

CITATION, SLAVERY, AND THE LAW AS CHOICE:  
THOUGHTS ON *BLUEBOOK* RULE 10.7.1(d)\*

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*Today, more than 150 years after the end of the Civil War, lawyers and judges continue to rely on antebellum decisions that tacitly or expressly approve of slavery. This reliance often occurs without any acknowledgement of the precedent’s immoral and legally dubious provenance. Modern use of these so-called “slave cases” was the subject of Professor Justin Simard’s 2020 article, Citing Slavery. In response to Professor Simard’s article, the latest edition of The Bluebook includes Rule 10.7.1(d), which requires authors to indicate parenthetically when a decision involves an enslaved person as a party or the property at issue. Unfortunately, Rule 10.7.1(d) applies only to academic writing—journal articles authored by law professors and students. It therefore does not address the moral and dignitary harms that result from courts’ and lawyers’ use of slave cases to invoke the legal force of the state. Courts themselves, therefore, must decide whether to require a parenthetical for slave cases. As it should be. Courts, not a student-written style guide, are responsible for addressing the judiciary’s connection to slavery. That responsibility counsels in favor of adopting Rule 10.7.1(d) as a tool to prompt lawyers and judges to carefully consider—and perhaps forgo—continued reliance on slave cases.*

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## INTRODUCTION

Lawyers and judges do not argue from first principles. Rather, our work is premised on—and constrained by—decisions that have come before. In *Law's Empire*, Professor Ronald Dworkin compares this process, the judicial act of “deciding what the law is,” to the actions of multiple authors drafting a chain novel.<sup>1</sup> On Professor Dworkin’s telling, an author dropped into the middle of a chain novel “must try to make [it] the best novel it can be” while still ensuring that the result “can be construed as the work of a single author rather than, as is the fact, the product of many different hands.”<sup>2</sup> This process involves judgment and interpretation. A new author’s contribution need not “fit every bit of the text” that came before it. “It is not disqualified simply because [the author] claims that some lines or tropes are accidental, or even that some events of plot are mistakes . . . . But the interpretation . . . must nevertheless flow through the text” from past authors to the present.<sup>3</sup>

In the chain novel of American law, how should today’s judges and lawyers treat previous chapters that involved the horror of slavery? Professor Justin Simard raised this question in his fascinating 2020 article *Citing Slavery*.<sup>4</sup> Today’s lawyers and judges must address this question because, though the Thirteenth Amendment prohibited slavery (except as punishment for a crime),<sup>5</sup>

1. RONALD DWORKIN, *LAW'S EMPIRE* 228 (1986). Professor Dworkin describes a chain novel as an “enterprise [in which] a group of novelists writes a novel *seriatim*; each novelist in the chain interpret[ing] the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.” *Id.* at 229.

2. *Id.* at 229.

3. *Id.* at 230.

4. Justin Simard, *Citing Slavery*, 72 *STAN. L. REV.* 79, 81 (2020).

5. U.S. CONST. amend. XIII.

the Amendment did not erase the decades of slavery-related case law that preceded its adoption.

These so-called “slave cases”<sup>6</sup>—that is, court decisions involving an enslaved person as a party or as the property at issue—are continually relied upon by courts and lawyers, long after their holdings may have been abrogated by the Thirteenth or Fourteenth Amendments.<sup>7</sup> Based on his review of modern opinions, Professor Simard finds that “[c]ourts routinely cite these [slave] cases without acknowledging that they may no longer be, in a formal sense, good law.”<sup>8</sup> And most of the time, these citations are not accompanied by any acknowledgement of the case’s slavery context.<sup>9</sup>

Courts’ continued reliance on slave cases presents important legal questions regarding the law of slavery and the precedential force of antebellum judicial decisions. How and when, if ever, should these “slave cases” be cited? Lawyers and judges facing these questions have no obvious place to look for answers. One place they are *unlikely* to look is *The Bluebook*. After all, it’s just a citation guide,<sup>10</sup> not a moral document or a treatise on the more nuanced points of precedent.<sup>11</sup> And even as a citation guide, it’s something that lawyers and judges often ignore.<sup>12</sup>

As is so often the case, however, *The Bluebook* provides a rule, even in the absence of guidance or explanation. Following the publication of Professor Simard’s article, and based on his recommendation,<sup>13</sup> the latest version of *The*

6. Professor Simard appears to have created this term to refer to these cases. *The Bluebook* uses the same term. For consistency’s sake, I therefore use it here.

7. Simard, *supra* note 4, at 81. Professor Simard notes that some of these cases may have been abrogated by the Thirteenth Amendment, which ended slavery. *Id.* But to the extent some slave cases were premised on the idea not just of slavery as a legal institution, but on the idea that enslaved people lacked the protections of citizenship, the Fourteenth Amendment also plays an important role.

8. *Id.* at 82.

9. *Id.* at 97 (noting that courts did not acknowledge slavery context in eighty percent of uses).

10. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, at 1 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020) [hereinafter THE BLUEBOOK]; see also David J.S. Ziff, *The Worst System of Citation Except for All the Others*, 66 J. LEGAL EDUC. 668, 670–71 (2017) (describing *The Bluebook*’s primary purpose as a citation guide for student law journal editors).

11. See generally BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT (2016) (providing information on the doctrine of legal precedent in the United States). For a thought-provoking critique of the entire concept of a treatise on precedent, see Amy J. Griffin, “If Rules They Can Be Called”: *An Essay on The Law of Judicial Precedent*, 19 LEGAL COMM’N & RHETORIC 155 (2022) [hereinafter Griffin, *Essay*].

12. See Ziff, *supra* note 10, at 681–82 (noting the wide variety of citation practices that deviate from *The Bluebook* rules); see also *id.* at 681 n.75 (observing that lawyers often break *The Bluebook* rules regarding abbreviations without objection).

13. See Simard, *supra* note 4, at 121 (suggesting the addition of a new *Bluebook* rule addressing the citation of slave cases).

*Bluebook* contains a rule for the citation of slave cases.<sup>14</sup> Rule 10.7.1(d) now states that authors should indicate parenthetically when a cited decision is a slave case:

Slave Cases. For cases involving an enslaved person as a party, use the parenthetical “(enslaved party).” For cases involving an enslaved person as the subject of a property or other legal dispute but not named as a party to the suit, use the parenthetical “(enslaved person at issue).” For other cases involving enslaved persons, use an *adequately-descriptive* parenthetical.<sup>15</sup>

As an example, *The Bluebook* provides a proper citation to *Dred Scott v. Sandford*:

*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.<sup>16</sup>

The intricacies of *Bluebook* rules are generally the domain of second-year journal editors, toiling away in the law library stacks.<sup>17</sup> But many practicing lawyers and judges must also attend to *The Bluebook*'s details and nuances, because many jurisdictions require *Bluebook* compliance in their state or local rules.<sup>18</sup> North Carolina is one such jurisdiction.<sup>19</sup> Lawyers and judges therefore have a practical interest in this new *Bluebook* rule for slave cases. If *The Bluebook* requires this new parenthetical, and if a jurisdiction requires *Bluebook* compliance, then this new slave-case parenthetical may be the law of the land.

*Bluebook* compliance is only half the story, however. More importantly, and wholly apart from the minutiae of a student-written citation guide, Professor Simard's article should prompt judges and lawyers to reconsider their continued reliance on slave cases as precedent.<sup>20</sup> Parenthetical or no, what does it mean for a case to be “good law” in the twenty-first century, if the case's holding was based on “racist presumptions,” if the case's reasoning contained “demeaning descriptions of the enslaved,” or if the case's result tacitly (or expressly) approved of slavery as an institution?<sup>21</sup>

14. THE BLUEBOOK, *supra* note 10, R. 10.7.1(d), at 111.

15. *Id.* (emphasis and improper hyphenation of phrasal adjective in original).

16. *Id.* Curiously, this citation to *Dred Scott* does not follow *The Bluebook*'s standard rule for party names: “Generally, omit given names . . .” *See id.* R. 10.2.1(g), at 100. Yet *Dred Scott* is uniformly cited as *Dred Scott v. Sandford*, not *Scott v. Sandford*.

17. *See* Ziff, *supra* note 10, at 670–71 (noting that *The Bluebook*'s purpose is to provide citation rules for student-edited law journals).

18. *See* THE BLUEBOOK, *supra* note 10, at 46–59 tbl.BT.2.2 (listing local state rules, many of which require some form of *Bluebook* compliance).

19. *See infra* Part II.

20. Simard, *supra* note 4, at 120 (proposing a general presumption against treating slave cases as “regular precedent”).

21. *Id.* at 112.

This Article offers practical guidance for lawyers and judges who may face these questions when they encounter (or cite) slave cases. Part I discusses slave cases and provides a brief review of Professor Simard's work, using some recent North Carolina precedents to illustrate the more general phenomenon of modern courts' continued reliance on slave cases. Part II then considers whether lawyers and judges in jurisdictions like North Carolina, which incorporate *The Bluebook* into their local citation rules, are *required* to follow Rule 10.7.1(d)'s instruction to parenthetically indicate when a cited decision is a slave case. Ultimately, Part II concludes that practitioners are *not* required to follow Rule 10.7.1(d) or use the slave-case parenthetical. When a jurisdiction requires *Bluebook* compliance, that requirement generally applies to *The Bluebook's* simplified rules for practitioners, not the more detailed rules for academic writing and student-edited law journals.<sup>22</sup> And Rule 10.7.1(d) is in the inapplicable academic rules.

But this lack of an existing requirement does not resolve the issue. Part III therefore addresses the corollary question: Should jurisdictions independently require the slave-case parenthetical, wholly apart from their general incorporation of *Bluebook* rules? To offer an answer to that question, Part III examines the practical effects of the rule, separately addressing the effects on legal readers and legal writers. In short: Legal readers will experience the parenthetical as a notice—a kind of disclaimer appended to citations. For legal writers, however, the rule will first require them to determine whether a given case is a slave case. They will therefore experience the parenthetical not as a notice, but as a requirement to consider a case's slavery context. That consideration may then prompt the writer to reconsider citing the case at all.<sup>23</sup>

Based on this examination, Part III concludes that jurisdictions should adopt a rule requiring the slave-case parenthetical. The parenthetical's notice-like function will benefit legal readers, warning them about potentially shaky precedent.<sup>24</sup> For legal writers, the requirement works more subtly: It may cause writers to think more carefully about their reliance on slave cases—a good result, since reliance on slave cases may present unforeseen legal problems and impose more foreseeable dignitary harms.

Alternatively, some legal writers may decide that including the parenthetical is just too much trouble. They might therefore alter their initial slave-case citation and instead cite a different case, not because of personal reflection, but because of inconvenience or frustration. There, too, the law likely benefits. We should want to reduce the citation of slave cases in our justice system. And the parenthetical rule would bring about that reduction not by

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22. See *infra* Section II.B.

23. See *infra* Sections III.A–B.

24. See *infra* Section III.A.

prohibition or “cancellation,” but by the individual and contextual choices of lawyers and judges.

“Every citation to a particular source legitimizes the institution of using sources of that type.”<sup>25</sup> As judges and lawyers continue to author the chain novel of American law, we should not unnecessarily legitimize antiquated decisions predicated on the horrors of our slave-holding past.

#### I. SLAVE CASES AS MODERN PRECEDENT—AND *THE BLUEBOOK*’S RESPONSE

The latest version of *The Bluebook* was released in 2020.<sup>26</sup> This twenty-first edition contains a new rule addressing so-called “slave cases”—that is, antebellum decisions involving an enslaved person as a party or as the relevant property at issue.<sup>27</sup>

This new rule—Rule 10.7.1(d)—springs directly from a 2020 article in the *Stanford Law Review* by Professor Justin Simard, *Citing Slavery*.<sup>28</sup> The article empirically examines how courts continue to rely on these slave cases, long after their holdings may have been abrogated by the Thirteenth or Fourteenth Amendments.<sup>29</sup> Moreover, even when not formally abrogated or overruled, many slave cases employ expressly racist reasoning to support their outcomes.<sup>30</sup> And yet Professor Simard discovered that “[c]ourts routinely cite these [slave] cases without acknowledging that they may no longer be, in a formal sense, good law.”<sup>31</sup> Nor do courts address the underlying racism inherent in many of these decisions. When citing slave cases, courts failed to discuss the case’s slavery context eighty percent of the time.<sup>32</sup>

25. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1958 (2008).

26. THE BLUEBOOK, *supra* note 10, at VIII.

27. *Id.* R. 10.7.1(d), at 111. This new rule was adopted after the first printing of the twenty-first edition, so early purchasers won’t find the rule in their copies. *Twenty-First Edition Information*, THE BLUEBOOK, <https://www.legalbluebook.com/preface-to-the-twenty-first-edition> [<https://perma.cc/J5DE-NRSC>]. Later editions contain the rule and, of course, the website reflects the latest updates. *Id.*

28. *See* Simard, *supra* note 4, at 121 (suggesting the addition of a new *Bluebook* rule addressing the citation of slave cases).

29. *Id.* at 81.

30. *See, e.g., id.* at 100 (discussing racist language and reasoning in a Tennessee slave case, which was then cited approvingly by the Tennessee Court of Appeals in 1992).

31. *Id.* at 82.

32. *Id.* at 97. Professor Simard arrived at this number by collecting every slave case he could locate and then reviewing all the modern-era opinions that cite those cases. His results are reflected in his *Citing Slavery* Project. *See infra* note 33.

A. *An Example: Slave Cases in North Carolina*

Many state courts continue to cite slave cases.<sup>33</sup> And North Carolina courts are no exception.<sup>34</sup> For example, in 2004 the Supreme Court of North Carolina decided *Whitacre Partnership v. Biosignia, Inc.*,<sup>35</sup> holding that North Carolina common law included the doctrine of judicial estoppel.<sup>36</sup> The specific issue in *Whitacre* involved a partnership suing to recover shares of stock, after the general partner had previously disclaimed ownership of the stock in a bankruptcy proceeding.<sup>37</sup> Regarding the doctrine of estoppel more generally, the *Whitacre* court explained:

As we noted over 150 years ago, [estoppel] is a principle which “lies at the foundation of all fair dealing between [persons], and without which, it would be impossible to administer law as a system.” *Armfield v. Moore*, 44 N.C. 157, 161 (1852).<sup>38</sup>

That second alteration—the substitution of the word [persons]—was made by the *Whitacre* court in 2004. Here is the original quotation from *Armfield* in 1852: “[T]he foundation of all *fair dealing between man and man*, and without which, it would be impossible to administer law as a system.”<sup>39</sup> Sensibly, the 2004 court updated its description of the doctrine to reflect today’s more equality-minded sensibilities.

But the *Whitacre* court did not remark upon the relevant facts underlying the dispute in *Armfield*. Here is how the 1852 court explained the issue before it:

[A]ccording to the record, James Moore has, in solemn form transferred to Jane Moore the negro woman in controversy, and now seeks to take her back upon an alleged mistake.<sup>40</sup>

*Armfield* was a slave case. The property at issue and the subject of the estoppel argument was a woman.<sup>41</sup> In a case purportedly about fair dealing in the administration of law, the *Whitacre* court recognized the rhetorical benefit

33. In connection with his article, Professor Simard began the Citing Slavery Project, a website that lists slave cases and tracks the more recent decisions that have relied on them. For a full listing of these cases, see *Court Cases*, CITING SLAVERY PROJECT, [https://www.citing-slavery.org/court\\_cases](https://www.citing-slavery.org/court_cases) [<https://perma.cc/RT2V-ZKZM>].

34. See, e.g., Simard, *supra* note 4, at 110 & n.189 (citing *Armfield v. Moore*, 44 N.C. 157 (1852), and *Whitacre P’ship v. Biosignia Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), as examples of courts using slave cases “to emphasize the well-established nature of the rules they cite”).

35. 358 N.C. 1, 38, 591 S.E.2d 870, 895 (2004).

36. *Id.* at 39, 591 S.E.2d at 895.

37. *Id.* at 4, 11–12, 591 S.E.2d at 873, 878.

38. *Id.* at 13, 591 S.E.2d at 879.

39. *Armfield v. Moore*, 44 N.C. 157, 160 (1852) (emphasis added).

40. *Id.* at 164.

41. *Id.*

of altering *Armfield*'s language to include all persons, not just men.<sup>42</sup> But the court did not feel similarly compelled to reconsider its reliance on *Armfield* more generally. Instead, the court quoted *Armfield*—a decision about ownership of a woman<sup>43</sup>—as authority for the law's foundational concern with fairness.<sup>44</sup>

Professor Simard's article offers another recent example from North Carolina courts.<sup>45</sup> In 2012, the North Carolina Court of Appeals recognized that state law does not permit the creation of common law marriages.<sup>46</sup> To support that black-letter proposition, the court cited the Supreme Court of North Carolina's 1836 decision in *State v. Samuel*.<sup>47</sup> But *Samuel* did not merely address the abstract legal question of common law marriage. Rather, the case involved two enslaved people, one of whom sought to assert the spousal testimonial privilege, despite the fact that enslaved people could not legally marry in North Carolina.<sup>48</sup> As Professor Simard notes, this "case was deeply enmeshed in the context of a slave society."<sup>49</sup>

The *Samuel* court's holding was based, at least in part, on enslaved people's inability to enter into contracts and the court's concern with "curtailing the rights and powers of the masters."<sup>50</sup> Instead of recognizing common law marriage between enslaved people, the court concluded that "concubinage, which is . . . permissive on that of the master . . . is the relation[] to which these people have ever been practically restricted, and with which alone, perhaps, their condition is compatible."<sup>51</sup>

If directly presented with this reasoning, lawyers and judges today would undoubtedly reject the *Samuel* court's justifications for its ruling. Yet *Samuel* continues to be cited for its general holding.<sup>52</sup> These modern citations undoubtedly do not reflect approval of the *Samuel* decision's racism. Rather,

42. See *Whitacre P'ship*, 358 N.C. at 13, 591 S.E.2d at 879 (quoting *Armfield*, 44 N.C. at 161) (changing "between man and man" to "between persons").

43. *Armfield*, 44 N.C. at 160 (setting out the procedural history of the case, including the sale of a "negro woman," one party's subsequent taking of "the woman and her child," and the subsequent replevin action).

44. *Whitacre P'ship*, 358 N.C. at 27, 591 S.E.2d at 887 (quoting *Armfield*, 44 N.C. at 161, regarding the "foundation" of fair dealing and the administration of law more generally).

45. Simard, *supra* note 4, at 96–97.

46. *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012) (citing *State v. Samuel*, 19 N.C. 177 (1836)), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013) ("[W]e note that common law marriages cannot be created in North Carolina.").

47. *Id.* (citing *Samuel*, 19 N.C. at 182).

48. Simard, *supra* note 4, at 96.

49. *Id.* at 96–97.

50. *Samuel*, 19 N.C. at 182.

51. *Id.* at 183.

52. Three modern cases cite *Samuel* for the general rule regarding common law marriage in North Carolina; none of them address its slavery context. See *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012); *Pickard v. Pickard*, 176 N.C. App. 193, 205, 625 S.E.2d 869, 877 (2006) (Tyson, J., dissenting); *State v. Lynch*, 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980).



they reflect a kind of neutrality—an implication that the decision’s reasoning can comfortably fit within today’s jurisprudence.

B. *Objections to Continued Reliance on Slave Cases*

After providing myriad examples where modern courts rely on slave cases, Professor Simard raises two general objections to judges’ and lawyers’ continued citation of these precedents: the risk of substantive legal mistakes and the imposition of dignitary harms.<sup>53</sup> Both objections counsel caution, and perhaps forbearance, when considering reliance on a slave case.

1. Slave Cases and Legal Mistakes

Regarding legal mistakes, Professor Simard explains that slave cases often “provide unclear precedent,” because modern lawyers and judges fail to appreciate how a case’s specific factual holding is situated in the broader context of the then-operative legal slave regime.<sup>54</sup> Even for slave cases that have not been overruled, they cannot easily be applied to modern, non-slavery contexts. “By treating people as property, slave cases sometimes blur the lines between conventional legal categories.”<sup>55</sup> And that blurring can result in misapplication by modern lawyers.

The use of precedent often involves an argument that the current case is materially *like* a prior case and should therefore be resolved the same way.<sup>56</sup> A precedent’s authoritative force applies even if the lawyer or judge does not agree with the prior case’s outcome.<sup>57</sup> In one sense, therefore, modern objections to the institution of slavery, no matter how strong, might not weaken the relevance of a slave case as precedent.

But even assuming a slave case’s general precedential force, its application can present unique difficulties, since modern practitioners are likely unable to understand if a slave case is materially *like* a modern dispute.<sup>58</sup> Relying on slave

53. Simard, *supra* note 4, at 107.

54. *Id.* at 108.

55. *Id.* at 107.

56. See GARNER ET AL., *supra* note 11, at 24. See generally Brian N. Larson, *Law’s Enterprise: Argumentation Schemes & Legal Analogy*, 87 U. CIN. L. REV. 663 (2019) (providing a rigorous discussion of analogical arguments in the law, how they differ from logical arguments, and how analogies can persuade).

57. See GARNER ET AL., *supra* note 11, at 24 (“In ruling that current case Y is like former case X and should be decided like X, we may mean simply to say that X is authoritative, not to imply that it’s necessarily good or right.”); see also Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 52–53 (2018) [hereinafter Griffin, *Dethroning*] (“[L]awyers and judges must follow mandatory authority regardless of whether they agree with its content.”).

58. Cf. Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 23 (1996) (“Analogical reasoning is explicitly narrational, for it compares the present story to the stories of other litigants in other cases.”). To properly evaluate an

cases “requires grappling with a legal regime that has been officially repudiated by the Civil War, politics and law.”<sup>59</sup> In this way, slave cases are somewhat like precedent from foreign jurisdictions, the weight of which “is diminished to the extent that it is based on conditions—geographic, climatic, social, economic, or political—peculiar to the foreign state or country.”<sup>60</sup>

A recent North Carolina decision illustrates this problem. In *Johnson v. North Carolina Department of Cultural Resources*,<sup>61</sup> the Johnson family plaintiffs sought the return of their ancestor’s document collection, which he had given to the North Carolina Historical Commission in the early 1900s.<sup>62</sup> That ancestor, Colonel Charles E. Johnson, loaned the collection to the Commission in 1910, subject to his right to reclaim it at any time.<sup>63</sup> He died in 1923 having never reclaimed the collection.<sup>64</sup> Neither his will nor the will of his wife (who received Colonel Johnson’s estate after his death) mentioned the collection or any right to reclaim it.<sup>65</sup>

Nearly a century later, some of the Johnson decedents asked the Department of Cultural Resources to return the collection.<sup>66</sup> The Department refused.<sup>67</sup> In the ensuing litigation, the Department argued that the original loan was a bailment that terminated upon Colonel Johnson’s death, at which time full ownership of the collection transferred to the Department.<sup>68</sup> In support of this argument, the Department relied almost entirely<sup>69</sup> on a North Carolina Supreme Court opinion from 1856, *Largent v. Berry*.<sup>70</sup>

*Largent* was a slave case. Though the case involved a bailment,<sup>71</sup> and therefore seemed superficially similar to the property dispute in *Johnson*, the disputed property in *Largent* was a person.<sup>72</sup>

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analogical argument, one must be able to assess the relevant features that make one case similar or dissimilar to another case. See Larson, *supra* note 56, at 701–03.

59. Simard, *supra* note 4, at 109.

60. GARNER ET AL., *supra* note 11, at 751.

61. 223 N.C. App. 47, 735 S.E.2d 595 (2012).

62. *Id.* at 47, 49–50, 735 S.E.2d at 597 (setting out the history of the dispute).

63. *Id.* at 49, 735 S.E.2d at 597.

64. *Id.*, 735 S.E.2d at 597.

65. *Id.*, 735 S.E.2d at 597.

66. *Id.*, 735 S.E.2d at 597.

67. *Id.*, 735 S.E.2d at 597.

68. Brief for Defendants-Appellants North Carolina Department of Cultural Resources and North Carolina State Archives at 8, *Johnson*, 223 N.C. App. 47, 735 S.E.2d 595 (No. COA12-173) [hereinafter Brief for Defendants-Appellants].

69. The Department’s brief in the court of appeals began with the bailment argument. See *id.* The argument spans two pages, which include nine citations or mentions of *Largent* and one “see also” citation to a Texas opinion. *Id.* at 8–9. The brief cites no other authority in support of its bailment argument. See *id.*

70. 48 N.C. (3 Jones) 531 (1856).

71. See *id.* at 532 (noting that the gift at issue was “a mere bailment”).

72. See *id.* (“The parcel gift . . . of the slave in question to the defendant, was, it is true, a mere bailment, which the intestate might have terminated at any time during his life.”).

*Largent*'s slavery context completely undermined its precedential relevance. As the North Carolina Court of Appeals explained, the substantive law of bailments differed at the time, depending on whether the property at issue was a person or an object: "The language of *Largent*, referring to the transfer as both a bailment and a gift, is consistent with the law which governed the specific transfer of a slave from a parent to a child at that time."<sup>73</sup> The court continued: "In this context, it is clear that the *Largent* court was only discussing the effect of the father-in-law's death because the transfer at issue was the transfer of a slave from a parent to a child. Contrary to the State's argument, *Largent* is inapplicable to bailments generally."<sup>74</sup>

The Department was aware of *Largent*'s status as a slave case. Indeed, the Department's briefing clearly set out the precedent's slavery context.<sup>75</sup> What the Department failed to appreciate was how that connection to slavery affected the case's relevance outside of the slavery context. *Largent*'s holding could not properly be understood without grappling with the ugly particulars of slave law. As Professor Simard explains, slave cases live at the intersection of traditional commercial law and the then-applicable law of slavery, which involved specific laws relating to slavery itself.<sup>76</sup> Stripped of that context, a slave case's holding cannot simply be treated as an otherwise normal legal decision.

## 2. Dignitary Harms

Even if the specific holding of a slave case remains, in some sense, "good law," judicial reliance on slave cases can still result in what Professor Simard describes as "dignitary harms."<sup>77</sup> By relying on slave cases, a court "illustrates the legal system's interest in one kind of history, namely that of the development of legal rules, while neglecting another, the experience of the people who served as the stuff out of which these legal rules were constructed."<sup>78</sup> Ignoring a case's roots in slavery can "obscure . . . the plight of the enslaved" people whose stories are at the heart of these cases.<sup>79</sup>

Reliance on slave cases can cause dignitary harms because legal citations in court opinions are not mere bits of history or abstract artifacts for academic discussion. Rather, the citations are a public reaffirmation of the prior case.<sup>80</sup> A

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73. *Johnson*, 223 N.C. App. at 51, 735 S.E.2d at 598 (2012).

74. *Id.* at 52, 735 S.E.2d at 598.

75. Brief for Defendants-Appellants, *supra* note 68, at 8–9.

76. Simard, *supra* note 4, at 86.

77. *Id.* at 109.

78. *Id.* at 110.

79. *Id.*

80. See, e.g., Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675, 700 (2009) (describing the law "(i) as norms that purport to stand in the name of the whole society, and (ii) as norms that address matters of concern to the society as such, not just matters of personal or sectional concern to the individuals who happen to be involved in formulating them").

court's reliance on a slave case sends a very tangible message to the litigants and the public: *We decided this question at one time in the past. That decision involved the tacit or express approval of slavery. And because of that previous decision, we are going to reach a similar outcome in this case, today, in a decision that directly affects you and that will continue to control others in our jurisdiction.*<sup>81</sup> That formal government imprimatur brings the stain of slavery into the modern courtroom as a justification for legal force. And that's where the dignitary harms are likely felt most strongly.<sup>82</sup>

Of course, when relying on a slave case, courts sometimes attempt to mitigate these dignitary harms by acknowledging or addressing the underlying facts.<sup>83</sup> But such acknowledgements are rare, with most courts relying on slave cases absent any such explanation.<sup>84</sup> Professor Simard argues that citing slave cases “without commentary ignores the humanity of those subjected to legal subjugation.”<sup>85</sup> And relying on a slave case as if it were a normal dispute “normalizes the treatment” an enslaved person “endured as legally defined property.”<sup>86</sup>

### 3. Professor Simard's Suggestions for Reform

Despite these legal and dignitary harms, Professor Simard does not recommend banning or “canceling” these slave cases. “A simple rule like ‘stop citing cases with bad facts or written by judges who did bad things’ would not work.”<sup>87</sup> Rather, he suggests that “judges and litigants should exercise a presumption against citing slave cases as regular precedent.”<sup>88</sup> And when relying on a slave case, the judge or lawyer should justify the legal persuasiveness of their citations and work to ameliorate the dignitary harms inherent in citing slave cases.<sup>89</sup> To avoid legal problems, anyone citing a slave case “should carefully analyze these cases to ensure that their basis in a slave regime, since

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81. In his treatise on precedent, Bryan Garner distinguishes between “Leading Cases” and “Ancient Cases.” See GARNER ET AL., *supra* note 11, at 173, 176 (defining leading cases and ancient decisions). A leading case is “of the very highest authority” because it was among the first to resolve a legal question and has “since been consistently and frequently followed.” *Id.* at 173. An ancient case, on the other hand, is simply old. *Id.* at 176. And ancient cases can become obsolete if “the conditions or facts that existed when they were rendered are different or no longer exist.” *Id.* at 178. When a court approvingly cites a slave case as the source of a doctrine, the court treats the case as a leading case of the “highest authority,” not as an obsolete ancient case.

82. Simard, *supra* note 4, at 109–12.

83. *Id.* at 113–14 (noting a handful of decisions that address a slave case's context).

84. *Id.* at 115 (noting that these “[o]ccasional remarks by judges are not sufficient to counteract the widespread citation of slave law”).

85. *Id.* at 84.

86. *Id.* at 102.

87. *Id.* at 119.

88. *Id.* at 120.

89. *Id.*

repudiated by the law, does not affect their validity.”<sup>90</sup> Judges particularly, as representatives of the state, should “work to ameliorate the dignitary harms inherent in citing slave cases.”<sup>91</sup> This process might involve an acknowledgment of the case’s slavery context and an explanation for the court’s decision, despite that context, to rely on the case.<sup>92</sup>

Professor Simard then offers three more practical and systemic reforms. First, he suggests that legal research databases should “flag” slave cases to alert lawyers and judges that the decision directly involves slavery.<sup>93</sup> Second, he suggests that *The Bluebook* should include a “slave case” parenthetical as part of a case’s relevant weight of authority.<sup>94</sup> Third, he suggests that state and federal courts should “publicly acknowledge the legacy of slave law and make the history of slave citation accessible to those without access to legal research tools.”<sup>95</sup>

Thus far, only Professor Simard’s second suggestion—the inclusion of a new *Bluebook* rule—has been adopted.<sup>96</sup> *The Bluebook*’s twenty-first edition now includes Rule 10.7.1(d) essentially without modification.<sup>97</sup> Professor Simard argued that such a rule would “prevent litigators from intentionally or accidentally obscuring a case’s origin in slavery.”<sup>98</sup> For readers, the parenthetical would “provide transparency to the public but not limit the power of judges and lawyers to cite these cases.”<sup>99</sup>

## II. *THE BLUEBOOK* AND THE FORCE OF LAW IN NORTH CAROLINA

### A. *North Carolina’s Adoption of The Bluebook*

The inclusion of Rule 10.7.1(d) in the latest edition of *The Bluebook* raises a question for lawyers and judges: Do we have to follow it? The answer to that question likely depends on your jurisdiction, since *The Bluebook* itself is just a stack of paper (or, in modern times, also a password-protected website) with no enforcement power of its own.<sup>100</sup> Some courts, however, have used their

90. *Id.* at 121.

91. *Id.* at 120.

92. *Id.* at 120–21.

93. *Id.* at 121.

94. *Id.*

95. *Id.*

96. See *THE BLUEBOOK*, *supra* note 10, R. 10.7.1(d), at 111.

97. *Id.*

98. Simard, *supra* note 4, at 121.

99. *Id.*

100. Ziff, *supra* note 10, at 682.

rulemaking authority to require *Bluebook* compliance.<sup>101</sup> The courts of my home state of Washington have done so.<sup>102</sup> As have courts in North Carolina.<sup>103</sup>

North Carolina state courts generally require compliance with *Bluebook* rules. For example, the Supreme Court of North Carolina's Office of Administrative Counsel produces *The Guidebook: Citation, Style, and Usage at the Supreme Court of North Carolina*.<sup>104</sup> This guide is authoritative: The most recent version was approved by the Supreme Court of North Carolina in 2020.<sup>105</sup> According to *The Guidebook*, "The Court generally follows the Uniform System of Citation that is described in *The Bluebook*."<sup>106</sup> And if that wasn't clear enough, Rule 1.1 hammers the point home, specifically requiring use of *The Bluebook's* rules:

#### 1.1 Adherence to the Uniform System of Citation

Unless *The Guidebook* recommends a different citation convention for a particular source, the Supreme Court of North Carolina follows the Uniform System of Citation that is described in *The Bluebook*, which is currently in its twenty-first edition. (*The Indigo Book*, which is in the public domain, describes this system ably as well.)

Comment. The Uniform System of Citation that is described in *The Bluebook* is ubiquitous in American legal writing. When drafting legal citations for the Court, use the current edition of *The Bluebook*.<sup>107</sup>

The state's appellate courts impose a similar *Bluebook* requirement. The North Carolina Rules of Appellate Procedure provide: "Citations should be

101. See THE BLUEBOOK, *supra* note 10, tbl.BT2.2, at 46–59 (listing local state rules, many of which require some form of *Bluebook* compliance). The fact that legal jurisdictions require compliance with *The Bluebook*, which is a private and restricted publication, inspired (in part) the creation of the free *Indigo Book*. See Carl Malamud, *Foreword to* SPRIGMAN ET AL., THE INDIGO BOOK: A MANUAL OF LEGAL CITATION (Public Resource 2016), <https://law.resource.org/pub/us/code/blue/IndigoBook.html#Foreword> [<https://perma.cc/8SHD-L7DP>]. The current version of the *Indigo Book*, which was compiled by Professor Jennifer Murphy Romig with assistance from students at the Emory University School of Law, is available online. THE INDIGO BOOK: A MANUAL OF LEGAL CITATION (Christopher Sprigman & Jennifer Romig et al. eds., 2d ed. 2021), <https://indigobook.github.io/versions/indigobook-2.0.html> [<https://perma.cc/Z7D8-TDH5>].

102. See *Style Sheet*, WASH. CTS. (July 3, 2018), [https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/?fa=atc\\_supreme.style](https://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.style) [<https://perma.cc/6G9R-7NGK>] [hereinafter *Washington Style Sheet*].

103. See, e.g., THE SUP. CT. OF N.C. OFF. OF ADMIN. COUNSEL, THE GUIDEBOOK: CITATION, STYLE, AND USAGE AT THE SUPREME COURT OF NORTH CAROLINA 4 (2d ed. 2020) [hereinafter THE GUIDEBOOK].

104. *Id.* at 2.

105. *Id.*

106. *Id.* at 3.

107. *Id.* at 4.

made according to the most recent edition of *The Bluebook: A Uniform System of Citation*.<sup>108</sup>

North Carolina's federal district courts' local rules are more agnostic on *Bluebook* compliance. The U.S. District Court for the Middle District of North Carolina "prefer[s]" *Bluebook* citations.<sup>109</sup> The courts for the Eastern District and Western District provide almost no citation guidance in their local rules.<sup>110</sup> Despite this lack of requirement, it should come as no surprise that the federal courts' written opinions generally reflect an adherence to *Bluebook* style.

Perhaps because of the state courts' local rules, or because of the judges' personal allegiance to *The Bluebook*, North Carolina courts seem willing to police *Bluebook* compliance. For example, in an unpublished 2012 opinion, the North Carolina Court of Appeals chided an attorney for improper citation practices:

On the subject of citations, [Appellant's] counsel appears to be completely unable to properly cite a single authority in the brief. Although [Appellant's] counsel provides 47 footnotes of citation, not a single one is in proper *Bluebook* format, and many provide no pinpoint citations. Perhaps [Appellant's] counsel would benefit from obtaining a copy of the *Bluebook* for reference in the future.<sup>111</sup>

More generally, state and federal judges in North Carolina rely on *Bluebook* rules. For example, the North Carolina Court of Appeals has relied on *The Bluebook's* definition of the "E.g.," signal to understand Supreme Court precedent.<sup>112</sup> The Fourth Circuit Court of Appeals has similarly used *The Bluebook's* citation signals to inform an interpretive inquiry, relying on the definition of "Cf." to interpret administrative guidelines.<sup>113</sup> In a recent dissenting opinion, Justice Barringer, an Associate Justice of the Supreme Court of North Carolina, described an agency's compliance with Rule 10.7.1(a),

108. N.C. R. APP. P. app. B; see also N.C. BAR ASS'N, APP. R. COMM., A STYLE MANUAL FOR THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE 90 (2021) ("Citations should follow the latest edition of *The Bluebook: A Uniform System of Citation*."); *id.* at 172 ("Generally, citations 'should be made according to the most recent edition of *The Bluebook: A Uniform System of Citation*' . . . ." (quoting N.C. R. APP. P. app. B)). The General Rules of Practice for the Superior and District Courts in North Carolina do not contain any specific citation rules. See generally N.C. GEN. R. OF PRAC. FOR THE SUPERIOR AND DISTRICT COURTS (providing no guidance).

109. See M.D.N.C. LOC. R. PRAC. P. 7.2(b).

110. See W.D.N.C. R. PRAC. P. LOC. CIV. R. 7.1 (providing no guidance); E.D.N.C. LOC. CIV. R. PRAC. P. R. 7.1(b(4)) (providing only that U.S. Supreme Court cases should follow *Bluebook* form).

111. *Trevarthen v. Treadwell*, 221 N.C. App. 668, 727 S.E.2d 406, 2012 WL 2552324, at \*5 (2012) (unpublished table decision).

112. See *Mole' v. City of Durham*, 279 N.C. App. 583, 2021-NCCOA-527, ¶ 23 n.3 (citing THE BLUEBOOK, *supra* note 10, R. 1.2(a), at 62–63).

113. See *United States v. Helton*, 944 F.3d 198, 206 (4th Cir. 2019) (citing THE BLUEBOOK, *supra* note 10, R. 1.2(a), at 62–63).

regarding subsequent history, as evidence of “admirable attention to the Bluebook.”<sup>114</sup>

B. *The Bluebook as Two Guides: One for Practitioners, One for Academics*

In light of these court rules and judicial pronouncements, a North Carolina judge or lawyer might suppose that they are required to follow Rule 10.7.1(d) when citing a slave case. Unfortunately, it’s not that simple. Yes, court rules require compliance with *The Bluebook*. But *The Bluebook* is not a single set of rules. The guide actually contains two separate sets of rules: the Whitepages for academic journal editors and the much simpler Bluepages for lawyers, judges, and other practitioners.<sup>115</sup>

*The Bluebook* itself explains this division of rules between academics and practitioners:

The Whitepages provide rules for academic publications such as law review articles and research papers. The Bluepages set forth permissible deviations from the Whitepages that are designed to accommodate the needs of lawyers and law clerks.<sup>116</sup>

As a practical guide for lawyers and judges, the Bluepages are much shorter and less detailed than the Whitepages.<sup>117</sup> The Whitepages contain many more rules, and those rules are much more detailed.<sup>118</sup> The Bluepages, on the other hand, contain gaps, which “may” be filled by reference to a Whitepages rule, or by whatever format the practitioner thinks most sensible.<sup>119</sup> The Whitepages are written for student-run law journals with full editorial staffs and lengthy publication processes.<sup>120</sup> The Bluepages are made for lawyers who need to get a reply brief filed by noon tomorrow.<sup>121</sup>

This division simplifies the rules for practitioners, but it complicates state-backed mandates to comply with *The Bluebook* as a single set of commands. One might expect that instructions to comply with a set of rules would incorporate

114. *State ex rel. Utils. Comm’n v. Va. Elec. & Power Co.*, 381 N.C. 499, 2022-NCSC-75, ¶ 54 n.4 (Barringer, J., dissenting).

115. See THE BLUEBOOK, *supra* note 10, at 3 (“The Bluepages are a guide for practitioners and law clerks to use when citing authority in non-academic legal documents.”).

116. *Id.* (“Special Note for Law Students”).

117. In the current edition of *The Bluebook*, the Bluepages span twenty-seven pages. *Id.* at 3–29. The Whitepages span 166 pages. *See id.* at 61–226.

118. See Ziff, *supra* note 10, at 680 (noting the differences between the Bluepages and the Whitepages).

119. THE BLUEBOOK, *supra* note 10, at 3 (“Where the Bluepages and local court rules are silent regarding the citation of a particular document, you may use the other rules in *The Bluebook* . . . to supplement the Bluepages.”).

120. See Ziff, *supra* note 10, at 678–79 (noting how the Whitepages’ complexity does not work for practitioners).

121. *Id.* at 679–80 (explaining how the Bluepages work for practicing lawyers).



the rules' own instructions regarding which parts apply to whom. But that's not always the case.

For example, Washington State's style guide, *The Style Sheet*, generally requires *Bluebook* compliance before noting certain exceptions.<sup>122</sup> But when *The Style Sheet* notes those exceptions, it indicates them as exceptions to Whitepages rules for academics, not exceptions to the Bluepages rules for lawyers and judges.<sup>123</sup> In other words, *The Style Sheet* seems to imply that the applicable *Bluebook* rules in Washington courts are the academic rules, not the practitioner rules.

North Carolina practice is similarly unclear on this Bluepages–Whitepages divide. For example, when Justice Barringer's dissenting opinion praised a litigant's "admirable attention to the Bluebook," she referenced Whitepages Rule 10.7.1(a) for academic editors, not the relevant rule for practitioners.<sup>124</sup> Similarly, when the court of appeals approvingly cited *The Bluebook* to define "E.g.," it cited Whitepages Rule 1.2(a), not the relevant Bluepages rule.<sup>125</sup> Same for the Fourth Circuit Court of Appeals' discussion of "Cf."<sup>126</sup>

In contrast, the U.S. District Court for the Middle District of North Carolina appropriately relied on the Bluepages rule when chiding a party for not providing proper pinpoint citations.<sup>127</sup> And when the U.S. District Court for the Western District of North Carolina required a party to place its citations in the text of a brief, instead of in the footnotes, the court relied on the Bluepages to support its order.<sup>128</sup>

Despite this inconsistency of citation between the Whitepages and the Bluepages, the North Carolina courts' actual observed citation behavior clearly

122. See *Washington Style Sheet*, *supra* note 102, Rule 1 (providing that the Twentieth Edition of *The Bluebook* provides the general citation rules for Washington courts).

123. For example, the Washington Style Sheet's first exception states: "Exception to *Bluebook* rules 2.1 & 2.2, at 67–70: Ignore rules about using roman type for case names. Case names should be in italics no matter where or how they are used." *Washington Style Sheet*, *supra* note 102. But rules 2.1 and 2.2 are Whitepages rules for law review editors. See THE BLUEBOOK, *supra* note 10, at 69–72. Practitioners following the Bluepages do not use roman type for case names, so no exception would be necessary. See *id.* B2, at 6–7 (stating that practitioners should use italics for case names).

124. See *State ex rel. Utils. Comm'n v. Va. Elec. & Power Co.*, 381 N.C. 499, 2022-NCSC-75, ¶ 54 n.4.

125. See *Mole' v. City of Durham*, 279 N.C. App. 583, 2021-NCCOA-527, ¶ 23 n.3 (citing THE BLUEBOOK, *supra* note 10, R. 1.2(a), at 62–63).

126. See *United States v. Helton*, 944 F.3d 198, 206 (4th Cir. 2019) (citing THE BLUEBOOK, *supra* note 10, R. 1.2(a), at 62–63).

127. *United States ex rel. Metromont Corp. v. S.J. Constr., Inc.*, No. 1:09CV745, 2010 WL 2793919, at \*1 n.2 (M.D.N.C. July 15, 2010) (citing THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, B10.3, at 20 (Columbia L. Rev. Ass'n et al. eds., 18th ed. 2005)) (complaining that "Metromont, however, references a 67–page deposition without citation to page and line numbers").

128. *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, No. 3:19-CV-00515, 2022 WL 1081850, at \*3 (W.D.N.C. Apr. 11, 2022) (citing THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, B1.1, at 3–4 (Columbia L. Rev. Ass'n et al. eds., 20th ed. 2016)).

follows the practitioner-focused Bluepages, not the academic-focused Whitepages. For example, the North Carolina Supreme Court's *Guidebook* requires compliance with *The Bluebook*, without designating the Bluepages or the Whitepages.<sup>129</sup> Yet the guide's examples uniformly follow the practitioner rules from the Bluepages. For example, its citations to secondary sources do not use LARGE AND SMALL CAPS, which would be required under the Whitepages.<sup>130</sup> And illustrative citations to court opinions use italics for the full case name, which is a Bluepages practice; full case citations are not italicized under the Whitepages.<sup>131</sup> Of course, one need not closely parse *The Guidebook* to conclude that North Carolina courts follow the Bluepages. A quick look at any recent opinion from the Supreme Court of North Carolina would lead to the same conclusion: Citations are in the text, per Bluepages practice, not in footnotes like a law review article. And the citations do not use the law review typeface conventions, like LARGE AND SMALL CAPS.<sup>132</sup>

C. *Rule 10.7.1(d) Applies to Academics, Not Practitioners*

This distinction between Bluepages rules and Whitepages rules may seem like small potatoes, but it matters for the proper citation of slave cases. Somewhat inexplicably, Rule 10.7.1(d), the rule requiring a parenthetical for slave cases, appears in the academic-focused Whitepages, not the practitioner-focused Bluepages.<sup>133</sup> Accordingly, *The Bluebook* rules require an academic writing a law review article to note an authority's slavery context. But a judge or lawyer relying on a slave case in actual litigation, affecting real parties, involving a judgment of the state that carries the force of law, need not provide such information.<sup>134</sup>

129. THE GUIDEBOOK, *supra* note 103, at 4.

130. *Id.* R. 1.6, at 7. *But see* THE BLUEBOOK, *supra* note 10, at 7 (noting that the Whitepages require "LARGE AND SMALL CAPS" for some secondary sources).

131. *See* THE BLUEBOOK, *supra* note 10, R. 10, at 95 (showing a case citation without italicizing the full case name).

132. *See, e.g.,* Keith v. Health-Pro Home Care Servs., Inc., 381 N.C. 442, 2022-NCSC-72, ¶ 29, ¶ 32 n.3.

133. THE BLUEBOOK, *supra* note 10, R. 10.7.1(d), at 111.

134. Some academics have bristled at the parenthetical requirement for slave cases. *See, e.g.,* Will Baude & Stephen E. Sachs, *Citing Slavery in the BlueBook*, VOLOKH CONSPIRACY (Oct. 30, 2020, 8:32 AM), <https://reason.com/volokh/2020/10/30/citing-slavery-in-the-bluebook/> [<https://perma.cc/BDN4-YZ4D>]. I generally agree with Professor Baude and Professor Sachs that the rule is a poor fit for academic writing, which is more concerned with discussing law as an object of study and less concerned with law as binding authority. *See* David Ziff, *Who Is Citing Slavery?*, ZIFF BLOG (Feb. 2, 2022), <https://ziffblog.wordpress.com/2022/02/02/who-is-citing-slavery/> [<https://perma.cc/C9TA-B6TS>]. Other academics have complained that the rule requires authors to determine whether a case involves slavery, presumably by reading the case. *See* Josh Blackman, *Bluebook Adopts Rule Requiring Slavery Parentheticals*, VOLOKH CONSPIRACY (Nov. 21, 2021, 8:29 PM), <https://reason.com/volokh/2021/11/21/bluebook-adopts-rule-requiring-slavery-parentheticals/>

This placement of Rule 10.7.1(d) seems precisely backward. Professor Simard’s article, the source of the rule, does not once mention the citation of slave cases in academic writing or legal scholarship.<sup>135</sup> The article focuses singularly on the writing of judges and lawyers—that is, practitioners who would be governed by *The Bluebook’s* Bluepages.<sup>136</sup> When arguing for a new *Bluebook* rule, Professor Simard states that the rule would prevent “litigators from obscuring a case’s origin in slavery.”<sup>137</sup> And he explains the rule would “not limit the power of *judges and lawyers* to cite [slave] cases.”<sup>138</sup> The editors of *The Bluebook*, apparently rejecting this focus, placed the rule in the section *not* applicable to judges, lawyers, or other practitioners—the very targets of Professor Simard’s article.

As things now stand, therefore, the applicable rules regarding the citation of slave cases lack a strong moral or legal foundation. Lawyers and judges, even those operating under court rules that require *Bluebook* compliance, need not follow the academics-only rule requiring a parenthetical indicating a decision’s slavery context.<sup>139</sup> And academics, whose privately published writings are not widely available and do not carry the force of law, are required to acknowledge the government’s role in the law of slavery.<sup>140</sup>

### III. THE QUESTION PRESENTED: SHOULD JURISDICTIONS INDEPENDENTLY REQUIRE THE SLAVE-CASE PARENTHETICAL?

Judges and lawyers cannot avoid thinking about slave cases simply because local court rules don’t incorporate *Bluebook* Rule 10.7.1(d). These slave cases exist, regardless. Judges and lawyers must therefore decide whether—and *how*—to cite them. Individual practitioners may, on their own, choose to use the parenthetical, even absent a Bluepages requirement. *The Bluebook* specifically provides that where the practitioner-focused Bluepages are silent on a question, a judge or lawyer “may use the other rules in *The Bluebook*” to supplement a citation.<sup>141</sup>

Beyond individual judges and lawyers, courts face a bigger decision. State and federal jurisdictions often mandate their own additions to (and deviations

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[<https://perma.cc/J4J8-SYUJ>]. As someone who favors reading cases before citing them, I am less sympathetic to that critique.

135. See Simard, *supra* note 4.

136. See, e.g., *id.* at 82 (noting that courts routinely cite slave cases); *id.* at 84 (focusing on the “legal profession,” not academia, as the target for the article’s critiques).

137. *Id.* at 121 (emphasis added).

138. *Id.*

139. The Bluepages do not mention slave cases and include no version of Rule 10.7.1(d). See THE BLUEBOOK, *supra* note 10, at 3–29 (containing the Bluepages).

140. See *id.* R. 10.7.1(d), at 111 (setting out Professor Simard’s recommended rule for slave cases).

141. *Id.* at 3.

from) *Bluebook* rules, even when otherwise requiring *Bluebook* compliance.<sup>142</sup> Any jurisdiction could, therefore, amend its own local rules to require the slave-case parenthetical, regardless of its general view toward the *Bluebook*'s Whitepages.

The wide-spread adoption of such a rule would have many benefits. As discussed, the casual reliance on slave cases can cause legal errors and dignitary harms.<sup>143</sup> This Article will therefore turn to more mundane matters: an analysis of the practical effects of the slave-case parenthetical and whether those effects would be sufficiently beneficial to warrant adoption.

The rule, if adopted, would have two quite different sets of effects, depending on whether one takes the perspective of the legal reader or the legal writer. This Article argues that, from either perspective, these effects would be good. Jurisdictions should therefore adopt some form of *Bluebook* Rule 10.7.1(d).

#### A. *The Parenthetical as Notice to the Reader*

First, the legal reader: As Professor Alexa Chew has explained, citations are a critical part of legal reading.<sup>144</sup> Legal citations “help readers make meaning from the text.”<sup>145</sup> Citations provide this help because legal readers evaluate arguments based on the strength of the argument’s authority.<sup>146</sup> An author’s “choice of legal authority is inextricable from the legal reasoning itself.”<sup>147</sup> To evaluate that reasoning, “[l]egal readers rely on legal citations to transfer information to them about the weight of authority.”<sup>148</sup>

A parenthetical noting (enslaved party) or (enslaved person at issue) will therefore tell the legal reader something about the weight of the cited precedent.<sup>149</sup> It can also tell the reader something about the strength of the author’s argument more generally.<sup>150</sup>

But what is that “something”? When a legal reader comes across a citation with a slave-case parenthetical, she will undoubtedly absorb some communicative message about the source. That message could be negative. The parenthetical might serve as a kind of warning label: *CAUTION! Shaky Law*

142. See *supra* notes 102–03 and accompanying text.

143. See *supra* Section I.B.2 (discussing dignitary harms).

144. See Alexa Z. Chew, *Citation Literacy*, 70 ARK. L. REV. 869, 871 (2018) [hereinafter Chew, *Literacy*].

145. See *id.* at 872.

146. See, e.g., Schauer, *supra* note 25, at 1935 (describing arguments from authority as providing “reasons to act, decide, or believe that are based not on the substantive content of a reason, but instead on its source”).

147. Griffin, *Dethroning*, *supra* note 57, at 91.

148. *Id.* at 883.

149. See Mary Whisner, *The Dreaded Bluebook*, 100 LAW LIBR. J. 393, 394 (2008); Chew, *Literacy*, *supra* note 144, at 873.

150. Griffin, *Dethroning*, *supra* note 57, at 91 (“An author’s choice of legal authority is inextricable from the legal reasoning itself.”).

*Ahead!*<sup>151</sup> The reader, when scanning the citations, would learn that this decision may suffer from the sorts of legal problems common in slave cases, like questionable or morally suspect reasoning, or shaky applicability outside the context of slavery.<sup>152</sup> The reader may ask why the best authority to be offered in support of a proposition is some 150-year-old case. The parenthetical would lead to skepticism, in much the same way a reader might react if a statement about North Carolina law were supported by a lone citation to a 1945 federal court opinion from the District of Minnesota. Eyebrows would be raised.

An example of this warning function might be found in the previously discussed *Johnson v. N.C. Department of Cultural Resources*. In that case, the Department relied on one precedent—*Largent v. Berry*—for the proposition that the original loan was a bailment that terminated upon the bailor’s death.<sup>153</sup> Recall, *Largent* was a slave case.<sup>154</sup> Though the Department did not use the (enslaved person at issue) parenthetical when citing *Largent*, the Department’s brief discussed the facts of the case and made clear that an enslaved person was indeed at the center of the dispute.<sup>155</sup> Seeing the case’s slavery context, the reader was put on notice. In this example, the reader was the North Carolina Court of Appeals. Though the Department likely did not intend for its recitation of *Largent*’s facts to serve as a warning, it had that effect. The court gave the precedent a closer look, ultimately determining that the case’s slavery context rendered it bad precedent, inapplicable to the modern concept of bailments.<sup>156</sup>

Apart from this negative “warning” function, use of the slave-case parenthetical might communicate a separate, positive message. To be clear, this positive message would not result from the citation of a slave case, but from the author’s proper use of the parenthetical when citing a slave case. The author’s careful disclosure of potentially negative information might comfort the reader and enhance the author’s ethos. The parenthetical could signal a general punctiliousness—a “Brown M&M” test, of a sort<sup>157</sup>—demonstrating that the

151. See Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 787 (2014).

152. See *supra* Section I.B.1 (discussing the legal problems inherent in relying on slave cases as precedential authority).

153. See Brief for Defendants-Appellants, *supra* note 68, at 8.

154. See *supra* notes 71–74 and accompanying text.

155. Brief for Defendants-Appellants, *supra* note 68, at 8–9.

156. *Johnson v. N.C. Dep’t of Cultural Res.*, 223 N.C. App. 47, 51–52, 735 S.E.2d 595, 598 (2012).

157. Joe Fore, *Encourage Students To Eliminate the Brown M&Ms from Their Legal Writing*, 25 PERSPS.: TEACHING LEGAL RES. & WRITING 18, 18 (2016). The idea of the “Brown M&M” test comes from Van Halen’s contract rider for concert venues in the 1970s and 1980s. *Id.* at 18. Hidden in the lengthy terms was a specific rule for the M&Ms provided to the band at the venue: no brown ones! *Id.* Professor Fore describes this term as a canary in the coal mine for the band’s more important contractual details—details concerning safety for the concert’s technical, electrical, and structural needs. *Id.* “If the promoter had paid enough attention to remember to remove the brown M&Ms,

author saw the problem, flagged it, and yet remained confident in the opinion's usefulness.<sup>158</sup> Relatedly, though less charitably, this positive response might reflect a kind of in-group elitism, in which fastidious citation practices communicate that the writer was on law review, or attended an elite *Bluebook*-affiliated institution, and might therefore serve as "a proxy for flawless research, analysis, and writing."<sup>159</sup>

And then of course, there's the possibility that the parenthetical offers no communicative message. Maybe the reader just doesn't care one way or the other about the parenthetical.

### B. *The Effects on the Legal Writer*

From the perspective of the legal writer, however, the rule's effects are quite different. In contrast to the legal reader, the parenthetical serves no notice or warning function for the legal writer. Unlike other types of subsequent history, a decision's status as a slave case is not flagged on traditional research databases.<sup>160</sup> A legal writer therefore has no way of knowing that an opinion is a slave case without first reading the opinion and understanding its slavery context. Any notice or warning would therefore be provided by reading the opinion itself, not by the after-supplied parenthetical.<sup>161</sup>

In that context, a rule requiring the parenthetical may have two separate effects on the writer. First, though it cannot provide notice, the required parenthetical may serve a different sort of information-forcing function. Instead of providing information itself, the requirement may prompt the writer to

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chances are they had paid attention to the big stuff, too." *Id.* Professor Fore uses this contract term as a lesson for legal writers: "[S]mall defects in a letter, memo, motion, or brief can undermine the reader's confidence in the bigger stuff—the accuracy of the analysis, the rigor of research, or the understanding of the facts." *Id.* at 19.

158. See Susie Salmon, *Shedding the Uniform: Beyond a "Uniform System of Citation" to a More Efficient Fit*, 99 MARQ. L. REV. 763, 795 (2016). The *Bluebook* rule regarding subsequent history serves a similar purpose. See THE BLUEBOOK, *supra* note 10, B.10.1.6, at 16. Practitioners are not prohibited from citing to reversed or overruled opinions; they are merely required to note the subsequent rejection. *Id.* Including that information provides some comfort to the reader, who might click on the citation and see a red flag. By including the opinion's negative subsequent history, the writer communicates to the reader: "Don't worry, I saw that red flag too. I reviewed the history and determined that the negative treatment does not undermine the argument I'm making here." *Cf.* THE BLUEBOOK, *supra* note 10, R. 10.7, at 109–11 (explaining Rule 10.7 for providing prior and subsequent history of cited cases). The inclusion of negative subsequent history operates much the same way. A reader might see "*rev'd on other grounds*," in a citation and be comforted that the writer checked the subsequent history. Though of course the proof is in the pudding.

159. Salmon, *supra* note 158, at 795–96 (noting the signaling effects of meticulous *Bluebooking*); see also Whisner, *supra* note 149, at 393–94 (comparing proper *Bluebooking* to knowing how to use the proper fork at a formal dinner).

160. See Simard, *supra* note 4, at 121 (recommending that research tools adopt a flag to indicate a decision's status as a slave case).

161. *But cf.* Blackman, *supra* note 134 (implying that lawyers and academics may not realize they are citing a slave case).

surface additional information by thinking deeply about various issues: Is the decision relevant to a modern context? Does the decision's slavery context present previously unconsidered legal problems or complications? Does the context necessitate additional explanation for reliance on the case? Do the potential dignitary harms of relying on a slave case outweigh the doctrinal benefits of the decision's precedential support? Should the case be used at all? Indeed, wholly apart from any individual citation decision, a jurisdiction's adoption of the rule will necessarily cause lawyers and judges to reflect on their use of slave cases.

Professor Ryan Calo has termed this kind of effect "facilitation"—when a rule helps decision-makers "arrive at their preferred outcome" by providing assistance, coordination, and information.<sup>162</sup> That preferred outcome may, in some cases, be the citation of a slave case, perhaps with some additional context or explanation.<sup>163</sup> But the rule's goals will likely be achieved, in large part, if the writer stops to consider and think deeply about any reliance on a slave case.<sup>164</sup> On this view, the writer (and the work product) benefit from this additional consideration. Perhaps the pause for consideration helps the writer avoid the kinds of errors that infected the briefing in *Johnson v. N.C. Department of Cultural Resources*.<sup>165</sup> Perhaps the writer decides, upon reflection, to rely on a different case—maybe a case less than a century old. Or, if the writer decides to cite the case, perhaps the pause and accompanying reflection will induce the writer to acknowledge or discuss the authority's roots in slavery.<sup>166</sup>

The rule's effects, however, may not be purely facilitative. Some writers might feel some punitive effects from the requirement to communicate a citation's connection to slavery. Professor Calo's regulatory framework distinguishes between facilitation rules, which help people make better decisions, and so-called "friction" rules, which erect barriers to "undesired behavior."<sup>167</sup> And the parenthetical requirement undoubtedly has frictional aspects.

Most directly, the writer may not want to trigger the negative reader reactions discussed above.<sup>168</sup> Why unnecessarily signal to your reader that a case

162. See Calo, *supra* note 151, at 796.

163. See Simard, *supra* note 4, at 84 (explaining that writers should consider the validity of slave cases and, if they use them, acknowledge and explain that use); see also *id.* at 84 (explaining that the goal of the article is not to remove slave cases, but to confront and acknowledge them); *id.* at 112 ("Judges who cite slave cases must pay more attention to the stories told by the judges on whom they rely. They must also recognize how their reliance on those stories affects the persuasiveness and legitimacy of the stories they tell in their own opinions.").

164. See *supra* note 163 and accompanying text.

165. See *supra* Section I.B.1.

166. See *supra* notes 83–86 and accompanying text.

167. Calo, *supra* note 151, at 796–97.

168. See *supra* notes 149–56 and accompanying text.

involves slavery? Why alert your reader to the case's dehumanizing facts and potentially weak precedential force?<sup>169</sup> The writer, conscious of the fact that a reader may find the parenthetical distracting at best, and negative at worst, could simply be pressured into using a different case.

More generally, the writer may not want to think deeply about these issues at all. The consideration of a slave case's context takes time and mental effort, which a busy lawyer or judge may not want to expend on a given project. In many cases, it may be simpler to just replace the slave case with a different case that makes the same point without involving slavery.<sup>170</sup> Citing a slave case may become more trouble than it's worth.<sup>171</sup>

Accordingly, the adoption of the rule will likely change lawyers' and judges' citation practices. And while some of those changes will result from the beneficial facilitation of additional thought and consideration, other changes will be more blunt, the result of the rule's friction costs. These costs must therefore be justified. In the next section, this Article argues that those costs are more than warranted by the beneficial effects of minimizing the use of slave cases in today's courts.

### C. *A Rule Requiring the Slave-Case Parenthetical Would Reduce the Citation of Slave Cases—Good*

If a jurisdiction's adoption of the slave-case parenthetical results in fewer citations to slave cases, that reduction should be welcomed. The reduction would be beneficial, even for slave cases that are still good law and are therefore still binding precedent, because the reduction would result from individual lawyers' and judges' decisions to avoid the unnecessary injection of slavery into contemporary jurisprudence.

Consider a modern-day practitioner deciding whether to cite a slave case. Without the required slave-case parenthetical, the practitioner may not have

169. A lawyer may be ethically obligated to disclose adverse legal authority. *See, e.g.*, WASH. RULES OF PRO. CONDUCT R. 3.3(a)(3). But even if a lawyer must acknowledge a contrary line of authority, the lawyer is likely not required to cite any one specific case within that line—and certainly not a slave case. *See infra* text accompanying notes 193–97 (discussing a lawyer's need to choose from among various relevant authorities).

170. For example, a lawyer seeking authority for North Carolina's rule against common law marriage does not need to cite the slave case *State v. Samuel*, 19 N.C. (3 & 4 Dev. & Bat.) 177, 182 (1836) (enslaved party). A citation to *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012) would likely do the job just as well, without any need to resurface slavery's role in the creation of the common law rule.

171. Though Professor Simard specifically rejects the idea of prohibiting the citation of slave cases, and though the rule itself presupposes that people will continue to cite slave cases, it is this "avoidance of trouble" aspect of the rule that has caused some to lump it in with "cancel culture." *See, e.g.*, Josh Blackman, *Cancelling Citations*, VOLOKH CONSPIRACY (May 10, 2021, 12:54 PM), <https://reason.com/volokh/2021/05/10/cancelling-citations/> [<https://perma.cc/DRQ8-7CCY>] ("The upshot of this policy will be to simply cancel certain citations.").



thought twice about the citation. But now she faces one of two scenarios: First, other (more recent) authority may be available to support the desired proposition. That authority could easily be cited instead, thereby avoiding the invocation of slavery in support of her argument.<sup>172</sup> Second, perhaps the slave case is truly the only or the best authority for the desired proposition. If so, the lawyer should welcome the opportunity for reconsideration—about the citation, of course, but also about the strength of the proposition itself. When no court in more than a century has adopted your client’s position, that absence of authority may be a sign that your client’s position is weak.<sup>173</sup>

One objection to this dichotomy might be the so-called “leading case”—an old case that is cited, not so much for its relevance or modern application, but out of habit, perhaps to illustrate the historical pedigree of the law. In his treatise on precedent, Bryan Garner explains leading cases this way: “Virtually all important legal rules have beneath them a case in which they were first established—a leading case to which later courts show respect and even obeisance.”<sup>174</sup> Such cases are “especially powerful precedent” and “the very highest authority.”<sup>175</sup> A citation to a leading case may, therefore, simply show respect to the precedent, or perhaps demonstrate the author’s respect for history.

Slave cases deserve no such respect. Neither *The Bluebook* nor any court rule requires the citation of supposedly leading cases. These citations are purely a matter of choice. And if a lawyer or judge chooses to pay homage to such a case, the required parenthetical serves as a reminder—to the reader, at least—that some respect should be withheld.

Moreover, leading cases are not leading cases by right or in perpetuity. No judicial body officially names leading cases.<sup>176</sup> Rather, as Garner explains, “No case . . . can be a leading case if it’s widely ignored in later opinions or remains a historical outlier.”<sup>177</sup> This social construction of authority results from the fact that, as Professor Frederick Schauer argued, “the recognition and non-recognition of law and legal sources is better understood as a practice.”<sup>178</sup> In

172. See *infra* notes 193–201 and accompanying text (discussing the ability for practitioners to choose from among many mandatory authorities).

173. See *supra* notes 62–76 and accompanying text (discussing *Johnson v. North Carolina Department of Cultural Resources*, in which the state lost, in part, because its only on-point authority was an inapplicable slave case).

174. GARNER ET AL., *supra* note 11, at 173.

175. *Id.*

176. See Schauer, *supra* note 25, at 1956–57 (“For in reality, the status of a source as an authority is the product of an informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted.”).

177. GARNER ET AL., *supra* note 11, at 173.

178. Schauer, *supra* note 25, at 1957.

other words, the community of lawyers and judges decides, collectively, what is or is not a leading case.<sup>179</sup>

The transitory nature of leading cases can be further illustrated by comparison to so-called “ancient cases.”<sup>180</sup> According to Garner, these cases have “long been accepted as a correct exposition of the law” and have “repeatedly been approved and followed,” but they “may become obsolete because of changed social or political conditions.”<sup>181</sup> One difference between ancient cases and leading cases is that ancient cases lose their precedential force “if the conditions or facts that existed when they were rendered are different or no longer exist, or if the underlying rationale is no longer sound.”<sup>182</sup>

This analysis of leading cases provides a path forward for courts and lawyers dealing with slave cases. For example, the previously discussed *State v. Samuel* might be a “leading case,” as it first held that North Carolina did not recognize common law marriage.<sup>183</sup> Later cases seem to treat *Samuel* as a leading case on the issue.<sup>184</sup> But surely the case’s underlying rationale—the court’s racist sociological views on the ability of enslaved people to engage in meaningful committed relationships<sup>185</sup>—is “no longer sound” and has become “obsolete because of changed social or political conditions.”<sup>186</sup> Lawyers and judges could turn *Samuel* from a leading case to an obsolete ancient case, simply by refusing to pay it respect. And that relegation to ancient-case status would not require any change in the state’s substantive law of marriage.

Many citations to slave cases are, most likely, similarly unnecessary. As Professor Simard has demonstrated, such citations are not always well considered.<sup>187</sup> And they can unnecessarily entwine the horrors of slavery and modern judicial orders.<sup>188</sup> The elimination of such thoughtless citations therefore favors the adoption of the parenthetical.

Reducing slave-case citations is favorable even when those cases represent binding authority from a controlling court. A practitioner considering a slave

179. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 115–16 (2d ed. 1994) (discussing the concept of the rule of recognition and explaining that this rule is determined by social values and understandings).

180. GARNER ET AL., *supra* note 11, at 176.

181. *Id.*

182. *Id.* at 178. This difference between leading cases and ancient cases has some similarity to H.L.A. Hart’s rule of recognition, which proposes that a system of law contains a rule to determine what primary rules are valid, and that this rule is determined by social values and understandings. See HART, *supra* note 179, at 107–16.

183. See *State v. Samuel*, 19 N.C. (2 Dev. & Bat.) 177, 178 (1836).

184. See *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012).

185. See *supra* text accompanying notes 46–52 (describing the *Samuel* holding and its application by modern courts).

186. GARNER ET AL., *supra* note 11, at 176, 178.

187. See *supra* Section I.B.1 (discussing the legal problems inherent in relying on slave cases as precedential authority).

188. See *supra* Section I.B.2 (discussing dignitary harms).

case will likely be considering a case that is still, technically, good law—so-called “mandatory authority” from a higher court that has not been overruled.<sup>189</sup> This authority carries weight not because it is correct or because of the persuasiveness of its reasoning, but because it comes from an authoritative source.<sup>190</sup>

Under the traditional view of precedent, the difference between mandatory authority and optional authority “hinges on whether the decisionmaker has a choice to use the authority.”<sup>191</sup> Optional authority “may be ignored,” while mandatory authority “must be used.”<sup>192</sup> On this view, therefore, a rule disfavoring the citation of slave cases will necessarily disfavor citing some authority that would otherwise be mandatory.

But this traditional explanation is incorrect to the extent it involves the *use* of mandatory authority. Mandatory authority must be *followed*. But it need not be *used*. To the contrary, when dealing with pages of search results, all of which may contain mandatory authority, a writer’s “first step . . . is choosing what to cite.”<sup>193</sup> Legal writers are not required to rely on or cite every possible source of on-point mandatory authority. And of course legal writers never actually behave this way.<sup>194</sup> Rather, like Professor Dworkin’s chain novelist, we pick and choose which mandatory authorities best suit our purposes.<sup>195</sup>

This choice of authority, even among various mandatory authorities, reflects Professor Amy Griffin’s observation that “the weight of authority is not a simple binary concept but a more subtle and fluid notion.”<sup>196</sup> Even though mandatory authorities are all equally *binding*, not “more or less binding,” legal writers still have discretion to choose among mandatory authorities, even if our traditional concepts of authority do “not acknowledge the complicated nature of [these] difficult legal questions.”<sup>197</sup>

Unfortunately, despite this freedom (or perhaps this *need*) to choose among mandatory authorities, scholars and commentators have offered little in the way of guidance. Consider Bryan Garner’s treatise, *The Law of Judicial Precedent*.<sup>198</sup> The book contains abundant information regarding which courts’

189. Schauer, *supra* note 25, at 1939.

190. *Id.* at 1935–36.

191. *Id.* at 1946.

192. *Id.*

193. Alexa Z. Chew, *Stylish Legal Citation*, 71 ARK. L. REV. 823, 854 (2019) [hereinafter Chew, *Stylish*].

194. *Id.* at 854–55.

195. Chew, *Stylish*, *supra* note 193, at 854 (“But more isn’t necessarily better. Indeed more is rarely better.”); *see also id.* at 855 (explaining that when lawyers need a cite for “explicit rules” or “uncontroversial rules” they just pick a good one).

196. Griffin, *Dethroning*, *supra* note 57, at 67.

197. *Id.* at 70.

198. GARNER ET AL., *supra* note 11.

decisions control which questions in which circumstances.<sup>199</sup> But it offers no advice on how to choose among various binding precedential decisions when crafting a legal argument. With apologies to John Rawls, the law may have a justified practice and system of rules regarding which decisions are precedential, but we have little in the way of guidance for justifying the citation of a specific precedential decision in a specific circumstance.<sup>200</sup> Professor Chew has provided practitioners with helpful advice on this score.<sup>201</sup> But we could always use more.

Professor Simard's article and the continued prevalence of slave cases demonstrate this need for more guidance and more attention to these citation decisions. As Professor James Boyd White has explained, law is not just something static that exists; law is "something we do."<sup>202</sup> With each case, each filing, each opinion, lawyers and judges participate "in the perpetual remaking of the language and culture that determines . . . who we are. [The law is not merely] a bureaucracy or a set of rules, [but] a community of speakers[,] . . . a culture of argument, perpetually remade by its participants."<sup>203</sup>

This act of making and remaking the law is not the exclusive province of judges. Lawyers are critical participants in the process of creating the law, its language, and its culture. Lawyers tell stories—stories about our clients, yes, but our writing also includes stories about the law itself, its development, its shape, and its power.<sup>204</sup> These narratives about the law undoubtedly reflect the lawyers' strategic decisions regarding which analogies to make, which policies to emphasize, and which authorities to highlight. But as Professor Linda Edwards has explained, lawyers' legal narratives also influence a court's ultimate legal narrative: its written opinion.<sup>205</sup> Lawyers' legal narratives, perhaps indirectly, then become part of the chain novel of the law authored by our courts.

Citations, of course, are part of this narrative<sup>206</sup>—if not the plot, then certainly a subplot. Judges read, gain information from, and are influenced by a

199. See, e.g., GARNER ET AL., *supra* note 11, at 155 (explaining how to tell the difference between a binding decision and a nonbinding decision).

200. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3, 5 (1955). Or, as Professor Griffin put it more succinctly: "[T]here is no legal authority on legal authority." Griffin, *Essay*, *supra* note 11, at 156. Of course, Professor Chew has begun to take on this formidable task. See, e.g., Chew, *Stylish*, *supra* note 193, at 824.

201. See Chew, *Stylish*, *supra* note 193, at 854–55.

202. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688 (1985).

203. *Id.* at 691.

204. Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 884 (2010).

205. *Id.* at 896.

206. See generally Chew, *Stylish*, *supra* note 193 (explaining the importance of strong citations to legal writing); Chew, *Literacy*, *supra* note 144 (explaining the importance of legal citations for both

lawyer's citations, not just our sentence-level prose.<sup>207</sup> And a lawyer's decisions regarding which opinions to cite can influence the citations found in the resulting judicial opinions.<sup>208</sup> In other words, a lawyer's citations can influence a court's opinion, which in turn becomes part of the legal narrative that constrains future decisions and from which future law will emanate. As Professor Schauer explained: The recognition of sources of law is best understood as "a practice in which lawyers, judges, commentators and other legal actors gradually and in diffuse fashion determine what will count as a legitimate source—and thus what will count as law."<sup>209</sup> Citation practice is part of that practice.<sup>210</sup>

What all of this means is that legal citation is both reflective of and constitutive of our law. Our citation choices reflect the historical constraints of the law. But those choices also bring into existence the law of tomorrow. And for this reason, a rule requiring slave-case parentheticals will likely benefit the development of the law. Such a rule would provide notice benefits to readers<sup>211</sup> and facilitative, thought-provoking benefits to writers.<sup>212</sup> And the rule may result in more careful acknowledgement of a case's slavery context in written opinions,<sup>213</sup> which could minimize the dignitary harms illuminated by Professor Simard.<sup>214</sup>

Though adoption of the slave-case rule would likely reduce the citation of slave cases, it would neither overrule these cases nor prohibit citing them.<sup>215</sup> The rule is therefore quite modest. It elides weightier moral questions, such as "Is evil law still law," or even the more practical "What considerations should guide courts in deciding cases?"<sup>216</sup> A jurisdiction need not resolve this debate between

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writing and reading legal arguments). Professor Edwards acknowledges that "[d]iscussions of law do not sound like stories." Edwards, *supra* note 204, at 884. But when lawyers "talk about legal authority, using the logical forms of rules and their bedfellows of analogy, policy, and principle, we are actually swimming in a sea of narrative, oblivious to the water around us." *Id.*

207. See Chew, *Literacy*, *supra* note 144, at 878.

208. See generally Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. APP. PRAC. & PROCESS 61 (2019) (examining the overlap between citations in briefs filed with a court and the court's ultimate opinion).

209. Schauer, *supra* note 25, at 1957; see also Griffin, *Essay*, *supra* note 11, at 159 (describing rules of precedent as "norms, arising from the ground up").

210. See generally Bennardo & Chew, *supra* note 208 (demonstrating how lawyers' citations influence the law).

211. See *supra* notes 142–44 and accompanying text.

212. See *supra* notes 151–56 and accompanying text.

213. See Simard, *supra* note 4, at 120–21.

214. See *supra* Section I.B.2.

215. Cf. FED. R. APP. P. 32.1 (permitting the citation of unpublished decisions issued on or after January 1, 2007). Before the amendment to Rule 32.1, courts would prohibit the citation of unpublished decisions. And some courts, like the Ninth Circuit Court of Appeals, still generally prohibit the citation of pre-2007 unpublished opinions. See 9TH CIR. GEN. R. 36-3(c).

216. See, e.g., Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 318 (1992) (noting the positivist division between law and bases for judicial decisions).

positive law and natural law before requiring the parenthetical, because a lawyer or a judge using the parenthetical faces a quite different question: “Is this slave case really an authority on which I want to rely for this proposition in this text?”

This question differs from the theoretical question along two axes. First, it is more practical. When choosing authorities to cite for a proposition, a judge or lawyer quickly moves beyond questions like: “What is law?” Sure, the practitioner doesn’t want to mistakenly cite nonbinding law, such as a case from a different jurisdiction or a case that has been overruled. But those sorts of limitations are only marginally helpful. Within the vast collection of authorities that constitute controlling “law,” the practitioner still must choose.<sup>217</sup>

For a lawyer, the choice is practical and client-centered: Which authorities are most likely to persuade the court to resolve this particular issue in my client’s favor? In some circumstances, that set of authorities may include a slave case. And in those circumstances the parenthetical permits the lawyer to move forward, albeit with some caution.<sup>218</sup> A judge faces a similar decision, without a client, but with a judicial obligation to provide a public statement of reasons: Which authorities are most likely to convince the public, the parties, and future courts that I’ve resolved this case justly?<sup>219</sup> The answer to neither of these questions involves determining whether a slave case remains “law.”

Second, the question prompted by the rule is directed toward individual judges and lawyers, not a court or legislature. For the same slave case, different lawyers and judges may reach different conclusions. Those actors may disagree about when the citation of a slave case is appropriate. The same actor may reach different conclusions in different circumstances. The rule sparks those considerations and discussions; it does not smother them via official edict.<sup>220</sup>

Adoption of the rule would, therefore, lead to more thoughtful citation practices, less reliance on the law of slavery in our modern jurisprudence, and perhaps more discussion among lawyers and judges regarding the continued

217. See Griffin, *Dethroning*, *supra* note 57, at 91.

218. The caution should result from the lawyer’s desire to avoid doctrinal errors, *see supra* Section I.B.1, and minimize the dignitary harms that accompany reliance on a slave case, *see supra* Section I.B.2.

219. *See, e.g.*, Waldron, *supra* note 80, at 700 (discussing the “public character of the law” and arguing that “the law presents itself as a body of rules dealing with matters . . . in a way that can stand in the name of public”).

220. This point about individual choice is not creative or original. But I was particularly inspired here by Professor Joseph Raz’s idea of “local coherence.” *See Raz, supra* note 216, at 313. Professor Raz rejects the idea of a general coherence in the law “which applies to the settlement of all cases.” *Id.* And this rejection is aimed squarely at Professor Dworkin’s idea of the law as a cohesive chain novel. *See id.* at 303–09 (addressing Professor Dworkin’s concept of law as integrity). But Professor Raz praises “local coherence,” which involves “many isolated decisions which amount to an unconstrained choice between different possible compromises between conflicting values.” *Id.* at 313–14. One benefit of the parenthetical is that it prompts individual lawyers and judges to weigh these potentially conflicting values—a case’s potential authority against a case’s connection to the horrors of slavery—in extremely “local” single decisions, which need not permanently inhere in the case itself.

force of slave cases. We should not, however, be too sanguine about a citation parenthetical's ability to purge the remnants of slavery from our nation's law.

Professor Robert Chang offers a cautionary tale, based on the government's citation practices in *Trump v. Hawaii*<sup>221</sup>—the Supreme Court case upholding former President Trump's so-called “Muslim travel ban.”<sup>222</sup> When evaluating the legal support for the travel ban, Professor Chang observed that the “*Chinese Exclusion Case*<sup>223</sup> and *Korematsu v. United States*<sup>224</sup> . . . provid[ed] perhaps the strongest precedential authority for” the government's actions.<sup>225</sup> And yet “government attorneys defending the Muslim travel ban [did] not cite to or directly rely upon the *Chinese Exclusion Case* or *Korematsu*.”<sup>226</sup> This omission was likely due to the lawyers' recognition that these cases had already “been overruled in the court of history.”<sup>227</sup> They are well-known as part of the so-called “anti-canon” of cases that “are famous for being wrong.”<sup>228</sup> Yet if the cases still had formal precedential force as mandatory authorities, they could have been used to support the government's arguments.<sup>229</sup>

Instead of relying on these ostensibly supportive precedents, however, the government lawyers “whitewash[ed]” them.<sup>230</sup> The government briefs cited to authorities that themselves cited or quoted the *Chinese Exclusion Case* and *Korematsu*, while removing or failing to indicate the authorities' reliance on the disfavored precedents.<sup>231</sup> “The Department of Justice attorneys rel[ied] on more recent cases without acknowledging the direct precedential history that goes back to those disfavored cases.”<sup>232</sup> And it worked. The government won its appeal to the Supreme Court, despite the Court's rejection of *Korematsu*.<sup>233</sup>

Clearly, there are limits to social change via parenthetical. In some sense, the government lawyers did precisely what this Article suggests: They removed

221. 138 S. Ct. 2392 (2018).

222. See *id.* at 2423; Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1189–90 (2018).

223. 130 U.S. 581 (1889).

224. 323 U.S. 214 (1944).

225. Chang, *supra* note 222, at 1183.

226. *Id.* at 1189.

227. *Hawaii*, 138 S. Ct. at 2423. The Supreme Court made this statement regarding *Korematsu*'s overruling after the parties had already briefed the case. But note that the Chief Justice did not purport to overrule the case in *Trump v. Hawaii*. Rather, he merely observed that it had already been overruled in the “court of history.” *Id.*

228. Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J. F. 629, 632 (2019).

229. See Chang, *supra* note 222, at 1189.

230. *Id.* at 1190.

231. *Id.* at 1215.

232. *Id.* For those interested in citation practices, Professor Chang's article provides an in-depth analysis of how something like a (citation omitted) parenthetical can alter the rhetorical force of a legal argument. See *id.* at 1215–21.

233. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). The *Trump v. Hawaii* Court did not mention the *Chinese Exclusion Case*.

citations to offensive and disfavored opinions and replaced them with citations to later opinions expressing a similar holding. But the core problem with the government's obfuscation of the *Chinese Exclusion Case* and *Korematsu* was not the obfuscation itself. Rather, the problem was the fact that the obfuscation served the same substantive goals that made the *Chinese Exclusion Case* and *Korematsu* abhorrent in the first place. After all, the problem with a wolf in sheep's clothing is the wolf.

If a modern lawyer or judge wants to rely on racist stereotypes or affirm racist outcomes, they will have no difficulty doing so without relying on slave cases. Plenty of other precedents exist to support those ends—precedents with no direct connection to slavery. And as Professor Chang's article demonstrates, the obfuscation of a doctrine's links to slavery may not always be the result of admirable intentions.<sup>234</sup>

But requiring lawyers and judges to think about these issues would be a vast improvement over the current state of affairs. Professor Simard's article shows that our courts are not taking seriously the issue of slave cases and those cases' continued influence on our law.<sup>235</sup> A parenthetical will not solve that problem. And it certainly won't solve the larger problem of slavery's long shadow. It is, however, a small step in the right direction.

#### CONCLUSION

Slave cases are part of our history. And since they are widely available in reporters and online databases, they are also part of our present. Rule 10.7.1(d) reflects *The Bluebook's* attempt to address this reality. Unfortunately, the rule is in the wrong part of the book; it applies only to academic journal authors, not lawyers and judges. That misclassification simply means that lawyers, judges, courts, and other actors in the legal system will need to decide, on their own, how to deal with slave cases as precedent. That's probably as it should be. *The Bluebook* has many beneficial qualities, but moral authority is not among them.

This Article recommends that courts adopt Rule 10.7.1(d) on their own, as part of their local rules. Contrary to some objectors, the rule does not "cancel" slave cases. Rather, it facilitates some reflection and adds a bit of a speed bump before a lawyer or a judge relies on a slave case as authority. In light of this nation's horrific history of slavery, the questionable legal bases of many slave cases, and the outright racism present in many such cases, a speed bump and a bit of reflection are warranted before incorporating a slave case into a public document seeking an order from a court carrying the force of law. A pause and some reflection is even more warranted when the document is the judicial order

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234. See *supra* notes 220–32 and accompanying text.

235. See *supra* notes 28–33 and accompanying text.



itself, claiming to speak for the government and backed by the power of the state.

A parenthetical is a small thing. It certainly cannot erase the stain of slavery from our history. Nor will it eradicate racism or other present-day ills. But as lawyers and judges, we should strive to make the law as just and fair as we can make it. And even a little step in that direction is one worth taking.