of New York and Ohio, Montana cites to federal cases much less frequently. Federal case law is apparently not as significant in Montana as it is in more populated states. Howev-

74. See *infra* p. 485 tbl. 4.

75. Manz, *supra* note 17, at 129.

76. See *id.* at 128-29.

77. See *id.* at 128-30.

78. *Id.* at 129.

79. Leonard, *supra* note 5, at 137.

er, the court does cite to federal case law, relying most often on United States Supreme Court decisions.

IV. AGE OF OPINIONS CITED IN MONTANA CASES

“Lawyers know that what courts want is not the oldest case but the freshest since it is usually the most relevant.”⁸⁰ Numerous reasons exist for a court’s preference for more recent opinions. Age can weaken an opinion’s precedential value. New statutes may be enacted, new opinions handed down or legal doctrines may become outdated.⁸¹ With respect to the 1994 Montana Supreme Court citations to previous Montana Supreme Court cases, 60.4% were to cases decided within the previous seven years (or 1987 through 1994); 73.5% to cases decided within the previous ten years; and 92.3% to cases decided within the previous twenty years.⁸² Cites to cases over fifty years old accounted for less than 3% of all cases cited. Aside from the obvious preference for newer decisions, there are simply fewer older cases to choose from as the Montana Supreme Court fifty years ago handed down fewer decisions per year.

Similar tendencies are found in the studies of other jurisdictions. The study of the California Supreme Court suggest a “citation half-life” of about seven years—that is, “the probability that any decision of the California Supreme Court will be cited by that court as an authority is reduced by half every [seven] years or so.”⁸³ The North Carolina study also noted a marked tendency toward citing recent cases: “47.2% of the cited cases . . . were no more than seven years old and 69.6% were seventeen years old or less.”⁸⁴ The 1995 New York study of the New York Court of Appeals noted that a large majority of the decisions were no more than twenty years old, and in the 1980 and 1990 sample years over 50% of all cases cited dated from the previous ten years.⁸⁵

The 1995 New York study noted for the New York Court of Appeals that, although the rate of citation to the court’s own cases over fifty years old had declined, these cases did account for nearly 11% of all the court’s citations in 1990.⁸⁶ The Ohio

80. Friedman et al., *supra* note 2, at 808.

81. Merryman, *supra* note 14, at 398.

82. *See infra* p. 486 tbl. 5.

83. Merryman, *supra* note 14, at 395 n.11.

84. Mann, *supra* note 18, at 44.

85. Manz, *supra* note 17, at 136.

86. Manz, *supra* note 17, at 137.

study noted that opinions over fifty years old accounted for less than 10% of the citations in Ohio Supreme Court cases.⁸⁷

Thus, Montana appears to rely more frequently on very recent cases as compared with other jurisdictions. Correspondingly, the court also rarely relies on precedent greater than fifty years old.

V. SECONDARY SOURCES AND THE MONTANA SUPREME COURT

Citation studies perhaps “demonstrate that legal scholarship makes only a modest direct contribution to the daily practice of law”—at least in terms of citation to law review articles by the courts.⁸⁸ At the same time there has been a large increase in the use by courts of secondary source citations over the course of the 20th century.⁸⁹

Some have said the citation to treatises, the Restatements, and other secondary materials must be handled with care. A treatise may represent only the views of the author, and certain sections of the Restatements have been criticized and even rejected.⁹⁰ Another commentator noted the remarks of Congressman Patman who said that people cannot be expected to respect decisions which are influenced by “unknown, unrecognized and non-authoritative textbooks, law review articles, and other writing of propaganda artists and lobbyists.”⁹¹ It is also possible that reliance on secondary sources can be objected to as a matter of accuracy.⁹² The Restatements did prove to be quite influential and were cited by the courts with great frequency, but in the end they have become just another research source. As the importance of the common law has faded in this era of legislation and administrative activity, the Restatements have become less critical. In line with the modern trend toward specialization in the law, the Restatements are taking on narrower topics. The Re-

87. Leonard, *supra* note 5, at 139.

88. Louis J. Sirico & Beth A. Drew, *The Citing of Law Reviews by the United States Court of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1056 (1991).

89. Wes Daniels, “Far Beyond the Law Reports”: *Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940, and 1978*, 76 L. LIB. J. 1, 4 (1983). Of course, in 1900 there were far fewer secondary sources available.

90. Reynolds, *supra* note 16, at 171 (noting that a number of courts have found serious deficiencies in Restatement (Second) of Torts § 402A (1965)).

91. Bernstein, *supra* note 33, at 63 (quoting the remarks of Congressman Patman, 103 Cong. Rec. 16159, 16150 (1957)).

92. *Id.* at 62.

statements can be used as persuasive authority, but only with care and additional support.⁹³

In Montana during 1994, of the total number of cites in Montana Supreme Court opinions (majority, concurring, dissenting), the court cited to secondary materials 2.4% of the time.⁹⁴ Historically, the use of secondary materials by the Montana Supreme Court was much greater (cites per opinion).⁹⁵

| | <u>Treatise</u> | <u>Periodical</u> | <u>Encyclopedia</u> | <u>A.L.R</u> | <u>Restatement</u> |
|---------|-----------------|-------------------|---------------------|--------------|--------------------|
| 1914-15 | 0.96 | 0.0 | .56 | 0.0 | 0.0 |
| 1954-55 | 0.47 | 0.04 | 1.72 | 0.29 | 0.02 |
| 1994 | 0.075 | 0.03 | 0.075 | 0.03 | 0.035 |

The total number of secondary sources cited by the United States Supreme Court rose 625% from the 1900 term to the 1978 term (127 to 921).⁹⁶ "The number of the court cited secondary sources cited per case increased" 1,635% over that period (from 0.651 to 7.140).⁹⁷ The largest part of the increase in the citation of secondary legal sources took place between 1940 and 1978.⁹⁸ The citation of a treatise or an article by a court enhances the treatise's or article's persuasiveness and increases the possibility that it will find future favor by the courts.⁹⁹ Treatises that have been cited by the courts have been accepted as authority by them and may thus be cited with greater confidence by the practicing attorney.¹⁰⁰

Most secondary source citations are not necessarily authoritative in purpose; that is, their primary function is not to justify a given assertion of fact or law.¹⁰¹ An analysis of United States Supreme Court opinions found that references which either identify additional discussion or the position of various persons account for 48% of the citations. Secondary citations were used as authority in only 33% of the total secondary references.¹⁰²

The 1995 New York study noted the percentage of majority opinions containing cites to secondary authorities by type of au-

93. ROBERT C. BERRING, *FINDING THE LAW* 291 (10th ed. 1995).

94. *See infra* p. 485 tbl. 3.

95. *See infra* p. 487 tbl. 6.

96. Daniels, *supra* note 89, at 4.

97. *Id.*

98. *Id.*

99. Manz, *supra* note 17, at 121.

100. Bobinski, *supra* note 4, at 997.

101. Bernstein, *supra* note 33, at 70. Arguably, the court may only be justifying its result.

102. *Id.*

thority in 1993. For the New York Court of Appeals in 1993, 64.2% of the majority opinions cited at least one secondary source.¹⁰³ The study found the New York opinions cited to treatises 35%, periodicals 19.7%, encyclopedias 2.9%, A.L.R. 4.4%, and the Restatement 8.8% of the time.¹⁰⁴

The sixteen-state comparative study found that for the 1960-1970 period 11.9% of the opinions cited to a periodical (law review) article, and 39.2% of the opinions cited to either a treatise, an encyclopedia, a Restatement, or an A.L.R. annotation.¹⁰⁵ For the smaller states in the study, 3.2% of the Idaho opinions had a cite to a periodical (law review) article, and 73.4% of the opinions had a cite to some other secondary source; 6.9% of the South Dakota opinions had a cite to a law review article, and 66.7% had a cite to some other secondary source.¹⁰⁶ The 1995 New York study noted a generally steady rate of citations to legal treatises.¹⁰⁷ It also noted a recent increase in the use of legal periodicals and a permanent low rate of citation to legal encyclopedias, the Restatements, and A.L.R.¹⁰⁸

In 1994, 6.5% of the sample Montana cases cited to a treatise,¹⁰⁹ 1.5% of the cases cited to a law review article,¹¹⁰ 7%

103. Manz, *supra* note 17, at 159 (tbl. 16).

104. *Id.*

105. Friedman et al., *supra* note 2, at 811.

106. *Id.* at 813 (not differentiating the kinds of secondary materials to which the courts cited). However, during that time period, it is probable that most of the cites were to legal encyclopedias.

107. Manz, *supra* note 17, at 148 (noting that the rate of .58 citations per majority opinion in 1995 was almost identical to the rate for sample years 1880 through 1900). *Id.* at 137.

The most cited treatises in 1993 were: (1) W. PAGE KEATON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS; (2) SAMUEL WILLISTON, THE LAW OF CONTRACTS; (3) CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE; (4) WAYNE R. LAFAVE, SEARCH AND SEIZURE. Manz, *supra* note 17, at 160 tbl. 17.

108. *Id.*

109. The following treatises were cited in the 200 Montana Supreme Court opinions analyzed for 1994: JAMES W. MOORE, MOORE'S FEDERAL PRACTICE (cited three times); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (cited twice). The following were cited once each: LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY; ROBERT D. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY; ROLLIN M. PERKINS, CRIMINAL LAW; J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION; D. BARLOW BURKE, THE LAW OF REAL ESTATE BROKERS; JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW; WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS; JACK B. WEINSTEIN, WEINSTEIN'S EVIDENCE; W. PAGE KEATON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS; GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW; WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW.

110. The *Montana Law Review* was cited only once. But see *infra* p. 488-89 tbl. 7, for the total number of cites to the *Montana Law Review* by year and for the

cited to a legal encyclopedia,¹¹¹ 3% cited to an A.L.R. annotation,¹¹² and 3% cited to a Restatement.¹¹³ For the Montana Supreme Court in 1994, 21.5% of the cases cited at least one secondary source. Clearly, secondary sources can be a useful and persuasive source in Montana.

A. *Montana Supreme Court Citation to Law Reviews*

The general trend of increased citation to law review articles and legal periodicals has been attributed to such factors as the increase in the number of legal periodicals and a judicial focus on newer problems in the criminal and constitutional areas. Other commentators have suggested that more innovative judicial attitudes play a role.¹¹⁴ Law reviews are the repository of much of the best contemporary legal scholarship.¹¹⁵

The 1981 sixteen-state comparative study noted that the state supreme courts which had been considered innovative—California and New Jersey, in particular—were the most prolific citers of law reviews.¹¹⁶ This study also noted that since 1960 state supreme courts looked more often to change-oriented legal writings such as law reviews and less often to treatises that crystallized the teachings of the past.¹¹⁷

The number of legal periodical articles cited by the California Supreme Court more than doubled from 1960 to 1970, rising from 73 to 164 citations.¹¹⁸ The multi-state study reported a rise in the law review citation rate from 3.8% of the cases citing articles in the 1945-1955 period to 11.9% of the cases citing articles in the 1960-1970 period.¹¹⁹ The number of legal periodical articles cited by the United States Supreme Court rose from only

total number of cites to all legal periodicals (law reviews) by year from 1965 through 1994.

111. References to C.J.S. and AM. JUR. 2D were about evenly split. But see *infra* p. 490-91 tbl. 8, for the total number of cases citing to AM. JUR. 2D and C.J.S. by year from 1953 through 1994. AM. JUR. 2D has been cited more frequently for every year from 1976 through 1994.

112. See *infra* p. 490-91 tbl. 8, for the number of Montana Supreme Court cases citing to A.L.R. by year from 1953 through 1994.

113. The Restatement (Second) of Torts was cited 4 times. The Restatements (Second) of Agency, Property, and Contracts were each cited once.

114. Manz, *supra* note 17, at 140.

115. Berring, *supra* note 93, at 291.

116. Friedman et al., *supra* note 2, at 815.

117. *Id.* at 817.

118. Merryman, *supra* note 14, at 450 tbl. 14.

119. Friedman et al., *supra* note 2, at 811 tbl. 10.

35 in 1940 to 343 in 1978.¹²⁰ The number of citations to legal periodicals in United States Supreme court cases decreased from 963 in the 1971-73 period to 767 in the 1981-83 period.¹²¹ For the New York Court of Appeals in the 1980 sample year, a dramatic increase had occurred in the rate of law review citations. The rate rose to 0.50 cites per majority opinion—more than a 300% increase from the 1970 rate of 0.15. In 1993, the rate was 0.39.¹²²

In Montana, the number of citations to legal periodicals by the Montana Supreme Court increased from ten in the 1971-73 period to thirty-six in the 1981-83 period. The peak years for Montana were: 1979 (twenty cites to law review articles), 1978 and 1990 (fifteen cites to law review articles). The Montana Supreme Court cited to one law review article in 1960 and it cited to two law review articles in 1970. Citations by the Montana Supreme Court to law reviews generally and to *The Montana Law Review* in particular peaked in the late 1970's, although the court still cites to them on a sporadic basis.

It may be, however, that courts now find legal scholarship decreasingly useful. A growing portion of academic writing, particularly in the elite journals, may be directed toward the scholar, rather than the bar or the bench.¹²³ Two scholars postulate the following reasons for infrequent citation to law reviews:

- (1) Judges find them of limited value;
- (2) Heavy workloads of judges and their clerks may prevent them from delving deeply into academic literature;
- (3) Some judges may have a bias against frequent citation of legal periodicals because:
 - (A) Articles may offer authority far inferior to case law;
 - (B) Articles often are policy-oriented and do not deal with the precise dispute at bar.¹²⁴

Appellate court justices may also believe that it is not quite fair to rely upon a law review article which has not been cited in the briefs or mentioned in oral argument, as a kind of deprivation of the right of cross-examination or an undue extension of the principle of judicial notice. Thus, there may be "a slight persistence

120. Daniels, *supra* note 89, at 6 tbl. 2.

121. Louis J. Sirico & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986).

122. Manz, *supra* note 17, at 140.

123. Sirico & Margulies, *supra* note 121, at 135.

124. Sirico & Drew, *supra* note 88, at 1053.

of ill will against law review articles."¹²⁵

B. *Montana Supreme Court Citation To Encyclopedias and A.L.R.*

A court can employ the legal encyclopedias in two ways: (1) as relators of "the law;" and (2) as repositories of cases on the point in question. However, one commentator cautions that the citation of such works as being dispositive of "the law" should be discouraged, and that legal encyclopedias are more appropriately used to lead the researcher to cases on the question presented.¹²⁶ Justice Peters of the California Supreme Court said of legal encyclopedias:

They are guides to the law, not embodiments of it. This statement of the law is no sounder than the cases that are cited to support the text. You should always go to the primary rather than the secondary authority.¹²⁷

The Montana Supreme Court does cite to the legal encyclopedias, but it has done so decreasingly over time.¹²⁸ Thus in 1994, the court cited to an encyclopedia in 5.4% of its decisions. Previously, the court cited to the encyclopedias much more frequently. In 1954, 1955, and 1958, 40% of the Montana decisions cited to a legal encyclopedia. In 1978, the percentage was 21.9% and it has continued to decline since then. The court has a predilection for American Jurisprudence (hereinafter "Am. Jur. 2d") over Corpus Juris Secundum (hereinafter "C.J.S."). In the years 1985 through 1994, the court cited to Am. Jur. 2d 179 times and to C.J.S. 59 times.

Although both encyclopedias are kept up to date by the use of pocket supplements, Am. Jur. 2d is in fact more current be-

125. Scurlock, *supra* note 20, at 260. Scurlock also noted complaints about the uselessness of the Index to Legal Periodicals for actually finding useful articles. *Id.* Currently, it is much easier to find useful articles now than when Scurlock wrote his article in 1964. Now, there is the much better indexed Current Law Index (and, perhaps because of the competition, the Index to Legal Periodicals is better than it used to be). Also, the Index to Legal Periodicals and the Current Law Index are available on Westlaw and Lexis so that key word searching for articles is both possible and very useful. Finally, CD-ROM versions of these indexes, available at the University of Montana Law Library and at the Montana State Law Library, provide key-word searching capabilities but without the costs associated with on-line searching.

126. Robert D. Archibald, *Stare Decisis and the Ohio Supreme Court*, 9 CASE W. RES. L. REV. 23, 33 (1958).

127. Reynolds, *supra* note 16, at 153 n.26.

128. See *infra* p. 491-93 tbl. 8.

cause its bound volumes are updated more frequently. The pocket supplements of both sets tend to list only new cases and to give very little new textual analysis.¹²⁹

Still, the criticism of the legal encyclopedias and of the practice of citing to them is often quite severe.

It is inevitable that in trying to describe everything [the legal encyclopedias] fall quite short of precisely describing anything. . . . Given the federal nature of the United States, no one set could possibly describe everything. Only a fool cites to legal encyclopedia as persuasive authority.¹³⁰

Citation percentages by the Montana Supreme Court to American Law Reports (A.L.R.) have tracked the citation percentages to the legal encyclopedias. In 1958, 44.5% of all Montana Supreme Court decisions cited to A.L.R. In 1966, the figure was 31.2%; in 1972 it was 16.4%; in 1979 it was 15.1%; in 1982 it was 9.7%; in 1994, 2% of the decisions cited to A.L.R. Undoubtedly, A.L.R. is really quite useful for finding case law on a particular subject if there is an annotation on point. However, it is generally unnecessary to cite to it except as a place where one can find a general line of cases on a particular point of law. It makes more sense to use it as a case finder and then cite to the underlying cases themselves. A.L.R. annotations can be very useful in cases of first impression. The annotation will not only compile the cases but help define the rule accepted by the majority of jurisdictions.

VI. CITATION FORM

Of related interest to the citation practices of the Montana Supreme Court is the citation *form* the court uses. The court follows its eight-page style guide entitled "Citation Forms," which is a part of a section out of the *Law Clerks' Orientation Manual*,¹³¹ used for and by the law clerks working for the sev-

129. One reason for not citing to these encyclopedias is that they are thought to be anonymous compilations. This is not true, however, for AM. JUR. 2D volumes published after 1970. Attorney-authors have written most sections. See, e.g., 59 AM. JUR. 2D *Parliamentary Law* §§ 1-16 (1987) (written by Sara L. Johnson, L.L.B.).

130. BERRING, *supra* note 93, at 288. Berring goes on to say, however, that for all their flaws legal encyclopedias have their virtues. "They can provide useful background, they can inform the researcher of the landmark cases in an area, they acquaint one with the important jargon. Perhaps best for the legal researcher, the modern legal encyclopedia places one into a research universe." *Id.* at 288-89.

131. MONTANA SUPREME COURT, LAW CLERKS' ORIENTATION MANUAL 20-26 (1995).

en justices of the Montana Supreme Court. The style guide notes that the Montana Supreme Court has developed a system of citation that differs in some respects from the forms found in *A Uniform System of Citation* (commonly known as "*The Bluebook*").¹³² Other than certain exceptions which are discussed in this section, the Montana Supreme Court does follow *The Bluebook*.¹³³ The Montana Rules of Appellate Procedure do not specify which citation form attorneys must follow in submitting their briefs to the Montana Supreme Court.

1. Year of Decision

The *Montana Citation Forms* requires that the year the case was decided should follow immediately after the case name.¹³⁴ Whereas, *The Bluebook* requires that the year of decision should come at the end of the cite.¹³⁵ Evidently, it is a relatively recent practice of the Montana Supreme Court that the date immediately follow the case name.¹³⁶

2. United States Supreme Court Cite

The *Montana Citation Forms* requires that full parallel citations be given to United States Supreme Court cases.¹³⁷ Whereas *The Bluebook* requires that citation only be given (if available) to the *United States Reports* (U.S.).¹³⁸

132. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review et al. eds., 15th ed. 1991) [hereinafter "THE BLUEBOOK"].

133. MONTANA SUPREME COURT, *supra* note 131, at 21.

134. For example: All-States Leasing Co. v. Top Hat Lounge (1982), 197 Mont. 200, 649 P.2d 1250. MONTANA SUPREME COURT, *supra* note 131, at 20.

135. For example: All-States Leasing Co. v. Top Hat Lounge, 197 Mont. 200, 649 P.2d 1250 (1982). See THE BLUEBOOK, *supra* note 132, at 64. Curiously, this rule does not actually state where the date or year goes in a case citation; it simply gives examples.

136. Telephone Interview with Chris Wethern, Staff Attorney of the Montana Supreme Court (Aug. 30, 1995). Apparently, former Chief Justice Haswell wanted the date closer to the front of the citation where it would be more easily noticed. This practice began in 1978 with volume 176 of the *Montana Reports*. Before 1977, the year of decision was not put in case citations at all.

137. For example: *Roe v. Wade* (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L. Ed. 2d 147. See MONTANA SUPREME COURT, *supra* note 131, at 20.

138. THE BLUEBOOK, *supra* note 132, at 165. As a practical matter, once the researcher has the U.S. cite, he or she can check the spine of the *Supreme Court Reporter* (S. Ct.) or *United States Supreme Court Reports, Lawyers Edition, 2d Series* (L. Ed. 2d) because the U.S. volume numbers are clearly given on the spines of the two commercial reporters. Thus, the parallel cites are not essential. However, they do make it slightly easier to find the case in either of the two commercial reporters.

3. *Montana Supreme Court Cite*

The *Montana Citation Forms* requires a cite to the *Montana State Reporter* only if the case is not yet published in *Montana Reports*.¹³⁹

4. *Montana Constitution Cite*

Citation Forms requires that the abbreviation “sec.” be used for “section” in a stand-alone citation.¹⁴⁰ Whereas *The Bluebook* requires that the symbol “§” be used for “section.”¹⁴¹

5. *Underlining*

The *Montana Citation Forms* requires that the full case title not be underlined.¹⁴² For law review text, *The Bluebook* also requires that case names not be underlined.¹⁴³ However, for cases cited in court documents and legal memoranda, *The Bluebook* requires that case names should be underlined.¹⁴⁴

6. *Internal Citation (Short Cites)*

The *Montana Citation Forms* requires that for an internal citation to a page in a case previously cited in full, one should use the regional reporter citation. This has been interpreted to mean to cite *only* to the *Pacific Reporter (P.2d)* for internal citations for Montana cases.¹⁴⁵ This clearly conflicts with *The Bluebook*, which requires a parallel cite.¹⁴⁶

139. For example: *State v. Mackie* (Mont. 1981), 622 P.2d 673, 38 St.Rep 86. See MONTANA SUPREME COURT, *supra* note 131, at 20. *The Bluebook* also requires a space between “St.” and “Rep.” THE BLUEBOOK, *supra* note 132, at 47 (explaining Rule 6.1(a)). One should note that both the *Montana State Reporter* and the *Montana Reports* are published by the State Reporter Publishing Company. Thus, the cases in the *Montana State Reporter* are the advance sheets for the *Montana Reports*.

140. For example: Art. V. Sec. 2, Mont. Const. See MONTANA SUPREME COURT, *supra* note 131, at 21.

141. THE BLUEBOOK, *supra* note 132, at 49 (explaining Rule 6.2(b)). Actually, requiring that “sec.” is used makes sense because some attorneys may not be able to figure out how to create the section symbol on their computer.

142. For example: *Blevins v. Kramer* (1978), 179 Mont. 193, 587 P.2d 28.

143. THE BLUEBOOK, *supra* note 132, at 31 (explaining Rule 2.1(a)(i)). An interesting exception to the *Montana Citation Forms* no-underlining rule is the parenthetical note that Justice Trieweller italicizes case names in both long and short cites.

144. THE BLUEBOOK, *supra* note 132, at 11 (explaining Practitioners’ Notes P.1).

145. For example: *Cavanaugh*, 672 P.2d at 484.

146. For example: *Cavanaugh*, 345 Mont. at 21, 672 P.2d at 484. See THE BLUEBOOK, *supra* note 132, at 16 (explaining Practitioners’ Notes P.4(a)).

The fact that the *Montana Citation Forms* does not require the parallel cite to the *Montana Reports* is indeed puzzling and, in fact, is probably a nuisance to a good many Montana lawyers who have easy access to the *Montana Reports*, but do not have similar access to the *Pacific Reporter*.¹⁴⁷ In this context, it is also worth noting that the *Montana Reports* are the "official reports" of the Montana Supreme Court cases: "official reports" appears on the title page of each volume of *Montana Reports*.¹⁴⁸

7. Case Names

The *Montana Citation Forms* notes that when the *Montana Reports* and the *Pacific Reporter* entitle the same case differently, the title given by the *Pacific Reporter* should be used.¹⁴⁹ Whereas *The Bluebook* requires that the citer use the abbreviations found in its table T.6.¹⁵⁰ Using the West form of abbreviation does seem to make sense for the people who routinely use the *Pacific Reporter*. However, difficulties arise when a case that has appeared in the *Montana State Reporter* has not yet been published in the *Pacific Reporter*.¹⁵¹

147. The *Pacific Reporter* is more expensive than *Montana Reports* and its updating service/advance sheets, the *Montana State Reporter* (both published by the State Reporter Publishing Company). The *Pacific Reporter* costs about \$800 per year; the *Montana Reports* costs \$57.50 per volumes with about five volumes published a year, and the *Montana State Reporter* costs \$235 per year. Of course, the *Pacific Reporter* covers many other states besides Montana.

There are about 250 subscribers in Montana to *Montana Reports* and about 560 subscribers in Montana to the *Montana State Reporter*. Telephone Interview with Jane Egan, representative of the State Reporter Publishing Company (Sept. 8, 1995).

148. This has been true since volume 21 (1898) of the *Montana Reports*, although the earlier volumes on their title page use the singular, "official report." It would also be easy for the justices' law clerks to insert the *Montana Reports* parallel cite because from 1945 star-paginated cites for Montana cases are available on WESTLAW. Even if the law clerk/researcher is using the *Pacific Reporter* in hard copy, he or she can easily get the parallel pinpoint cite out of the *Montana Reports* by using the FIND command on WESTLAW with the *Pacific Reporter* pinpoint cite. It is also important to note that case publication in the *Montana Reports* lags about four to six months behind publication in the *Pacific Reporter* so that some parallel pinpoint cites would not be available. Also, to retrieve the parallel pinpoint cite from the *Montana State Reporter* is difficult because WESTLAW help is not available.

149. MONTANA SUPREME COURT, *supra* note 131, at 22.

150. For example: the *Pacific Reporter* (or the West Publishing Company, actually) uses "comm." for the word "commission," and *The Bluebook* uses "comm'n" (without a period). See THE BLUEBOOK, *supra* note 132, at 60 (explaining Rule 10.2.2). Table T.6, on pages 264-265, has abbreviations for ninety-eight words.

151. The *Montana State Reporter* is about two months more current in case coverage than the *Pacific Reporter*, but it has about the same coverage as WESTLAW. Presumably WESTLAW can be used to obtain case names in lieu of the *Pacific Reporter*. Of course, if some attorneys cite cases the *Pacific Reporter* way and

Furthermore, because the rule in the *Montana Citation Forms* with respect to the no-underlining or no-italicizing of the case names is simply not followed, the rule should be deleted. In their briefs to the Montana Supreme Court, attorneys should underline case names. In its published opinions, the Supreme Court should continue to italicize case names.

The second time that an opinion cites to a case in a published court report this short cite (also called a pinpoint cite) to an internal page should be a parallel cite to both P.2d and to the *Montana Reports*. It is a small thing to do, but busy attorneys who routinely use the *Montana Reports* would welcome it. It is also quite common for a justice writing a concurring or dissenting opinion to cite in full a case that has already been cited in the majority opinion. However, under these circumstances it would be preferable to short cite the case in the concurring or dissenting opinion. In this way, it would tip-off the attorney reading the court report that the particular case had been cited, and probably discussed, earlier in the court report—probably in the majority opinion.¹⁵²

8. Statutes

The *Montana Citation Forms* requires citing to the current Montana code without its year of publication and using the abbreviation "MCA."¹⁵³ Whereas *The Bluebook* requires that the statute should be cited with a different abbreviation and should include the year.¹⁵⁴

One should note that the *Montana Citation Forms* cite to the code without the date can be slightly confusing. For example, if a researcher is reading a 1993 case in which she sees § 45-5-202, MCA, and wants to check that statute, she must first realize she needs the 1993 code—and not the current (1995) code. Obviously, there may be a difference if that 1993 code section was amended by the 1995 legislature. If she does pull out the 1995 code, she

some cite them the *Montana Reports* way and some cite them *The Bluebook* way, it may make little difference since the differences are minor. Most attorneys take case names in their research from the Montana Supreme Court opinions from whatever source—*Pacific Reporter*, *Montana Reports*, WESTLAW, or MONTLAW. The correct volume and page number are what matter.

152. One could say that a close reader would know this anyway. However, some court reports are quite long, and the reader may not be sure.

153. For example: § 45-5-202, MCA.

154. For example: MONT. CODE ANN. § 45-5-202 (1995); see THE BLUEBOOK, *supra* note 132, at 192 (explaining Table 1: United States Jurisdictions).

has to read rather carefully the "Compiler's Comments," which in rather sparse detail covers the various amendments over time to the section. A more serious concern is whether the court in its 1993 opinion is referring to the 1993 code (the new code usually comes out in October in odd-numbered years) or to the 1991 code. Frankly, this seems reason enough to add the year to the code cite—even to a current code cite. The *Montana Citation Forms* already requires that the year be added to prior Montana codes. Also, if attorneys are routinely not adding the year to the cite of the current code, confusion could be multiplied.

Preferably, the year of the Montana Code Annotated should always be added parenthetically even for the current code. The year alone should make it clear whether the court is citing to the current code or to a superseded code. In the latter part of odd numbered years, real confusion can exist before and after the "new" Montana Code Annotated has come out: the question being—which version has the court actually cited to.

For citation to a United States Code section, the *Montana Citation Forms* does not require the date for the volume of the code section.¹⁵⁵ Whereas *The Bluebook*, although using the same general format, also requires the date of the volume that the code section appears in must be included.¹⁵⁶

Actually, this is an area where *The Bluebook* might well be ignored. Although the United States Code (U.S.C.) is the official version of the code, it is very rarely used by lawyers and researchers. Instead, they use the *United States Code Service* (U.S.C.S.) (Lawyers Cooperative) or the *United States Code Annotated* (U.S.C.A.) (West Publishing Company). Both of these commercial versions are noted for their accuracy,¹⁵⁷ are much more current than the U.S.C., and have the annotations and other research features that attorneys and judges need. To require that lawyers and law students cite to U.S.C. is simply a faked process. Researchers use U.S.C.A. or U.S.C.S. and then cite to U.S.C. This is inaccurate and misleading. It would be much better to acknowledge real practice and cite to the text

155. For example: 29 U.S.C. § 185(a).

156. For example: 29 U.S.C. § 185(A) (1994). See *THE BLUEBOOK*, *supra* note 132, at 77 (explaining Rule 12.3.2).

157. U.S.C.A. uses the text as it appears in the official version, the U.S.C. See J. MYRON JACOBSTEIN ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 167 (6th ed. 1994). "A major difference between U.S.C.S. and U.S.C.A. is that U.S.C.S. follows the text of the public laws as they appear in the *United States Statutes at Large*." *Id.* at 168.

actually used.¹⁵⁸

9. Rules

The Montana *Citation Forms* requires the following form with respect to the Montana Rules of Civil Procedure: "Rule 52(a), M.R.Civ.P." Whereas, *The Bluebook* requires a different form: "Mont. R. Civ. P. 52(a)."¹⁵⁹ These distinctions are somewhat arbitrary (notice that even the spacing is different). Actually writing out the word "rule" does add a measure of clarity. The Montana *Citation Forms* follows the same format for the Montana Rules of Appellate Procedure and for the Montana Rules of Evidence.

For the Administrative Rules of Montana (ARM), the Montana *Citation Forms* requires the following form: "Rule 42.2.12(6), ARM." Whereas *The Bluebook* requires: "Mont. Admin. R. 8.52.202 (1988)."¹⁶⁰ Again, it would add clarity if the year were added to the ARM cite. The addition of the specific date from the bottom of the ARM page would be preferable (for example, Aug. 31, 1988). That date clearly shows what the citer was looking at. Because the ARM's are in looseleaf format with new pages interfiled and old pages thrown away, the only date that makes sense is the date given at the bottom of each page.

158. THE BLUEBOOK provides that, if possible, one should cite to statutes currently in force to the current official code (U.S.C.) or its supplement. Otherwise, cite to a current unofficial code (U.S.C.A. or U.S.C.S.) or its supplement. THE BLUEBOOK, *supra* note 132, at 74 (explaining Rule 12.2.1). The "if possible" is usually interpreted to mean that for code sections that have not yet appeared in U.S.C. because of its slowness in coming out then it is permissible to cite to U.S.C.A. or U.S.C.S. However, for researchers who simply do not have, or have easy access to, U.S.C. (which is just about all attorneys and probably most judges as well) it is not "possible" for them to cite to U.S.C. either.

Note the comments of one perceptive commentator:

Many legal writers use U.S.C.A. or U.S.C.S. for their legal research. From law school, they might remember that the official U.S.C. is preferred over U.S.C.A. or U.S.C.S. for citation to federal statutes. Thus, though they use U.S.C.A., some legal writers simply drop the "A" and produce a U.S.C. citation. Such a practice is extremely improper. If the statute was located in one of the supplement features of U.S.C.A. or U.S.C.S., the chances are good that the same statute does not even appear in U.S.C. because U.S.C. is notoriously slow. The rule you should follow for all legal citations is to cite the source you read. If your statute came from U.S.C.A. or U.S.C.S., then cite that source, not U.S.C. where you think the same statute appears. The bottom line is to tell the reader exactly "where to go."

C. EDWARD GOOD, *CITING & TYPING THE LAW: A GUIDE TO LEGAL CITATION AND STYLE* 28 (3d ed. 1992).

159. THE BLUEBOOK, *supra* note 132, at 83 (explaining Rule 12.8.3).

160. *Id.* at 192 (explaining Table 1: United States Jurisdictions).

In summary, it appears that the *Montana Citation Forms* seems to work just fine for the Montana Supreme Court, although, as mentioned above, a few changes could help clarify certain citations. For the sake of uniformity, the supreme court might want to put into the Montana Rules of Appellate Procedure a recommendation that attorneys should follow the form provided in the *Montana Citation Forms* in their briefs. The Clerk of the Montana Supreme Court could then mail out copies of the *Montana Citation Forms* upon request.

VII. CONCLUSION

The Montana Supreme Court is a busy court. It handed down 445 published and 130 unpublished decisions in 1994. Montana is one of only eleven states with no intermediate appellate court.¹⁶¹ Even two of Montana's neighbors, North Dakota and Wyoming, have intermediate appellate courts, although their total number of appellate court judges is only eight (three on the intermediate court of appeals and five on the state supreme court).¹⁶² Montana has seven justices on its Supreme Court.

The average number of citations per opinion for Montana Supreme Court decisions is not particularly unusual.¹⁶³ The number of cites to federal cases as a percentage of total case citations is clearly smaller than in the other two most recent studies for Ohio and New York.¹⁶⁴ It may well be, however, that in states with much greater population, courts may need to cite more frequently to federal cases because of federal constitutional or statutory issues. The Montana Supreme Court also has a strong preference for using its own case law rather than using case law from other states (although many criminal cases are federal constitutional cases). Attorneys filing briefs with the

161. Delaware, Maine, Mississippi, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. STATE JUSTICE INSTITUTE, STATE COURT CASELOAD STATISTICS ANNUAL REPORT 1992 81-83 tbl. 3 (1994).

162. In North Dakota, a temporary court of appeals was established to assist the North Dakota Supreme Court should the caseload exceed 250 cases annually. Each panel consists of three judges who may be active or retired district court judges, retired justices of the supreme court or lawyers. BNA'S DIRECTORY OF STATE AND FEDERAL COURTS, JUDGES, AND CLERKS 269 (Judith A. Miller & Kamla J. King, eds., 1995-96). The Montana Supreme Court caseload has exceeded 250 for every year since 1977. See *infra* p. 483-84 tbl. 1.

163. See *supra*, notes 37-47 and accompanying text. Bobinski noted that there has also been a decrease in average citation number for the New York Court of Appeals. Bobinski, *supra* note 4, at 979. The decrease in the average number of citations per case reflects the increased workload of the court. *Id.* at 982.

164. See *infra* p. 485 tbl. 4; see also *supra* notes 74-79 and accompanying text.

Montana Supreme Court need to recognize this and need to thoroughly research Montana case law. The supreme court may be stretching facts into tenuous analogies under Montana case law, when perhaps cases with more similar facts from other states are not cited.

In a recent survey in Montana, "40% of the responding judges indicated that attorneys tend to spend insufficient time analyzing and applying precedent case law to the case before the court."¹⁶⁵ Irving Younger, writing about effective briefs, said that attorneys should cite sparingly and should analyze the key cases: "[g]ive the court the necessary cases and not one more. . . . Give the judge a naked citation and you have been discourteous, imposing on the judge's time and energy."¹⁶⁶ Younger also remarked on the uselessness of string citations—"a good case in a string citation just gets lost."¹⁶⁷ As noted earlier, the Montana Supreme Court no longer uses string citations.¹⁶⁸

The Montana Supreme Court is also well within the norm in citing to recent cases.¹⁶⁹ Thus, the practitioner in writing a brief should be particularly attentive to recent cases. Attorneys just starting out and building a library should know that having the last twenty years worth of cases will be quite adequate for research purposes over 90% of the time.¹⁷⁰

The importance of using secondary materials, both for the Montana Supreme Court and for attorneys, is an interesting question. Actually, the term "secondary materials" covers a wide range of materials. The legal encyclopedias and A.L.R., while useful as case finders and providing an overview of a topic, typically should not be cited by the supreme court or by attorneys in their briefs. If sections from C.J.S., Am. Jur. 2d, and A.L.R. are pertinent, only the footnoted cases should be cited. It is good to see that the legal encyclopedias and A.L.R. are now infrequently cited by the court.

On the other hand, treatises, law review articles, and the Restatements can provide important legal analysis which can

165. Sharon K. Snyder, *Judges Know a Good Brief When They See One*, MONT. LAW, June 1995, at 11.

166. Younger, *supra* note 52, at 110.

167. *Id.*

168. *See supra* note 48-50 and accompanying text.

169. *See infra* p. 486 tbl. 5; *supra* notes 82-87 and accompanying text.

170. In 1994, 93% of the Montana cases cited by the Montana Supreme Court were less than 21 years old. The LEXIS computer database has the last 30 years of Montana cases on-line; WESTLAW has the last 50 years of cases; MONTLAW has all Montana published cases on-line.

significantly aid the court and practitioner. Thus, these sources are appropriate to cite to—both by the supreme court and by attorneys.¹⁷¹ Also, law review articles often analyze trends in the law; in certain cases, the court and practicing attorneys should be aware of these trends.¹⁷² Furthermore, at least one of the functions of the Montana Supreme Court is an educational function. In that role, one might hope to see the court cite more often to treatises, law review articles and the Restatement.

In conclusion, it was an instructive and practical endeavor to analyze the citation practices of the Montana Supreme Court. Montana attorneys can concentrate on researching and citing those kinds of authorities that the Montana Supreme Court deems particularly important. Also, where this Article has revealed citation *form* practices that are somewhat confusing, the Montana Supreme Court may want to give some thought to changing those practices.

171. For example, in a complex case regarding comparative negligence, it may be very helpful for the court to refer the practitioner to VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (1994). The court may or may not cite to this treatise in its opinion, but it could be an extremely useful tool for analysis.

172. The Editors of the Montana Law Review might want to consider how infrequently the Montana Supreme Court has cited to their law review. If it is important to them that the Supreme Court cites more often to articles out of the Montana Law Review, it may have some bearing on the kinds of articles that they select to appear in the Montana Law Review.

TABLE 1
Montana Supreme Court:
Published Decisions Per Year

| | |
|------|-----|
| 1945 | 63 |
| 1946 | 88 |
| 1947 | 74 |
| 1948 | 79 |
| 1949 | 87 |
| 1950 | 82 |
| 1951 | 82 |
| 1952 | 88 |
| 1953 | 96 |
| 1954 | 90 |
| 1955 | 97 |
| 1956 | 82 |
| 1957 | 162 |
| 1958 | 110 |
| 1959 | 127 |
| 1960 | 132 |
| 1961 | 101 |
| 1962 | 127 |
| 1963 | 144 |
| 1964 | 117 |
| 1965 | 171 |
| 1966 | 138 |
| 1967 | 127 |
| 1968 | 141 |
| 1969 | 161 |

| | |
|------|-----|
| 1970 | 141 |
| 1971 | 165 |
| 1972 | 165 |
| 1973 | 213 |
| 1974 | 185 |
| 1975 | 229 |
| 1976 | 242 |
| 1977 | 279 |
| 1978 | 274 |
| 1979 | 325 |
| 1980 | 304 |
| 1981 | 305 |
| 1982 | 341 |
| 1983 | 288 |
| 1984 | 369 |
| 1985 | 324 |
| 1986 | 373 |
| 1987 | 360 |
| 1988 | 363 |
| 1989 | 356 |
| 1990 | 502 |
| 1991 | 440 |
| 1992 | 433 |
| 1993 | 531 |
| 1994 | 445 |

TABLE 1

Montana Supreme Court: Published Decisions Per Year

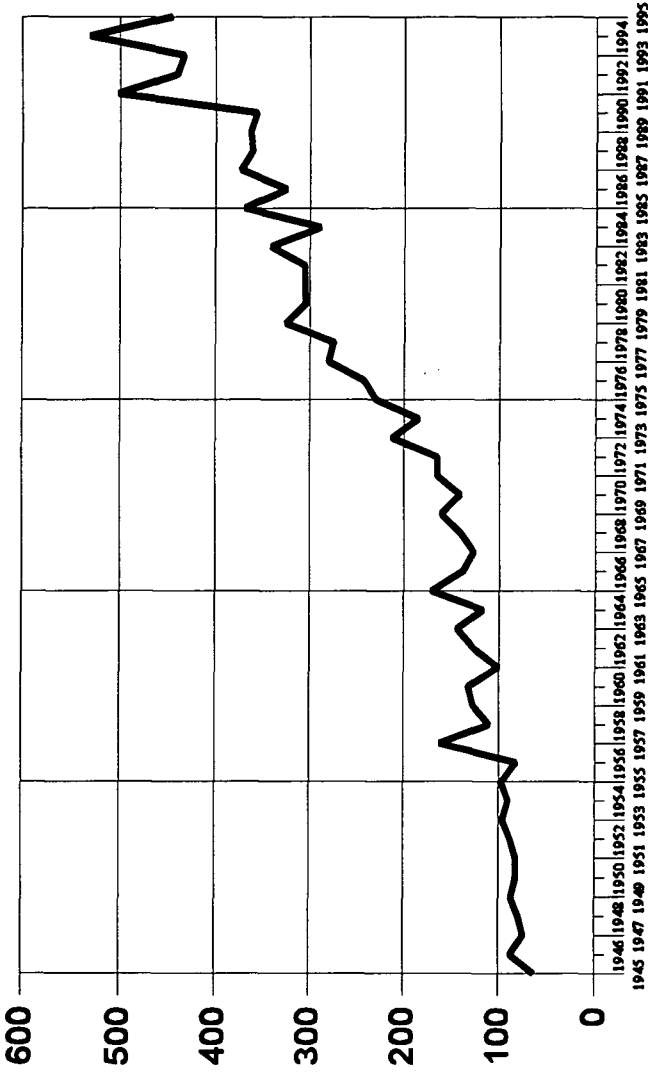


TABLE 2
Montana Supreme Court

| | 1914-15 (100 Decisions) | 1954-55 (100 Decisions) | 1994 (200 Decisions) |
|-------------------------------------|--|--|---------------------------------------|
| Total Citations Per Decision | 15.88 | 22.37 | 13.97 |
| Pages Per Decision | 5.98 | 9.33 | 7.67 |
| Citations Per Page | 2.66 | 2.40 | 1.82 |

TABLE 3
Montana Supreme Court
Citations By Type Of Authority

| | 1914-15 | 1954-55 | 1994 |
|--|----------------|----------------|-------------|
| Judicial Decisions | 62.3% | 61.3% | 62.5% |
| Statutes/Constitution/Court Rules/Regulations | 27.9% | 26.7% | 35.1% |
| Secondary Materials | 9.8% | 12.0% | 2.4% |

TABLE 4
Montana Supreme Court
Citations To Judicial Decisions

| Court Cited | 1914-15 | 1954-55 | 1994 |
|------------------------------|----------------|----------------|-------------|
| Montana Supreme Court | 38.3% | 52.8% | 85.3% |
| Federal | 11.0% | 8.1% | 7.7% |
| Supreme Court | 8.7% | 4.7% | 4.9% |
| Courts of Appeals | 2.3% | 2.6% | 2.1% |
| District Courts | 0% | 0.8% | 0.7% |
| Other States | 50.1% | 39.0% | 7.0% |
| Other Countries | 0.6% | 0 | 0 |

TABLE 5

Montana Supreme Court 1994 Decisions: Age of Montana Case Citations

| Year of Citations | Cumulative % of Total Case Cites |
|--------------------------|---|
| 1994 | 3.0% |
| 1993 | 16.9% |
| 1992 | 26.7% |
| 1991 | 34.2% |
| 1990 | 44.9% |
| 1989 | 50.8% |
| 1988 | 56.2% |
| 1987 | 60.4% |
| 1986 | 65.2% |
| 1985 | 69.2% |
| 1984 | 73.5% |
| 1983 | 75.6% |
| 1982 | 78.5% |
| 1981 | 81.4% |
| 1980 | 84.2% |
| 1979 | 86.9% |
| 1978 | 88.9% |
| 1977 | 90.4% |
| 1976 | 91.2% |
| 1975 | 92.3% |
| 1974 | 92.5% |
| 1973 | 93.1% |
| 1972 | 93.3% |
| 1971 | 93.7% |
| 1970 | 93.8% |
| 1969 | 94.1% |
| 1968 | 94.3% |
| 1967 | 94.5% |
| 1966 | 94.9% |
| 1965 | 95.2% |
| 1964 | 95.4% |

TABLE 6
Montana Supreme Court
Citations to Secondary Authorities

| | 1914-15 (100 Decisions) | 1954-55 (100 Decisions) | 1994 (200 Decisions) |
|----------------------|--|--|---------------------------------------|
| Treatises | 96 | 15 | 15 (7.5 per 100) |
| Encyclopedias | 56 | 172 | 15 (7.5 per 100) |
| A.L.R. | 0 | 29 | 6 (3 per 100) |
| Restatements | 0 | 2 | 7 (3.5 per 100) |
| Law Reviews | 0 | 4 | 6 (3 per 100) |

TABLE 7**Montana Supreme Court:
Cites to Periodical Articles**

| | All Law Review Articles | Montana Law Review Articles |
|------|------------------------------------|--|
| 1965 | 12 | 5 |
| 1966 | 4 | 1 |
| 1967 | 1 | 1 |
| 1968 | 2 | 1 |
| 1969 | 2 | 1 |
| 1970 | 2 | 1 |
| 1971 | 0 | 0 |
| 1972 | 7 | 2 |
| 1973 | 3 | 0 |
| 1974 | 2 | 2 |
| 1975 | 5 | 3 |
| 1976 | 7 | 3 |
| 1977 | 13 | 3 |
| 1978 | 15 | 3 |
| 1979 | 20 | 5 |
| 1980 | 14 | 3 |
| 1981 | 14 | 0 |
| 1982 | 11 | 5 |
| 1983 | 11 | 6 |
| 1984 | 13 | 7 |
| 1985 | 14 | 9 |
| 1986 | 17 | 4 |
| 1987 | 3 | 2 |
| 1988 | 12 | 6 |
| 1989 | 10 | 5 |
| 1990 | 15 | 8 |
| 1991 | 7 | 2 |
| 1992 | 1 | 0 |
| 1993 | 11 | 3 |
| 1994 | 8 | 4 |

TABLE 7

Montana Supreme Court: Cites to Periodical Articles

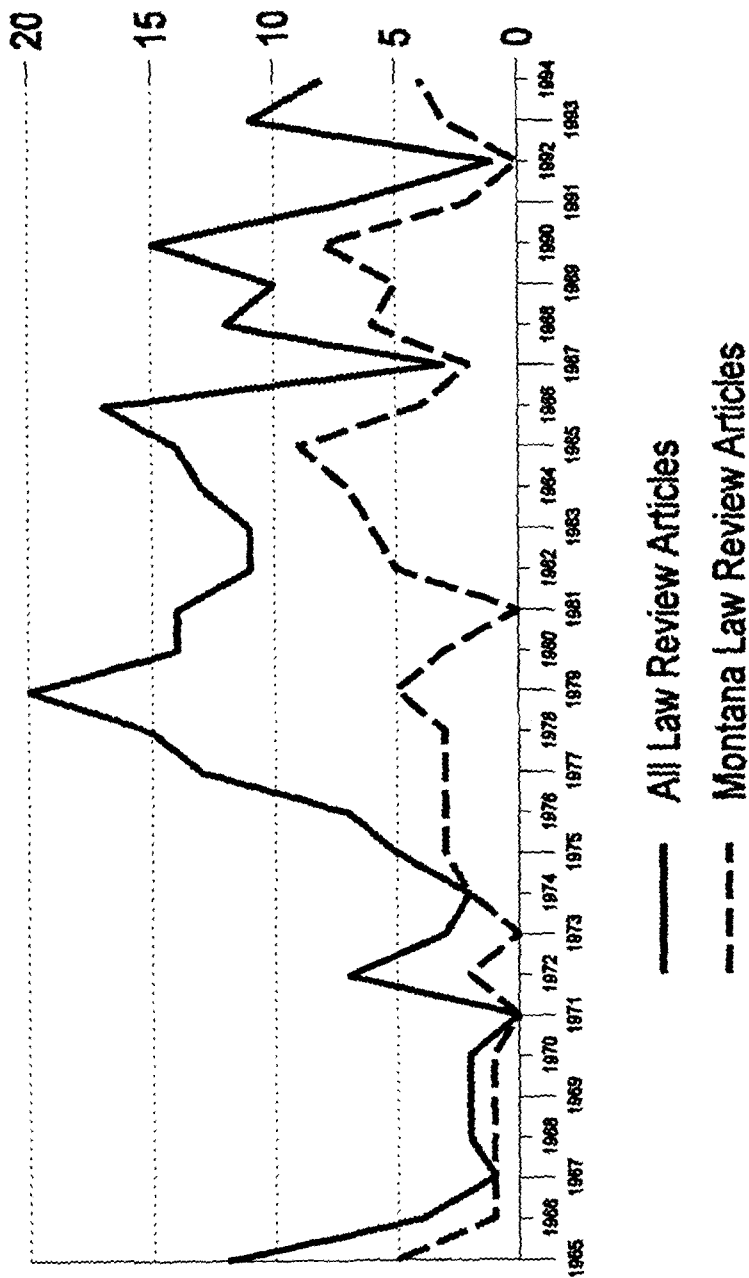


TABLE 8**Montana Supreme Court
Cases Citing to A.L.R., Am.Jur.2d, C.J.S.**

| | A.L.R. | Am.Jur.2d | C.J.S. |
|------|--------|-----------|--------|
| 1953 | 31 | 26 | 26 |
| 1954 | 33 | 24 | 27 |
| 1955 | 28 | 25 | 35 |
| 1956 | 16 | 19 | 24 |
| 1957 | 48 | 46 | 47 |
| 1958 | 49 | 25 | 37 |
| 1959 | 43 | 26 | 28 |
| 1960 | 43 | 22 | 37 |
| 1961 | 34 | 13 | 22 |
| 1962 | 37 | 10 | 24 |
| 1963 | 32 | 13 | 18 |
| 1964 | 27 | 11 | 16 |
| 1965 | 54 | 20 | 28 |
| 1966 | 43 | 16 | 17 |
| 1967 | 29 | 12 | 16 |
| 1968 | 34 | 16 | 17 |
| 1969 | 37 | 10 | 16 |
| 1970 | 24 | 9 | 5 |
| 1971 | 21 | 16 | 14 |
| 1972 | 27 | 11 | 14 |
| 1973 | 27 | 20 | 24 |
| 1974 | 27 | 19 | 11 |
| 1975 | 27 | 18 | 25 |
| 1976 | 29 | 36 | 18 |
| 1977 | 27 | 24 | 17 |
| 1978 | 36 | 40 | 26 |
| 1979 | 49 | 47 | 26 |
| 1980 | 34 | 32 | 29 |
| 1981 | 26 | 20 | 11 |
| 1982 | 33 | 26 | 17 |
| 1983 | 27 | 21 | 13 |
| 1984 | 25 | 30 | 6 |
| 1985 | 15 | 19 | 8 |
| 1986 | 12 | 14 | 3 |
| 1987 | 12 | 18 | 6 |
| 1988 | 11 | 21 | 9 |
| 1989 | 13 | 28 | 3 |
| 1990 | 10 | 14 | 5 |
| 1991 | 9 | 16 | 7 |
| 1992 | 2 | 12 | 3 |
| 1993 | 14 | 20 | 5 |
| 1994 | 9 | 17 | 10 |

TABLE 8

Montana Supreme Court: Cases Citing to A.L.R., Am.Jur.2d, C.J.S.

