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## "... See Erie.": Critical Study of Legal Authority

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*Kris Franklin\**

## I. LEGAL CITATION IS LEGAL REASONING

In law schools we usually treat the proper use of legal authority as synonymous with bluebooking,<sup>1</sup> and everybody knows that everybody *hates* bluebooking. Law students hate to learn it, lawyers hate to do it, and law faculty hate to teach it. As far as most of us are concerned, working on legal citations is overly technical, tedious, and ultimately trivial. It may be a primary reason for the existence of law review editors, but conveniently enough for nearly everyone else associated with legal education, it is usually covered in legal writing programs, often by upper-level students, allowing others not to have to worry about it.

Those who do teach legal citation often implicitly, and sometimes explicitly, inform first year law students that some people, for whatever reason, care very much about the details of citation form and that law students and beginning lawyers are often, fairly or not, judged on this.<sup>2</sup> Thus, law students need to learn citation form as a sort of test of their foundational skills, much the way sushi chefs spend years perfecting the cooking and seasoning of rice before they're allowed to touch the fish. Once they pass this hurdle, they can join the fraternity of more experienced lawyers, all of whom loathe bluebooking as much

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1. Throughout this article I use the term “bluebooking” as a generic verb describing the act of drafting or correcting legal citations, quite simply because that is what most of us call it. The nomenclature is so pervasive, in fact, that the editors of the citation manual previously titled *A UNIFORM SYSTEM OF CITATION* officially bowed finally to common parlance, and with the release in 1991 of the Fifteenth Edition, changed the title to *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION*. A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook*, 26 *STETSON L. REV.* 53, 58 (1996).

Given the publication and growing acceptance of competing citation manuals such as the *ALWD CITATION MANUAL*, pointedly subtitled “A Professional System of Citation,” using the term “bluebooking” in the generic may seem to be taking sides, but the term is so inescapably part of the practical lexicon of American lawyers that it would seem pointless to avoid it.

2. Hence, “the substance of an argument may be undermined by inattention to detail when creating the document in which the argument is communicated.” Timothy D. Blevins, *A Hallmark of Professional Writing Citation Form*, 29 *T. MARSHALL L. REV.* 89, 89 (2003).

as they do, and many of whom do not really remember how to do it well. After all, that's what junior lawyers are for.

But does citation really not matter to the intellectual work of law? Why, then, can attorneys' improper citation be sanctionable?<sup>3</sup> What explains the endless struggles about who should decide on the proper formats for legal citations?<sup>4</sup> And what justifies extended scho-

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3. For a summary of courts' criticisms and sanctions of work not meeting professional standards due to citation errors, see Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1 (1997).

4. The Introduction to the current (18th) edition of *The Bluebook* heralds itself as "the definitive style guide for legal citation in the United States." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 1 (Columbia Law Review Ass'n et al. eds. 18th ed. 2005). This rather self-aggrandizing assertion, new to this most recent edition, may, however, have been introduced as a defensive response to fairly intense critiques of *The Bluebook* and the rise of a now seriously-regarded competitor.

Compiled by a student law review editor in 1926, the earliest forerunner of *The Bluebook* was intended primarily as an internal document governing footnotes in the articles the law review published. A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook*, 26 STETSON L. REV. 53, 57-58 (1996) (compiling "seventy years of bluebook history"). By the mid-twentieth century, though, subsequent versions of the manual held themselves to offer a complete citation system and had begun to be accepted as the standard guide to citation in United States law. Alex Glashausser, *Citation and Representation*, 55 VAND. L. REV. 59, 62-63 (2002).

But *The Bluebook* has always had its critics, particularly those who objected to its length, its pedantry, its dual system of citation forms (one for practitioners and one for academic work), and its seemingly unattainable goal of answering every possible citation question with specific rules and examples. See, e.g., Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986). Despite the 1989 introduction of a greatly simplified citation system affectionately dubbed "*The Maroonbook*," *The Bluebook's* foundational status remained essentially unquestioned until the 1996 publication of its sixteenth edition. With that edition came a number of significant changes in citation format, most notably the rules regarding the use of introductory signals. See Dickerson, *supra*, at 66-70. (The changes in rules for signal use are discussed more thoroughly *infra* at Part III A.)

Given the intense criticism of the sixteenth edition and the ongoing questions about the authorship and style of *The Bluebook* itself, The Association of Legal Writing Directors came out in 2000 with their own citation manual. DARBY DICKERSON, ASS'N OF LEGAL WRITING DIRS., ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION (2000). Even though it has generally received accolades, adoption of the ALWD (now in its third edition) has hardly been universal. See, e.g., M.H. Sam Jacobson, *The ALWD Citation Manual: A Clear Improvement Over the Bluebook*, 3 J. APP. PRAC. & PROCESS 139 (2001); Melissa H. Weresh, *The ALWD Citation Manual: A Coup De Grace*, 23 U. ARK. LITTLE ROCK L. REV. 775 (2001). The most recent edition of *The Bluebook* seems to have been revised directly to keep pace with its competitor. See K.K. DuVivier, *The Bluebook No. 18 - "Thank God for Competition...."*, 34 COLO. LAW 111,112 (2005). The question of which of the current

larly discourse on such seeming arcana as the proper use of “*cf.*” signals<sup>5</sup> or the cultural and contextual meaning of the ordering of sources by their supposed expertise in accordance with *The Bluebook’s* Rule 1.4?<sup>6</sup>

It seems that legal citation matters very much indeed. Citation to proper authority is not simply about form. Rather, it constitutes a crucial connection between legal argument and the grounding upon which it rests. At its base, understanding citation requires understanding the ways that lawyers and judges characterize and use law. Support for assertions made is the foundation of legal reasoning—the basis of virtually all legal conversation in a common law system. Understanding how legal authorities are most effectively deployed to build legal arguments requires mastery of all of the most fundamental components of legal reasoning: reading sources of law meticulously, interpreting them critically, and applying them strategically to craft sustainable legal theories about novel facts. In short, thoughtful understanding of how legal authority is used is a (perhaps *the*) central project for those who would seek to understand how to study, learn, and ultimately work with legal doctrine.<sup>7</sup>

It is, therefore, a mistake to speak about legal citation as if it were simply “bluebooking.” As a profession we do a significant disservice

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manuals, if either, will gain supremacy seems as yet unsettled. *See*, C. Edward Good, *Will The ALWD Citation Manual v. The Bluebook Be the Trial of the Century?*, 37 TRIAL 76 (2001).

Despite all of this struggle and rancor, however, for all practical purposes the answer may prove moot—the resulting citation forms under both schemes are (intentionally) virtually identical. Suzanne E. Rowe, *The Bluebook Blues*, 64 OR. ST. B. BULL. 31, 31 (2004) (“Citations that conform to the *ALWD Manual* are virtually identical to those produced under *The Bluebook’s* rules for practitioners.”).

5. *See, e.g.*, Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the cf. Citation: Getting our Signals Uncrossed*, 48 DUKE L.J. 1043 (1999).

6. Michael Bacchus, Comment, *Strung Out: Legal Citation, The Bluebook, and the Anxiety of Authority*, 151 U. PA. L. REV. 245, 267 (2002) (contending that Rule 1.4 generally placing all professionally-authored work before all student-written work exemplifies an anxiety about what constitutes authoritativeness in law, and reifies a differentiation of authority based less on its relevance or merits and more on the professional status of its author).

7. As one commentator summarizes: “The importance of citations in American jurisprudence can hardly be overstated. Stability in the law depends on the principle of stare decisis, which in turn relies on precedent. Virtually all legal argument, therefore, rests on precedent. Legal writers must demonstrate that the precedent on which they rely is sound and authoritative, and citations are the shorthand they use to show readers the nature and source of that precedent.” Vickie Rainwater, *Citation Form in Transition: The ALWD Citation Manual*, 7 TEX. WESLEYAN L. REV. 21, 21 (2000) (book review).

to ourselves by not analyzing citation critically and by emphasizing picayune detail over substantive analysis of the ways that lawyers use authority. Legal citation matters because it provides a window into larger issues of legal reasoning. There are, of course, major cases that must be referenced if one wants to participate in a discussion on a given issue. On the whole, however, the choice of authority invoked and the context for that authority are, to a surprising extent, at the discretion of the writer. Memoranda, amicus curiae briefs, and judicial decisions rest heavily on the choice of source and the weight given to various sources by different kinds of citation. The rules of citation are, in many ways, guides to argumentation; they take for granted that different legal authorities bring with them different kinds of rhetorical power and that the form of citation conveys (or argues for) the strength of an authority.<sup>8</sup>

Experienced lawyers, of course, know this implicitly. But law students usually do not. Therefore, if we do not teach it explicitly, then we may miss a vital way to talk with students about the core skills in their developing repertoires. For those of us in legal education, teaching citation presents a wonderful opportunity to teach more than just the proper mechanics with which to reference authority. It is a place (a way, really) to teach the very basis of legal reasoning. Thus, this article seeks to treat proper use of legal authority as a primary skill in understanding the subtleties of legal reasoning, rather than simply a technical addendum to the process of legal writing. It asks what it might look like if legal education were broadly suffused with an inquiry into effective (as well as ineffective or potentially improper) use of legal authority.

I argue first that a thoughtful understanding of legal citation sheds light on the basic processes of law. I then ask: How might we teach students to comprehend legal work and legal studies differently if we focused rigorously on the idea that to understand how common law is constructed one must master the fundamental legal skill of interpreting and using authority? What might such a curriculum be, and how, if at all, might it help? While it may not be realistic to expect any educational institution to adopt such a curriculum wholesale, the exer-

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8. "Citations are the 'shorthand' writers use to show readers that the sources they cite are sound and authoritative." Nancy A. Wanderer, *Citation Excitement: Two Recent Manuals Burst on the Scene*, 20 ME. B.J. 42, 42 (2005). Citation, accordingly, becomes the "grammar" used to communicate the rudiments of legal argument. *Id.* For a discussion of citation manuals as legal grammar texts, see Jennifer L. Cordle, *ALWD Citation Manual: A Grammar Guide to the Language of Legal Citation*, 26 U. ARK. LITTLE ROCK L. REV. 573, 576 (2004).

cise of imagining how it might play out may help all of us find smaller ways to introduce or expand upon a close analysis of the ways that lawyers use legal authority and reference legal authority.

## II. GOOD CITATION REQUIRES CRITICAL ANALYSIS

Consider the frustratingly typical (or typically frustrating) experience of a civil procedure teacher: A first-year student appears in her office on the first day of the Spring semester, clutching his final exam, asking the almost unanswerable question: “Why did I get a B-?”<sup>9</sup> The professor opens the exam booklet and reads the following:

“Castco Inc. will bring suit in federal court. The federal court will be hearing the matter in diversity jurisdiction, so state law will apply. The complaint will be considered timely filed under Blackacre’s rules, so Pro Sport’s motion to dismiss will be denied. *See Erie*.”<sup>9</sup>

Of course, there may be nothing substantively wrong with the student’s conclusions, though they seem underdeveloped and thin. Moreover, the student is not incorrect to cite *Erie*,<sup>10</sup> one of the cornerstones of civil procedure rules governing the relationship between local and federal jurisdictions.

But, at the same time, he is incorrect. The depth and variety of ways one might understand and apply *Erie* is reduced to a careless afterthought; there is no consideration of how (let alone why) *Erie* is relevant here. It is as though the citation speaks for itself and no further elaboration is necessary. The biggest problem in explaining to the student why his exam merited only a mid-range score is that the professor cannot simply say to the student that he must support his conclusions; he thinks he *is* explaining and justifying the reasoning in his answer by including the reference to *Erie*. After all, the *Erie* doctrine

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9. My experience working with law students striving to improve their work suggests that this is a typical example, but it is a work of fiction, not derived from any particular piece of student work. The example (and with it, the title of this article) was generated by Richard K. Neumann’s description of this common problem, amid a discussion of an early outline of this project. My gratitude goes to Professor Neumann for his usual insight and intellectual generosity.

10. Assuming, of course, that the students were permitted or advised to cite cases by name on their exams. Many faculty prefer that students not do so on typical closed-book, timed examinations, either to ensure that students do not waste valuable review time seeking to memorize case names or because they fear that students will make mistakes about cases’ names. Given the centrality and degree of attention devoted to *Erie* doctrine in most first-year civil procedure classes, however, it is unlikely than many students who had prepared for a test in the subject would be unfamiliar with the case name. Rather, the fear here might be that this was *all* that the student recalled.

underlies all of the points he is making in this brief passage. What he does not understand, however, is that one vague mention of a germinal case, from which sprouts reams of commentary, waves of subsequent cases, and weeks of this student's time at home and in the classroom, cannot possibly be a substitute for a more careful exploration of what *Erie* means in this context, how it operates, and how it and its progeny lead to the conclusions that our hypothetical student quite rightly reaches.

Compare that free-floating citation as substitute for analysis reference, to one a higher-scoring student might deploy:

Since Castco Inc. will bring suit in federal court under diversity jurisdiction, the court may follow the federal rules with respect to its own processes. However, in order to respect the constitutional authority of state courts, as well as to avoid the possibility of competing interpretations of state law, the federal court, following *Erie*, will be bound to follow and apply the common law that the state has developed on this point. Prior rulings in *Blackacre* would deem the complaint timely, so the federal court will be obliged to concur.

Now this is not to say that every case employed in every exam question requires similarly methodical elucidation. In fact, quite often the opposite is true; most of the cases assigned in a typical torts casebook, for example, are included not as paradigmatic leading cases but as illustrations or examples of particular legal principles at work.<sup>11</sup> If a student chose to cite one of these illustrative cases in an exam, she would use it, if at all, quite differently from the way the students above might have used *Erie*—that is, she would cite it in passing, or as a factual analogy to compare or distinguish the given facts, not as basic to her understanding of the material and to her larger argument.<sup>12</sup> (Thoughtful students should be able to understand the differences between “leading” cases and “illustrative” ones as they read and study them. Indeed, learning to categorize the materials in their casebooks in such a way might lead to a richer understanding of the material they cover, particularly for beginning law students).

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11. That is to say, the particular cases have been chosen due to their compelling facts, well-crafted explanations of their reasoning, or simply because they are interesting, but any of a number of similar decisions would just as easily have illustrated the point.

12. Moreover, if any of these students used any of these cases in a legal memorandum or brief rather than in a closed-book exam, their references to all of the cases would be expected to be far more precise and not incidentally, technically correct in form.

The point here is that well-supported legal analysis requires a layered understanding of how legal authority may be used in different ways. Simultaneously, it demands good judgment in making the best decisions about how to introduce and employ the relevant cases on a particular issue. Too often, however, beginning law students do not know (or are not taught) that their job is to discern, operate within, and push at the boundaries of interpretation. For students like our hapless civil procedure exam taker, cases are place-holders, rather than complicated sets of arguments, doctrines, and potential ammunition for strong legal analysis. Thus, tagging the appropriate case completes the student's task—Q.E.D., his answer must be correct. He does not understand that he has taken only the first step of a complicated series of interpretative and explanatory moves.

Why do beginning law students not know this? It seems both automatic and axiomatic to more experienced lawyers.<sup>13</sup> After all, any lawyer writing a brief recognizes that citing cases is as much an art as a science. But perhaps that is where the problem lies. It seems self-evident to those used to conceiving of cases and statutes as tools for explaining and justifying ideas, rather than as ends in themselves, that the use of legal authority requires simultaneously respecting the limitations of the law and energetically pushing at the boundaries of its potential meanings.

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13. Though, it is precisely this trees/forest distinction that some argue is the divider between novices and experts in legal reasoning. See, e.g., Barbara M. Anscher, *Turning Novices into Experts: Honing Skills for the Performance Test*, 24 *HAMLIN L. REV.* 224, 225–26 (2001) (observing, with respect to the Multistate Performance Test for new lawyers, that experienced attorneys can sort through the tasks needed to begin working on a legal problem and “instinctively devise schemas for performing these tasks,” while law students “seem to work document by document” without a full comprehension of how the pieces of a problem might fit together). Of course there are reams of scholarship devoted to understanding the differences between the way that novices and experts work in law and helping law students move toward a broader comprehension of the material they read. For but a few examples, see RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* (2005); Leah M. Christensen, *The Psychology Behind Case Briefing: A Powerful Cognitive Schema*, 29 *CAMPBELL L. REV.* 5, 10–11 (2006) (discussing the differences in the ways that law faculty and students read cases but noting the difficulty in articulating and explaining those differences); Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 *WILLAMETTE L. REV.* 315 (1997) (exploring the stages that law students typically move through as they seek to understand the rudiments of legal reasoning); Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 *MICH. ST. DCL L. REV.* 447 (examining the ways that law students learn and proposing a curriculum for helping beginning law students better understand and control their own goals in “learning” law).



Law students, however, have significant trouble seeing all of these layers of potential meanings and interpretations. They see cases stacked up like so much cordwood, bolstering whatever doctrine they are arguing for. This world view may not be surprising when we consider that the day in/day out experience of most of the first-year curriculum constructs a routine that is quite unlike the actual work of lawyering, or the law-students' equivalent, which is analyzing hypothetical fact patterns on exams. This happens *despite* the committed effort of many members of law school faculties to tell and show students that they must be ready to do that kind of synthesis and that they are capable of doing so. Perhaps this is because students spend the bulk of their time reading and briefing cases with an eye toward preparing to analyze the meanings of each of those cases in class, so it should not be surprising that they come away with the assumption that this process is the primary objective of their courses. Thus, they may over-emphasize the importance of individual cases they read and consequently under-emphasize the synthesis of (or disjuncture between) groups of cases they encounter, the underlying questions and tension in various bodies of law, and the insightful application of those cases to new facts.

But this is certainly not what legal educators intend. Law faculty want law students, and ultimately lawyers, to look at this civil procedure student's exam and easily understand why "*see Erie*" is, correct or not, inadequate. We want students to understand that given the malleability of legal authority in a common law system, reference to controlling precedent may sometimes settle a question definitively, but more often it does not. This is why further explanation of the way a referenced case or statute relates to the proposition for which it is cited is so often necessary to complete the writer's task. Simply telling law students that they must explain and justify their reasoning is probably not enough to break through.<sup>14</sup> They need help understanding what it means to thoroughly ground an argument in something as murky and subject to interpretation as case law. And they are likely to need a fair amount of practice to do this well.

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14. This precise point has been made, countless times, by law teachers and deans, academic support professionals, and commercial services seeking to help law students do optimal work in law school. In fact, I am not aware of *any* guide for beginning law students that fails to emphasize this point as a centerpiece of its advice. For but a few of the more recent examples, see CHARLES R. CALLEROS, *LAW SCHOOL EXAMS: PREPARING AND WRITING TO WIN* 7-12 (2007); JAMES E. MOLITERNO & FREDRIC I. LEDERER, *AN INTRODUCTION TO LAW, LAW STUDY, AND THE LAWYER'S ROLE* 173-176 (2d ed. 2004); HERBERT N. RAMY, *SUCCESSING IN LAW SCHOOL* 111-120 (2006).

### III. TEACHING “CRITICAL LEGAL AUTHORITIES”<sup>15</sup>

A legal authorities curriculum would have to grow out of the proposition that learning about the law requires learning about how cases are *used*. Experienced attorneys understand that we can play games with citation, and that the more carefully we attend to the ways we can frame and characterize relevant cases and statutes, the more tools we have at our disposal for constructing persuasive legal analyses.

#### A. “Citing” Includes Framing

In order to clarify the work that citation to legal authority does, we would necessarily need to redefine the term “citation” to make it reach more broadly. That is, we would have to collectively agree that even technically correct citation requires more than simply understanding the rule<sup>16</sup> (and the reason)<sup>17</sup> for citing F.2d without a space and F. Supp. 3d with several, or grasping the constantly-shifting standards of referencing internet materials.<sup>18</sup> At the very least, our definition of correct legal citation work must include inquiry not just into form but also the actual (or at least proposed) connections between referenced authorities and assertions for which they are introduced.

Interestingly, though this connective tissue may not be encompassed in the common connotation of the term “bluebooking,” it is included in the denotation. That is to say, *The Bluebook* itself seeks to

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15. The quotation marks represent my somewhat apologetic appropriation of the language of important scholarly movements such as critical legal studies, critical race theory, and so forth. In doing so I am conscious of the powerful social critique such work encompasses. I wish in no way to diminish the important struggles of which these movements are a part by using similar phrasing to describe the work of making visible the strands of legal reasoning implicit in the use and teaching of legal authorities. Nonetheless, the phrasing does strike me as an apt description of the project of closely examining the very building blocks of legal thinking.

16. THE BLUEBOOK: AN UNIFORM SYSTEM OF CITATION R. 6.1, at 72, tbl.T.1, at 193 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

17. Adjacent capital letters and individual numbers standing alone are closed up. When the terms within the abbreviation are longer and include lower case letters, spaces are inserted throughout the separate components of the abbreviation.

18. Rules 12.5 and 18 have been revised repeatedly in recent editions of *The Bluebook* in an attempt to keep up with the explosion of internet-based sources and the use of electronic databases. For a discussion of the ways that *The Bluebook*’s usual five-year publication schedule forces it to “race to catch up with legal researchers . . . in the area of Internet research,” see Christine Hurt, *The Bluebook at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship*, 82 IND. L.J. 49, 56–57 (2007).

codify the notion that for a citation to be “correct” it must properly show how the referenced authority and the reference relate. Thus, *The Bluebook* treats signals (and to a lesser degree, parentheticals) as absolutely basic and essential components of all citations,<sup>19</sup> even those in which the correct signal is “no signal.”<sup>20</sup> Signals are vital parts of bluebook grammar *precisely because* they are mechanisms by which a writer demonstrates the relationship between an assertion and its attendant citation. Parenthetical explanations within citation sentences are of lesser significance because they are not mandatory; however, they can be important for legal writers both conceptually and strategically because they are a place for the writer to elaborate on or clarify the relationship between the cited and the cite, wherever helpful or necessary.<sup>21</sup>

The relentless focus on learning the *Bluebook*-approved abbreviation for “department” (“dep’t” not “dept.”),<sup>22</sup> however, obscures for many the paramount importance of the substance of legal citation. Thus, signals can be treated as minor or somehow advanced parts of citation form, appropriate for consideration only by current and former senior law review editors.

Such a profound misunderstanding of the centrality of the interpretive work that signals do have led to significant furor over the precise meanings of some of the most common signals. When the sixteenth edition of *The Bluebook* was released, the rules governing the use of “see” versus “[no signal]” were substantively altered.<sup>23</sup> The

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19. *The Bluebook*'s Bluepages tip B4 itself opines, “[m]astering the use of signals is a key step to effective citation.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. B4, at 4 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

20. *Id.* at R. 1.2(a), at 46, B4.1, at 4.

21. *Id.* at R. 1.5, at 51, B5.1.4, at 10.

22. *Id.* at tbl.T.6, at 335.

23. Under the rules of the fifteenth edition, any case that was directly on point for the proposition being argued was cited without a signal; using “see” indicated that the case was relevant but more by analogy than by direct applicability. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 22–23 (Columbia Law Review Ass'n et al. eds., 15th ed. 1991). (Using “[no signal]” required only, among other possibilities, that the cited authority “clearly state[ed] the proposition,” while “see” was appropriate where the cited authority “clearly support[ed]” it.) *Id.*

According to the sixteenth edition, however, the rules essentially stipulated that only direct quotations could be cited with no signal—all other citations required the use of “see” to point to the authority being called upon. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 22 (Columbia Law Review Ass'n et al. eds., 16th ed. 1996).

These changes put practicing attorneys in a difficult position. Under the new rules they were required to pepper their briefs with “see.” But for anyone (which is to

changes led to much outcry<sup>24</sup> and culminated in the construction of the ALWD competitor<sup>25</sup> and rapid backpedaling by *The Bluebook* editors.<sup>26</sup>

How could the editors of *The Bluebook* have made what, in the final analysis, was such an enormous and potentially costly mistake? The differences between audiences for *The Bluebook*, students and professionals, may have been the source of the problem. *The Bluebook* is published by student law review editors, whose focus in thinking about citation is the use of authority in scholarly journals. Academic legal writing leans on the side of caution in citing cases, because most journal articles are proposing new ways of understanding law and theorizing about the possible meanings of judicial decisions. In an academic context, it may make sense to assign unambiguous citation only to direct quotation and more nuanced invocations to everything else.

But for practicing attorneys, all legal authorities are potential tools for argumentation. In deciding whether and how to deploy cases, statutes, and other forms of legal authority, advocates must resolve two interrelated questions in rapid sequence:

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say, for any judges) familiar with the standard practice of referencing legal authority under the previous fifteen editions, an argument supported only by citations modified with “see” could seem noncommittal and the authorities unconvincing. While this change might not affect student editors of law journals, for whom the change in tone suited the meticulous and cautious nature of scholarship, it proved to be confusing and contentious in practice, where confidence persuades.

24. Most influentially, Dickerson, *supra* note 4, at 66–70. The outcry reached an apex in a resolution by the House of Representatives of the Association of American Law Schools condemning *The Bluebook* editors’ changes and urging law faculty and legal periodicals to continue to use the signal rules in the fifteenth edition. Pamela Lysaght & Grace Tonner, *Bye-Bye Bluebook*, 79 MICH. B.J. 1058, 1058 (2000).

25. Julie Cheslik, *The Battle Over Citation Form Brings Notice to LRW Faculty: Will Power Follow?*, 73 UMKC L. REV. 237, 240–44 (2005) (tying outcry over the sixteenth edition’s signals rules directly to the formation of the Association of Legal Writing Directors and its decision to craft its own citation manual).

26. Though new editions of *The Bluebook* are ordinarily released on a five-year schedule, the seventeenth edition was published after a four-year interval (published in 2000, though expected in 2001). C. Edward Good, *Will The Bluebook Sing the Blues?* 37 TRIAL 78, 78 (2001) (noting the early publication of the seventeenth edition and speculating that it was due to expected competition with the newly-published ALWD *Citation Manual*). The seventeenth edition of *The Bluebook* essentially reinstated the fifteenth edition’s signal rules, with some slight modification in wording and emphasis. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds. 17th ed. 2000) (acknowledging that the “15th Edition’s version of the rule [1.2 on introductory signals] has been reinstated.”).

- a. *Can* I frame or characterize the authority in question in a particular (strategically advantageous) manner within the bounds of the law?<sup>27</sup>
- b. *Should* I push my interpretation and use of this authority as far as I might, or will doing so strain my credibility more than it will strengthen my position?

Of course these questions are patently interconnected, and their answers inevitably overlap. And it would be the rare attorney who would articulate her choices about how to support her discussions of legal text in precisely this way because, for most of us, the questions intuitively converge. But disarticulating these somewhat different inquiries helps us begin to untangle the complicated but often hidden calculus that lawyers and judges make as they use legal authority. The first question deals with the possibility of framing or characterizing an authority in a particular, strategically advantageous way; that is to say, would this characterization be proper (that is, true to the argument made in the case cited)? The second is more subtle and requires an understanding of the context in which the authority is being introduced, not simply an understanding of its self-contained text. To ask “*should* I?” requires an advocate to think about how serviceable an authority really is. While an authority might be appropriate to the issue at hand, it does not automatically follow that the precedent is persuasive or that it does not strain credibility.

Once law students recognize that citing cases and statutes can be part of an exciting array of strategic considerations and not solely a dry exercise in tedious obligation, they can also understand the stakes involved in citing them appropriately and correctly. In going about their daily business of reading and understanding cases and statutes, students who are trained to look critically at the use of legal authority would have richer opportunities to practice and absorb some of the fundamentals of legal advocacy: close reading, precise writing, the centrality of rules, and meaningful assessment of the risks lawyers take in challenging the limits of the law.

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27. Taking into account, of course, both the requirements of zealous advocacy and the ethical obligation to be truthful in referencing legal authority.

## B. Games Lawyers Play with Framing

For a clearer understanding of the ways that legal authority intersects legal reasoning generally, it is helpful to consider an example. Suppose that a lawyer<sup>28</sup> were confronted with the following scenario:

Mary Elizabeth Walker is a twenty-seven year old Texas resident with a troubled past. She recently experienced a religious conversion. Seeking to “change her life with help from above,” she enrolled in a four-week retreat for women held by a local convent.

At first, Mary Elizabeth found her time with the Sisters of Mercy quite therapeutic. Just as the brochure promised, the program’s structure was quite demanding and afforded a wealth of opportunities for quiet reflection. The minimal comforts of her room, extended periods of silent meditation, and early morning chores on the convent grounds provided the discipline and structure Mary Elizabeth had been looking for.

After the first week, however, Sister Helen, who was in charge of the retreat, told the group that it was “time to intensify” their spiritual work. She explained that each of the women in the group would, in turn, “encounter the Holy Spirit.” Choosing Mary Elizabeth to go first, Sister Helen led her to a small room in the convent’s cellar. She instructed Mary Elizabeth to remain inside and “search her soul,” while the remaining participants prayed outside.

The room Mary Elizabeth found herself in was small and devoid of furnishings. Having always suffered from claustrophobia, Mary Elizabeth began to panic. She shouted to Sister Helen that she was frightened, but the nun replied that the encounter was a necessary part of Mary Elizabeth’s path to healing, and urged her to continue. Mary Elizabeth sat for over an hour trying to control her breathing. Eventually, she exhausted herself and fell asleep. When she awoke, the rest of the group and Sister Helen were crowded around her, congratulating her for successfully “fighting her demons.”

Within days, Mary Elizabeth began having nightmares about her time in the “encounter room.” She eventually developed difficulty sleeping, withdrew from other group members, and cried during prayers. She met with Sister Helen, and they decided together that she should not continue in the program. When Mary Elizabeth returned home her condition deteriorated further, and a counselor

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28. Or a law student taking an exam was presented this scenario. (Note that an exam is intended essentially to be the practice of relevant law, writ small.)

diagnosed her with Post Traumatic Stress Disorder. After consulting an attorney, Mary Elizabeth decided to sue the convent and Sister Helen for false imprisonment.

Let us assume that the lawyer working on this issue has come across several false imprisonment cases decided in Texas.<sup>29</sup> The first, *H.E. Butt Grocery Co. v. Saldivar*,<sup>30</sup> represents a fairly classic false imprisonment scenario: someone was wrongly accused of shoplifting and held for a short time by store security guards. While out shopping in Brownsville, Texas, with her mother and two aunts, Diana Saldivar was apprehended by a security guard at H.E. Butt Grocery, who accused her of stealing the sunglasses clipped to her blouse. After the guard escorted Saldivar back into the shop, her relatives challenged him and demanded to see the manager. The manager arrived and established that the sunglasses were not a brand the store stocked. He apologized, then Saldivar and her family left.<sup>31</sup> Shortly afterwards, she sued H.E. Butt for false imprisonment. A jury found in her favor, awarding her \$10,000 for actual damages,<sup>32</sup> and the Texas Court of Appeals affirmed the award.

The second case, *Fojtik v. Charter Medical Corporation*,<sup>33</sup> presents a more unusual scenario in the context of this intentional tort. Friends and family members had staged an intervention with Fojtik over his abuse of alcohol and told him that if he did not enter Charter Hospital for treatment they would have him forcibly committed, using handcuffs if necessary. Fojtik agreed and was admitted to the facility.<sup>34</sup> Though uncooperative with the hospital's substance abuse program, Fojtik always voluntarily returned to the hospital on time after being granted passes to go out for a few hours at a time.<sup>35</sup> According to the hospital, Fojtik was free to leave at any time, but he charged false imprisonment, claiming that the threat of being involuntarily committed was enough to intimidate him and keep him in the program.<sup>36</sup> Here, the lower court ruling, affirmed by Texas Court of Appeals, dismissed the case against defendant Charter Medical.

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29. Or the student who has been assigned these cases in a Torts class.

30. 752 S.W.2d 701 (Tex. App. 1988).

31. *Id.* at 702.

32. *Id.*

33. 985 S.W.2d 625 (Tex. App. 1999).

34. *Id.* at 628.

35. *Id.* at 629.

36. *Id.* at 630.

The controlling issue in both of these decisions appears to be one of consent on the part of the plaintiff. In order to make out a prima facie case of false imprisonment, the plaintiffs must show the essential elements: 1) willful detention; 2) without consent; and 3) without authority of law.<sup>37</sup> The other issues having been resolved without contest, the appellate courts focused on the meaning of the term “without consent.” In *Saldivar*, the court concluded that although the jury had decided that the plaintiff “voluntarily complied with a request to remain”<sup>38</sup> with the security guard to establish her innocence, in fact, given her vulnerability as “a nineteen year old woman” compared to the guard who was “male, uniformed, and armed,” her decision to come back into the store with him was not voluntary.<sup>39</sup> Indeed, *Saldivar* herself testified that she “didn’t feel like [she] could leave.”<sup>40</sup>

Fojtik, by contrast, “was a forty-five-year-old man who had run several businesses. . . . [h]e was not a young, inexperienced woman”<sup>41</sup> and could be expected to understand that he could leave at any time. The opinion describes at some length prior cases in which plaintiffs had successfully argued a lack of consent to their detention despite never having physically tried to leave.<sup>42</sup> In portraying the facts of each case, the *Fojtik* court’s descriptions take pains to emphasize that most of the plaintiffs were women, the only male one being an employee of the store from which he was accused of stealing.<sup>43</sup> Given the narratives offered by the court, it seems quite reasonable to conclude that in these cases all of the plaintiffs felt tortiously intimidated and coerced. This stands in contrast to *Fojtik*’s circumstances, because “none of the factors that are considered in evaluating whether threats are sufficient to overcome the plaintiff’s free will, *i.e.*, the relative size, age, experience, sex, and physical demeanor of the participants,” weighed in *Fojtik*’s favor.<sup>44</sup> Accordingly, the court found “nothing in this case to suggest that *Fojtik* was a person whose weakness or susceptibility to intimidation might excuse his failure to insist on leaving when he felt he was falsely imprisoned.”<sup>45</sup>

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37. *Grocery Co. v. Saldivar*, 752 S.W.2d 701, 702 (Tex. App. 1988).

38. *Id.* at 703.

39. *Id.*

40. *Id.*

41. *Fojtik*, 985 S.W.2d at 631.

42. *Id.* at 630–31.

43. *Id.*

44. *Id.* at 631.

45. *Id.*



Moreover, despite the threat of involuntary commitment, Fojtik was given several opportunities to leave the hospital on passes and chose to return each time. Among the false imprisonment cases detailed by the *Fojtik* court in its list was another theft case in which a plaintiff was found not to have been falsely imprisoned.<sup>46</sup> The plaintiff in that case, a female employee, was asked to wait or continue working while an investigation was conducted, and in the interim she left twice and returned to the office in which she was allegedly detained.<sup>47</sup> The court in *Fojtik* uses this case to support its conclusion that allowing the plaintiff to leave the hospital on temporary passes (although implying that he was not free to go at other times) was not false imprisonment. After all, each time Fojtik left the hospital on a pass, he returned.<sup>48</sup>

The question facing Walker's lawyer (actual or hypothetical) is which case her situation is more like: Diana Saldivar's or Felix Fojtik's. Realistically, the question is how her attorney can best argue that her situation resembles Saldivar's and simultaneously distance her from *Fojtik*. Simply dropping a reference to *Saldivar* will not be sufficient:

Mary Elizabeth Walker will likely succeed in her false imprisonment claim against Sister Helen and the Sisters of Mercy Convent. . . . She was traumatized by her experience in the convent's "encounter room," and never effectively consented to enter or remain there. See *H.E. Butt Grocery Co. v. Saldivar*, 752 S.W.2d 701 (Tex. App. 1988).

This passage can be seen as the lawyer's version of "see *Erie*." Both *Saldivar* and Walker's case involve women in vulnerable positions submitting without audible complaint to authority figures who urge them to enter and remain in places they were reluctant to be. Both involve circumstances in which an empathetic observer might identify with the plaintiffs' sensation of threat, and many might agree to remain despite feeling coerced. But the simplistic correlation of the two cases entirely skirts the issues that complicate Walker's position. Walker is an adult in her late twenties; she is not being detained by a man with a uniform and a gun; she voluntarily began the convent's retreat and freely entered the "encounter room." Although it is clear that Sister Helen and the others on the retreat strongly urged her to

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46. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995).

47. *Id.* at 643.

48. *Fojtik*, 985 S.W.2d at 631-32 (citing *Randall's Food Market*, 891 S.W.2d at 645).

continue the process, there is no clear indication that Walker would have been prevented from leaving if she had tried.

Such an analysis inevitably raises the comparison with Fojtik, whose case arguably turns on the fact that despite his complaints about Charter House, he “never insisted that he be permitted to leave.”<sup>49</sup> In fact, there are some striking similarities between the two cases: both involve challenging programs in which the participants themselves enrolled in order to make changes in their lives, and both participants seemed to want to leave their programs but were dissuaded from doing so. Even though there was significant pressure on both Walker and Fojtik from both peer participants and program leaders to remain in their programs, it could be argued that overcoming reluctance and resistance are integral to both experiences, and therefore, do not constitute evidence of a tort. Somehow, Walker’s attorney will have to grapple with *Fojtik*.

It would be tempting for Walker’s advocate to try to acknowledge the potential analogy to negative authority, but to treat it dismissively, referencing it only in passing.<sup>50</sup>

Mary Elizabeth Walker will likely succeed in her false imprisonment claim against Sister Helen and the Sisters of Mercy Convent. . . . She was traumatized by her experience in the convent’s “en-counter room,” and never effectively consented to enter or remain there. *See H.E. Butt v. Saldivar*, 752 S.W.2d 701 (Tex. App. 1988) (finding lack of consent where a young woman felt she had no choice but to do as an authority figure asked, so she did not openly object); *cf. Fojtik v. Charter Medical Corp.*, 985 S.W.2d 625 (Tex. App. 1999) (denying a claim of no consent for a middle-aged professional man who complained about his in-patient substance abuse program but left and returned several times).

From Walker’s perspective, this version of the law is quite helpful. There appears to be solid precedent on her side, and counter-arguments are made to seem tangential and inapt. To most lawyers the passage might seem to satisfy question one above.<sup>51</sup> It appears to suffi-

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49. *Fojtik*, 985 S.W.2d at 631.

50. Parenthetical explanations within citations may be particularly well suited for such purposes. They can create the appearance of meticulous precision in citation, while actually allowing the writer great latitude to characterize authority favorably without inviting the scrutiny that similar textual claims might warrant.

51. Most states’ rules of professional conduct adopt standards similar or identical to those in the Model Rules of Professional Conduct’s Rule 3.1 regarding “Meritorious Claims and Contentions”: A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so

ciently and truthfully connect the precedent to the propositions that it *can* be used, and to the extent that it comes too close to the boundaries of fairness, tweaking the parentheticals to make them less aggressive would likely resolve many objections.

But this is not necessarily enough. Chances are such a characterization of the law would still strike most careful lawyers as playing rather too fast and loose. Resolving problems such that the references to *Saldivar* and *Fojtik* have minimally sufficient truthfulness (or at least, “truthiness”)<sup>52</sup> to pass the muster of professional ethics is probably unwise. Just because an advocate arguably *could* frame the Texas law on consent in false imprisonment this way certainly does not mean that he or she *ought* to.

After all, the convent’s attorney will be researching and using these cases as well. Opposing counsel might very well rely on *Fojtik* as a remarkably similar and favorably-resolved case. In both scenarios a person voluntary enters an institution for therapeutic purposes, but at some point becomes disenchanted with the program. The defense attorney could very well contend that the voluntary nature of both programs controls the outcome:

When a troubled person chooses to enter a residential therapeutic program it may be common for the patient to resist at some point, or even ask to leave, but this is not tantamount to revoking consent for treatment. Withdrawal of consent in such a setting must be explicit. *Fojtik v. Charter Medial Corp.*, 985 S.W.2d 625, 631 (Tex. App. 1999).<sup>53</sup>

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that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. Model Rules of Prof’l Conduct R 3.1 (2002); available at [http://www.abanet.org/lcpr/mrpc/rule\\_3\\_1.html](http://www.abanet.org/lcpr/mrpc/rule_3_1.html)). Accordingly, lawyers are limited by the objective criteria that their arguments must not be “frivolous,” but apart from patently unwarranted claims, the vagaries of subjective interpretation, coupled with the mutable boundaries of the “good faith” argument for the expansion of legal doctrine, open the door to the possibility that it might be ethical for some attorneys to advance certain arguments that would be unequivocally unethical if made by others (depending upon their “good faith” beliefs). But that fact would implicate the second question that I propose. Citations so far testing the limits of credible interpretation of existing doctrine, even if technically ethical, should likely be foregone as strategically unwise.

52. That is, have the quality of *seeming* to be truthful. “Truthiness,” a word concocted satirically for the inaugural episode of Comedy Central’s *The Colbert Report*, is now defined by Merriam-Webster’s dictionary as “truth that comes from the gut, not from books.” MERRIAM-WEBSTER ONLINE (2006), <http://www.m-w.com/info/06words.htm> (citing Stephen Colbert).

53. The discussion specifically referenced here holds that: “The facts of this case

This seems effective because it uses the authority in an affirmative way: defining a rule for a very narrow situation, and offering precise authority on point. Moreover, counsel has implicitly dealt with *Saldivar*. The case does not need to be raised or distinguished in counterargument since it has been cordoned off as irrelevant.

Note that using the [no signal] signal *here* indicates that the authority to follow “directly states the proposition.”<sup>54</sup> That is a questionable usage here: there is little doubt that the case can be understood to *stand* for this proposition, but does it actually *state* it? There are grey areas subject to the interpretation of the individual litigator. The more cautious writer might understand the rules as requiring a near paraphrase for the [no signal], and thus, would adopt the weaker signal. But an advocate more comfortable with framing authority assertively might opt for the direct citation here because it is not clearly wrong and appears more forceful and effective than the same citation modified by “*see*.”

The more aggressive litigator might consider resolving the conflict by using “*see, e.g.*.” That move would include careful modification and focus attention more squarely on the implication that the referenced case is but one of many similar decisions. As long as there is at least one other case that arguably relies upon similar reasoning, such usage is probably legitimate. But would it be wise?

Regardless of the signal chosen here, characterizing *Fojtik* as demanding explicit withdrawal of consent for a previously-compliant plaintiff to put forward a false imprisonment charge, counsel for the defense has not only satisfied question one, but might well have met the second criterion, strategic effectiveness. Nevertheless, the defense attorney should at least consider that Sister Helen’s urging Ms. Walk-

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do not raise a fact issue on whether *Fojtik* had a ‘just fear’ of injury. The record before us indicates that, while *Fojtik* certainly complained about being at Charter, he never insisted that he be permitted to leave.” *Fojtik v. Charter Med. Corp.*, 985 S.W.2d 625, 631 (Tex. App. 1999). The pinpoint citation, or “jump cite,” might help the reader find that specific quotation. But even if it does not, it ought to be included by a careful writer because it adds both technical compliance with *The Bluebook’s* Rules 3.2 and B5.1.2 and the *appearance* of precision. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 3.2, at 59, R. B5.1.2, at 7 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005). As a side note, in drafting the text above, I considered using the quotation in a parenthetical to the citation but decided that it was sufficiently powerful that it would probably be better discussed, possibly quoted, in subsequent text. Legal drafting is rife with such minute strategic considerations. Helping students unpack them in assigned texts, or better yet, make them themselves, can be a lot of fun.

54. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a) at 46 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

er to remain in the room is hardly the same as Mr. Fojtik's being issued passes to leave the hospital.<sup>55</sup> And the powerful sense that a young woman undergoing "religious conversion" may have regarding a nun's authority might easily hearken back to the vulnerability of the plaintiff in *Saldivar*.<sup>56</sup> Additionally, Mary Elizabeth's sensation that she could not simply open the door and leave might differentiate her case from Fojtik's, and the individual characteristics raised in both opinions could also play to her favor, since gender is clearly an issue for both courts.

A thoughtful response to the defense articulated above might read:

*Fojtik* is not, as defense counsel claims,<sup>57</sup> solely concerned with vocal recanting of consent. Indeed, the case turns instead on the concrete fact that plaintiff Fojtik several times "left [Charter] and voluntarily returned."<sup>58</sup> *Fojtik v. Charter Medial Corp.*, 985 S.W.2d 625, 631 (Tex. App. 1999) (citing *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995), in which the same actions by the plaintiff "were held to negate her false imprisonment theory.") In fact, Ms. Walker's case is far more analogous to *H.E. Butt Grocery Co. v. Saldivar*, in which the Texas Court of Appeals held that a young woman's failure to insist on leaving a premises could not be deemed consent sufficient to bar her recovery for false imprisonment, because she might have felt "so overawed and intimi-

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55. *Fojtik*, 985 S.W.2d at 631.

56. This is particularly true if Ms. Walker is Catholic, something suggested but not settled in the fact pattern as given. Though of course this is a factor not mentioned in the rather demographic description of vulnerability factors laid out in *Saldivar*, so the question of how precisely the case can be used to support the notion that plaintiff's obedience to threatening authority can be deemed coercion rather than consent remains an interesting one.

57. Of course, reasonable minds might differ on the advisability of attacking opposing counsel's assertions so directly, rather than doing so by inference but without direct reference. Common wisdom usually holds that while it is wise to concede an opponent's points that are beyond refute, advocates should, otherwise, stick solely to elaborating their own arguments without explicit reference to opposing parties' positions. In this example, though, I am imagining an attorney who has decided that her primary strategy revolves around categorizing *Fojtik* as irrelevant and encouraging the court to disregard it. Thus, the effect of calling attention to the defendant's reliance upon the case is to suggest, implicitly, that if the court agrees with the plaintiff's interpretation of that case, then it will have to similarly agree that the defense's case must inevitably fall like a house of cards once its foundational reliance on *Fojtik* is revealed to be faulty.

58. Note that in order to make this point, this quotation is not necessarily *needed*, but its inclusion helps call for the parenthetical reference to *Johnson*, which strengthens the entire passage.

dated” that she could not meaningfully refuse the entreaties of a person with a great deal of perceived power. 752 S.W.2d 701, 703 (Tex. App. 1988) (citing *Black v. Kroger*, 527 S.W.2d 794, 800 (Tex. Civ. App. 1975)).

The well-conceived reply could in turn contend quite simply that:

Fojtik, like the plaintiff here, was a voluntary patient whose claims to have been imprisoned were dismissed because “he never insisted that he be permitted to leave.” *Fojtik*, 985 S.W.2d at 631. Absent physical restraint (e.g. *Skillearn & Sons, Inc. v. Stewart*, 379 S.W.2d 687 (Tex. Civ. App. 1964) (cited in *Fojtik* at 630)), or unusual weakness or susceptibility (e.g., *Black v. Kroger*, 527 S.W.2d 794 (Tex. App. 1975) (cited in *Fojtik* at 630-31)), there can be no jury question as to whether the plaintiff had a “just fear” or injury. *Fojtik*, 985 S.W.2d at 631–32.

All of the examples developed above show two sides speaking to each other, one posing the problem in one way and the other responding. As this conversation developed in complexity, so did the process of citation, building towards increasingly sophisticated ways of understanding and using the source material. Not coincidentally, as the analysis progresses it also comes closer to crafting examples that can more fully satisfy the two criteria set up at the beginning of this discussion, balancing the “*can*” with the “*should*.”

Because the practice of law always leaves room for strategy and interpretation, no two lawyers are going to have the same approach to this case. But most lawyers could see, understand, and agree with this construction as effective, even if it were not the path they themselves would choose.

### C. Teaching Legal Authority in Action.

If we turn from imagining this as an actual case to presenting it, instead as hypothetical law students might face, what does the discussion above do for them?

Let us suppose that both cases had been included in a torts class on false imprisonment, and the student finds this fact pattern on an exam. The student’s immediate reaction is to list the three elements of false imprisonment and one would hope, soon realize that the case turns on the question of consent. Ideally, the student would duplicate the thinking of our hypothetical lawyers above, working through both sides of the argument, replicating what the lawyer would do interpretively with both the facts and the relevant cases.

Replicating those thinking processes is an important part of helping students understand one of the most basic yet most elusive concepts in the study of law: the idea that rules of law can be both fixed (and binding), *and* simultaneously somewhat malleable as they are applied to new facts and interpreted in new cases. After grappling with *Saldivar* and *Fojtik* in these various iterations, what student would not understand the boundaries and definitions of false imprisonment more fully? Negotiating not just the cases but also, how one might use the cases as authority—the “can” and the “should”—teaches students the limits (and the elasticity of the limits) of doctrine because they are required to test their rhetoric against the standards of both ethical and credible argumentation. Moreover, students also comprehend more deeply how legal authority functions in the arena of advocacy and how cases can be manipulated (although always within limits) to serve various arguments. Working through citations helps make the uses of law, the basis of common law itself, more concrete.

Teaching students the significance of citation might also have the added bonus of helping them learn to execute the formal elements of bluebooking more successfully because what they are doing feels that much more important and comprehensible.

#### D. Teaching Citations in Context

Of course, what most people mean when they say “bluebooking,” the purely technical process of using proper citation form, the majority of students do not do very well. One part of the solution to improve competence in basic citation form can be to embed it within a broader investigation into using authority effectively. This would help transform a meaningless set of letters and numbers into a rubric that makes sense.<sup>59</sup> Although that does not guarantee that students will correctly

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59. Of course, I do realize that in talking about how we cover the building blocks of legal citation, I have moved to material that would, in most institutions, be covered somewhere other than the torts class I was imagining just above. The material that I am describing here would most likely be taught in some version of a legal research/writing/analysis course. Such a transition is not inconsequential, although my invisible switching among educational forums may suggest that it is. In fact, weaving together the various concepts introduced in different segments of law school curriculum is an enormous task for students, and it is something in which all law schools would probably like to improve their own efforts.

Nonetheless, this task of this article is imagination. It is important to be aware of the boundaries in what we teach but not always to be limited by them. We may not easily be able to accomplish everything I discuss here; we may not even want to. But simply considering it and finding ways to use the critical teaching of legal authority to

follow every single rule devised in their citation handbook, it can help ensure that they will master basic citation form. After all, research on learning clearly suggests that the better students understand a concept, the more easily and effectively they retain it, use it, and deploy it correctly.

Imagine, for example, that rather than teaching citation form in a top-down way that impresses upon students any number of rules, we approached it from the ground up. What if we asked students to construct, based on what they know about how law operates, the pieces of information someone might need in order to evaluate the legal support offered for a given proposition? Suppose the authority in question was a case decided by a court. How could we identify it so that judges, other lawyers, and law students could track down the source and verify the accuracy of our arguments? Most likely, students, given a minute to consider the question, would conclude that they needed to know:

1. What is the name of the case;
2. How to find it: where in the reporters it is assembled and archived;
3. When it was decided and its contemporary relevance;
4. Which court decided it, the level of its authoritativeness, and its jurisdiction;
5. Whether it is still good law. Have any subsequent cases rethought, rewritten, or substantially changed its holdings?
6. The precise meaning of the decision;
7. Where in the text of the decision that central meaning can be found, by page number; and
8. Why this case is being introduced in this time and place: that is, how it relates to the assertion for which it is being raised.<sup>60</sup>

Not surprisingly, this list of necessary information covers every single point in the standard case citation format. Indeed, *The Blu-*

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enrich our curriculum, can be enough.

60. I should acknowledge that some years back I did, in fact, ask these questions to large sections of the entire entering class at NYU School of Law. Without exception (but occasionally with a bit of faculty prodding), each group generated slightly differently-worded versions of precisely this list.



*ebook* itself used to make this clear to its readers; in earlier editions there was a section called “Typical Legal Citations Analyzed” that diagrammed the elements of a standard citation, all of which are included on the above list.<sup>61</sup> Even in the absence of that feature, the Bluepages section of the current edition presents itself as providing “easy-to-comprehend guidance for the everyday citation needs of first-year law students, summer associates, law clerks, practicing lawyers, and other legal professionals.”<sup>62</sup> A glance at the chapter subheadings in the Bluepages simultaneously bears out and belies this claim, depending upon the attitude of the reader: B3 “Elements of a Citation”; B4 “Introductory Signals”; B5.1.1 “Case Names”; B5.1.2 “Reporter and Pinpoint Citation”; B5.1.3 “Court and Year of Decision”; B5.1.5 “Subsequent History”; and so on.<sup>63</sup>

Collectively, these elements (numerically-coded!) can make a student’s head spin. But if we start by treating them not as random blobs of information but instead as containing everything you need, then the conventions of basic citation form become a fairly simple, almost elegant way of presenting this information in readily-available, comprehensible form. Understanding the process and purpose of legal citation necessarily makes it easier to learn and to do, both conceptually and technically.

#### IV. ADOPTING A “CRITICAL AUTHORITIES” CURRICULUM

What if legal educators collectively decided that teaching students to understand the nuances of legal authority, and to cite it correctly and thoughtfully, was central to the mission of legal education in a common law system? Even assuming that we could reach such a consensus in a world of many, many competing interests and constantly limited pools of resources, it would be hard to know where to start.

The first difficulty in imagining how to integrate this kind of curriculum into a law school is deciding where it fits. Currently, many law students and beginning lawyers come away from their legal education thinking that “citation work” is really or only about mastering the intricacies of 415 pages of rules and cross-referencing in the eighteenth edition of *The Bluebook*.<sup>64</sup> Moreover, professors generally assign the

61. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds. 17th ed. 2000).

62. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION Introduction, at 1 (Columbia Law Review Ass’n et al. eds. 18th ed. 2005).

63. *Id.* B3, B4, at 4, B5.1.1, at 6, B5.1.2, at 7, B1.5.3, at 8, B5.1.5, at 10.

64. Or the 572 pages and 49 general rules of the 3rd edition of the *ALWD Cita-*

teaching of technical bluebooking to legal writing courses, substantive comprehension of law to required doctrinal classes, and studying the ways that students absorb learning about legal process to academic support programs. Whether this division of labor is doing anyone any good is, and has been, a matter of debate, but within the usual current structure there is no easy place where the integrated understanding of legal authorities that this article proposes neatly fits.

Although, institutionally, this presents a pragmatic obstacle to establishing this kind of program, the comprehensive nature of a critical legal authorities curriculum also offers a kind of challenge to the pedagogical status quo and enables a kind of flexibility of ownership of these ideas. No matter where we sit in the law school, all of us can, at least in some small way, decide that it is part of our jobs to teach legal authority well. We do not necessarily *need* a comprehensive curricular change to incrementally become more explicit about the complex ways that legal authority can be understood, characterized, and cited. Regardless of our individual institutional roles, all of us are engaged in the project of getting students to understand and use law; a critical examination of the uses of legal authority and citation can fit into any class, in any field, if we want it to.

Thus, despite the structural challenges this material may pose, there may be good news. For example, a classic torts textbook might include a case like *Saldivar* to introduce and illustrate the richness of notions of consent when there is an implication of coercion or threat. It might also (although this is becoming rarer) include *Fojtik* as a counterpoint so that students could be invited to consider the boundaries of the sympathy for the plaintiff that is evidenced in *Saldivar*. Rather than simply reading the cases to discuss their contradictions or reconciliation in class, students could be asked to work through ways of citing and using the cases in a scenario like that of Mary Elizabeth Walker's, so that they might build for themselves a more sophisticated grasp of the material. Similar examples might be constructed by drawing on materials in criminal law, evidence, wills, and so forth.

In addition, legal writing programs, rather than treating citation as drudgery to be gotten through, can introduce strategic citation and framing of legal authority with greater enthusiasm as a crucial part of the thinking and writing process.

Academic support professionals, whose work often focuses on finding a point of entry for students to learn the law with a basic grasp of what it *is* as both a field and a phenomenon, might work with mate-

rials students are studying by playing “citation games” to introduce students to the intellectual excitement of relating cases and facts to one another.

In other words, these kinds of approaches do not require a complete re-imagining of what we teach and how we teach it. What they would require, however, is a shift in perspective. We would need to cover the same set of materials but start from a different place. A critical legal authorities approach is focused on making connections between the analytical, the rhetorical, and the formulaic: indeed, on showing that these elements of legal education are not really separate at all, but intertwined. To do this, we must also begin to dissolve the boundaries between form and content, doctrine and skills, argumentation and citation; boundaries that case law itself shows us are constructed rather than actual. I think it is not too much to hope that, as a result, we will end up with students less bewildered by the challenges they face and more enmeshed in the purpose of their education.