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# The Bluebook at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship

Christine Hurt

*University of Illinois College of Law, [achurt@law.uiuc.edu](mailto:achurt@law.uiuc.edu)*

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# ***The Bluebook* at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship<sup>†</sup>**

CHRISTINE HURT\*

## INTRODUCTION

The latest edition of *The Bluebook* has arrived,<sup>1</sup> and for citation aficionados, the publication of a new edition of *The Bluebook* is an event to be simultaneously heralded and critiqued. Just as cable television commentators display insatiable appetites for dishing evening wear worn at award ceremonies, many legal writers embrace the opportunity to critique each new edition of *The Bluebook*. For almost sixty years, since *The Bluebook* was chosen as a national system of citation at a conference of law review editors,<sup>2</sup> legal scholars and practitioners have written page after page criticizing various aspects of the citation manual.<sup>3</sup> Among the most-criticized aspects are the obstinate adherence to the “exhaustion theory”<sup>4</sup> that seems to underpin new changes,<sup>5</sup> the almost inevitable inconsistencies and typographical errors in each edition,<sup>6</sup> the negative externalities, including trauma to law students,<sup>7</sup> replacement costs for

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\* Associate Professor of Law, Richard W. and Marie L. Corman Scholar, University of Illinois College of Law. The author would like to thank her co-author in citation crime, Tracy L. McGaugh, and her research assistant, Trevor Haley, who was subjected to various forms of citation torture in the production of McGaugh & Hurt, *Interactive Citation Workbook* (Lexis 2006).

1. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds., 18th ed. 2005) [hereinafter EIGHTEENTH EDITION].

2. James W. Paulsen, *An Uninformed System of Citation*, 105 HARV. L. REV. 1780, 1783 (1992) (book review).

3. See Jim C. Chen, *Something Old, Something New, Something Borrowed, Something Blue*, 58 U. CHI. L. REV. 1527, 1527–28 (1991) (book review) (arguing that “[t]he *Bluebook* has even inspired its own brand of scholarship.”).

4. See James D. Gordon III, *How Not to Succeed at Law School*, 100 YALE L.J. 1679, 1692 (1991) (“The operating principle of the *Bluebook* is that ‘NATURE ABHORRETH A VACUUM’ so the *Bluebook* has provided a way to cite every single source since the invention of papyrus.”).

5. See generally Stephen R. Heifetz, *Blue in the Face: The Bluebook, the Bar Exam, and the Paradox of Our Legal Culture*, 51 RUTGERS L. REV. 695, 703 (1999) (“The *Bluebook* hammers law students with the notion that the law is simply an intricate set of rules that, although tedious to learn, contains determinate answers decipherable by anyone willing to spend sufficient time staring at all of the possibly relevant rules.”).

6. Donald H. Gjerdingen, Book Review, 4 WM. MITCHELL L. REV. 499, 512 (1978) (stating that “[t]he first printing of the Twelfth Edition was marred by at least forty typographical errors.”).

7. See Peter Phillips, Book Note, 32 N.Y.L. SCH. L. REV. 199, 199 (1987) (“No modern law school graduate can summon up memories of his first year of law school without painful recollections of hours in Legal Writing class, trying to master weird rules, counting spaces, or checking periods and abbreviations.”).

practitioners, and additional legal costs for legal consumers;<sup>8</sup> the seeming arbitrariness of rule changes;<sup>9</sup> the comical in-jokes<sup>10</sup> and self-citation;<sup>11</sup> the disconnect between practitioners' needs and the focus of *The Bluebook* on scholarly writing;<sup>12</sup> and even the fact that the authors are law students.<sup>13</sup> This "raging against the machine" often proves fruitful, as new editions tend to incorporate the most vocal complaints about the earlier edition.<sup>14</sup>

*The Bluebook* is not merely a compilation of abstract rules regarding the citations of sources. This Article presents *The Bluebook* as an important chronicler of legal scholarship and practice. New rules and amendments to old rules serve as archeological proof of changes in how scholars and practitioners view and use "the law." Like high school students rushing to grab a copy of their school's yearbook to glimpse the personalities and events that captured the eye of school photographers,

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8. See Ian Ayres, *Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks*, 43 U. KAN. L. REV. 541, 557–58 (1995) (describing the publishers of *The Bluebook* as a monopolist with monetary incentives to "engage in excessive innovation" by promulgating new rules that create an artificial demand for new editions). In addition, recent attempts to move courts away from publisher-based rules found in *The Bluebook* to vendor-neutral citation rules have been supported by consumer advocacy groups such as the Taxpayer Assets Project and the Consumer Project on Technology.

9. See, e.g., A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook*, 26 STETSON L. REV. 53, 69 (1996) (urging editors to realize that "[c]hanging what the signals mean effectively changes the substance of our common law."). The most-hated rule change was the overhaul of the signal rules in Rule 1.2 that accompanied the Sixteenth Edition. *Id.*

10. See James D. Gordon III, *Oh, No! A New Bluebook!*, 90 MICH. L. REV. 1698, 1702 (1992) (noting that in the Fifteenth Edition, the first edition published after the creation of the *University of Chicago Manual of Legal Citation* ("Maroonbook"), the editors inserted no fewer than three examples that included parentheticals criticizing the *Maroonbook*) [hereinafter Gordon, *Oh, No!*].

11. With each edition of *The Bluebook*, the examples given for student-written articles are replaced by articles written by the student editors of the new edition. Christine Hurt, *Network Effects and Legal Citation: How Antitrust Theory Predicts Who Will Build a Better Bluebook Mousetrap in the Age of Electronic Mice*, 87 IOWA L. REV. 1257, 1263 (2002) ("Each citation legislator will enter the legal profession anonymously, leaving behind only an editorial shadow, often times a self-indulgent use of a name or note in a *Bluebook* example, as a clue to the lawmaker's identity.").

12. See William S. Fulton, Jr., Book Review, 97 MIL. L. REV. 127, 131 (1982) (noting that the Thirteenth Edition's rules prohibiting parallel citation for U.S. Supreme Court cases and mandating parallel citation for state cases did not reflect the reality that most practitioners' libraries will contain only unofficial Supreme Court and state reporters).

13. Thomas R. Haggard, *Basic Citation Form, Part I*, S.C. LAW., May/June 1998, at 13, 13 (1998) (declaring that with the Sixteenth Edition, "the time has come for the profession to reclaim its own authority over citation form" from the "bare initiates in the High Calling of the Law").

14. See *supra* note 9. The clearest example of this type of change is the reversion of the signal rules in Rule 1.2 in the Seventeenth Edition to the rules that preceded the changes in the Sixteenth Edition after widespread criticism of those changes. See Hurt, *supra* note 11, at 1272 (noting that the Seventeenth Edition reinstated the original meanings of "see" and "[no signal]").

legal scholars can trace important movements in the law and legal scholarship from edition to edition.

The Eighteenth Edition is no exception to this theory. This Article traces changes in the latest edition to recent developments in legal research and citation practices. For example, the Eighteenth Edition ratifies current practices of citing to electronic sources, including working papers<sup>15</sup> and weblogs,<sup>16</sup> and reflects controversies, such as debates over citing to unpublished federal opinions.<sup>17</sup> In addition, the Eighteenth Edition, published in the summer of 2005, is notable because it is the first edition of *The Bluebook* that was produced in the shadow of a known competitor, the *ALWD Citation Manual*,<sup>18</sup> which was published for the first time in 2000.<sup>19</sup> The impact of the appearance of a competitor can be examined by analyzing changes from the Seventeenth Edition to the Eighteenth Edition, particularly the revamping of the Practitioners' Notes into the new "Bluepages."<sup>20</sup>

Parts I and II of this Article describe the histories of both *The Bluebook* and the *ALWD Citation Manual*. Part III provides examples of how the Eighteenth Edition ratifies new citation practices, responds to improvements in the *ALWD Citation Manual*, and reflects debates within the practicing bar and the legal academy. Part IV proposes the author's wish list for the inevitable Nineteenth Edition of *The Bluebook*.

### I. A BRIEF HISTORY OF *THE BLUEBOOK*

The history of *The Bluebook* is well-chronicled.<sup>21</sup> Although the "Uniform System of Citation" was not officially adopted by most law reviews until 1949, earlier versions had been used by the four journals listed as authors today—*Columbia Law Review*, *Harvard Law Review*, *University of Pennsylvania Law Review*, and *Yale Law Journal*.<sup>22</sup> Although the manual had a humble beginning as a pamphlet prepared in 1926 by Erwin Griswold, editor-in-chief of the *Harvard Law Review* and later dean of Harvard Law School,<sup>23</sup> *The Bluebook* is generally accepted as the paragon of citation style for law schools and the legal industry.<sup>24</sup> Gradual and not-so-gradual changes have transformed a modest pamphlet into the 415-page monolith *The Bluebook* is today.

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15. See EIGHTEENTH EDITION, *supra* note 1, R. 17.3, at 150.

16. *Id.* R. 18.2.4, at 158.

17. See *infra* Part III.C.

18. ASS'N OF LEGAL WRITING DIRS. & DARBY DICKERSON, *ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION* (1st ed. 2000).

19. When the Seventeenth Edition was published, the *ALWD Citation Manual* was in press, but the content of the manual was unknown to *The Bluebook* editors. The editors of the Eighteenth Edition, by contrast, had the advantage of being able to address directly any advantages of the competition.

20. See *infra* Part III.B.

21. See generally Dickerson, *supra* note 9, at 57–65; Hurt, *supra* note 11, at 1265–67.

22. Although Harvard was the original editor and the other three law reviews merely users and contributors, the quadratic cartel was formed when the other three law reviews threatened to publish rival manuals in the 1970s. See Chen, *supra* note 3, at 1530–31.

23. See Dickerson, *supra* note 9, at 57–58.

24. See Chen, *supra* note 3, at 1534 (marking that even after the entrance of the *Maroonbook* into the market for legal citation, *The Bluebook* remains the authoritative resource).

What we call *The Bluebook*, in fact, has also been known by other names, including the “Brown Book,”<sup>25</sup> and the “White Book.”<sup>26</sup> Although originally intended as a style and citation manual for one particular law review, with the Twelfth Edition, *The Bluebook* acknowledged that its rules were used not only by law review editors and legal scholars, but also by practitioners creating court documents and legal memoranda.<sup>27</sup> Although the death of *The Bluebook* was announced prematurely<sup>28</sup> with the advent of *The University of Chicago Manual of Legal Citation* (the “Maroonbook”) in 1986,<sup>29</sup> *The Bluebook* has continued to dominate the citation market for the last half century.

## II. A LESS BRIEF HISTORY OF THE *ALWD CITATION MANUAL*

In January 2006, Aspen Publishers delivered the third edition of the *ALWD Citation Manual*.<sup>30</sup> Although legal writing professionals had long criticized the editors of *The Bluebook* for publishing too frequently and releasing new editions in the middle of academic years,<sup>31</sup> the semester-break release of this competitor of *The Bluebook* marked its third edition since the summer of 2000. For the first time, this new edition sports a bright green cover, perhaps signaling the editors’ acquiescence to the nickname “Greenbook.”<sup>32</sup>

### A. Profile of a Competing Product

The *ALWD Citation Manual* is written by Darby Dickerson, dean of Stetson University Law School, former professor of legal writing and an expert on legal citation. Dean Dickerson is aided in this effort by a committee of members of the Association of Legal Writing Directors. Although the *ALWD Citation Manual* is much younger than *The Bluebook*, its short life has already been fully memorialized in book

25. See Dickerson, *supra* note 9, at 58 (suggesting that the 1939 change from brown covers to blue covers was prompted by a sense that brown was associated with Adolph Hitler’s army and that blue was more pro-American and patriotic).

26. *Id.* at 59 (describing how the Eleventh Edition in 1967 bore a white cover, which was changed again to blue in 1976, the year of the U.S. Bicentennial Celebration).

27. *Id.* at 64 (quoting the Twelfth Edition as stating in the preface that “[t]he following uniform system of citation has been designed for use in all forms of legal writing.”).

28. See Richard A. Posner, Essay, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1351–52 (1986).

29. THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION (Univ. of Chi. Law Review & Univ. of Chi. Legal Fellows eds., 1986) [hereinafter *Maroonbook*].

30. ASS’N OF LEGAL WRITING DIRS. & DARBY DICKERSON, *ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION* (3d ed. 2006) [hereinafter *ALWD THIRD*].

31. See Steven D. Jamar, *The ALWD Citation Manual—A Professional Citation System for the Law*, 8 PERSP.: TEACHING LEGAL RES. & WRITING 65, 66–67 (2000).

32. The first editions of the *ALWD Citation Manual* reflected an intentional decision of the authors and publishers that the manual not be known by its color. The first covers had a white and gray marbled appearance, although the interior pages used green as a contrasting color. However, the decision to avoid being associated with a particular color must have changed at some point. See Maureen B. Collins, *Communicating Your Authority*, 91 ILL. B.J. 637, 637 (referring to the *ALWD Citation Manual* as being “known as the Greenbook”).

reviews and articles.<sup>33</sup> According to citation lore, the *ALWD Citation Manual* grew out of a growing frustration with and resentment of *The Bluebook* by legal writing professors because it is not an easily teachable system and the book itself is not a good teaching text. The authors and publishers of the *ALWD Citation Manual* market the manual as creating a system that is more teachable and further encourage adoption by providing legal writing professors with tools and support in teaching citation using the *ALWD Citation Manual*.

The *ALWD Citation Manual* provides much-needed competition in the legal citation industry. For a true revolution<sup>34</sup> to occur, however, the *ALWD Citation Manual* would need to gain acceptance in first-year legal writing programs, among law review editors, with legal employers, and in the court system. The *ALWD Citation Manual*, heavily marketed both formally by Aspen Publishers and informally by Association of Legal Writing Directors (ALWD) officers and members, has had success in at least one area: many law schools' legal writing programs have adopted it.<sup>35</sup> Those adoptions partially reflect that legal writing professors feel a greater allegiance to the ALWD organization than to the student editors of *The Bluebook*. Many legal scholars have already written about the power struggle within legal citation between legal writing professors—the least powerful branch of law school faculties—and the law student editors.<sup>36</sup> The

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33. See generally Melissa H. Weresh, *The ALWD Citation Manual: A Coup de Grace*, 23 U. ARK. LITTLE ROCK L. REV. 775 (2001) (detailing the history of the manual and of the motivating factors that led Darby Dickerson and the Association of Legal Writing Directors to create an alternative citation manual).

34. In fact, one law professor has written a law review article that uses an extended metaphor comparing the publication of the *ALWD Citation Manual* with the American Revolution and the Sixteenth Edition of *The Bluebook* with the Stamp Act. See Alex Glashausser, *Citation and Representation*, 55 VAND. L. REV. 59, 61 (2002) (“As the doctrine of ‘no citation without representation’ united practitioners and academics and spurred a nationwide resolution condemning the revision, the *Bluebook* recognized a brewing rebellion . . . .” (footnote omitted)).

35. Association of Legal Writing Directors & Legal Writing Institute, *ALWD Citation Manual Adoptions*, <http://www.alwd.org> (last visited Nov. 10, 2006) (follow “ALWD Citation Manual hyperlink on left side of page, then follow “Information about adoptions” hyperlink on right side of page) (listing ninety schools as having adopted the *ALWD Citation Manual* for at least one class as of 2002). This list has not been updated since 2002. However, a list provided by Aspen Publishers in February 2006 indicates that seventy-three schools adopted the *ALWD Citation Manual* for use in their first-year legal writing programs for the 2005–06 academic year and that individual professors in seventeen other schools adopted the manual for their courses (on file with author).

However, these statistics may not take into account first-year programs that teach both *The Bluebook* and the *ALWD Citation Manual*. According to the annual survey taken by the Association of Legal Writing Directors, only fifty-six out of 176 responding schools taught the *ALWD Citation Manual* exclusively in the first-year legal writing program in 2005. Eighty-nine programs responded that they teach *The Bluebook* exclusively. Association of Legal Writing Directors & Legal Writing Institute, *2005 Survey Results*, Question 27, at <http://www.alwd.org> (follow “ALWD/LWI Survey” hyperlink on left side of page, then follow “2005 ALWD/LWI Survey Report” hyperlink) (last visited February 19, 2006).

36. Julie Cheslik, *The Battle over Citation Form Brings Notice to LRW Faculty: Will Power Follow?*, 73 UMKC L. REV. 237, 243 (2004) (“[I]t is hard to believe that *The ALWD Citation Manual*, now in its second edition, is really about citation form, really about signals,

advent of the *ALWD Citation Manual* has pushed a debate over the hierarchies that exist within the legal academy to the forefront.<sup>37</sup> Whether attempting to gain control over citation will empower legal writing professors or jeopardize what power they have remains to be seen.<sup>38</sup> For example, anecdotal evidence suggests that although legal writing professors have traditionally been able to choose their own texts as other law professors do, complaints from student law review editors over the teaching of the *ALWD Citation Manual* to the exclusion of *The Bluebook* have threatened the academic freedom of legal writing professors in this area.<sup>39</sup>

Along with having a ready-made market of legal writing professors, the publishers of the *ALWD Citation Manual* have marketed the manual very well. Unlike the publishers of *The Bluebook*, Aspen includes the *ALWD Citation Manual* in its complimentary copy policy for faculty. Therefore, any law professor who asks for a copy of the *ALWD Citation Manual* will receive one for free, just like most other law school textbooks and casebooks. No one gets *The Bluebook* for free, even if the professor assigns it to five-hundred incoming first-year students. In addition, Dean Dickerson and others provide teaching notes, computer presentations, and exercises to all law professors free of charge.<sup>40</sup> As legal writing professors may have smaller development budgets than other faculty, this level of support goes a long way toward securing adoptions in first-year legal writing programs. In addition, members of the ALWD organization routinely write positive reviews of the manual for law journals and bar publications.<sup>41</sup>

Beyond first-year legal writing programs, however, the *ALWD Citation Manual* has

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really about the inadequacy of *The Bluebook*. Instead, it is about power.”); see Eric Shimamoto, Comment, *To Take Arms Against a Sea of Trouble: Legal Citation and the Reassertion of Hierarchy*, 73 UMKC L. REV. 443, 444 (2004) (questioning “whether the publication of the *ALWD Citation Manual* simply represents an attempt by one group, situated toward the bottom of the law school teaching hierarchy (legal research and writing faculty) to exert what power the hierarchy gives them over one of the few groups situated below themselves (students)”).

37. See Kathryn M. Stanchi, *Who Next, the Janitors?: A Socio-feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 477 (2004) (reminding readers that within the stratification of law school faculties, the average experienced legal writing professor’s annual salary is \$55,000 less than that of a full professor).

38. See Cheslik, *supra* note 36, at 244–45 (suggesting that legal writing faculty gaining power from the publication of the *ALWD Citation Manual* is the “least likely of possible outcomes”).

39. See *id.* at 250.

40. See Ass’n of Legal Writing Dirs. & Legal Writing Inst., *ALWD Citation Manual*, <http://www.alwd.org/cm/> (last visited Dec. 4, 2006) (offering downloadable charts, exercises, computer presentations, and even a *Jeopardy!*-style game).

41. See, e.g., Jennifer L. Cordle, *ALWD Citation Manual: A Grammar Guide to the Language of Legal Citation*, 26 U. ARK. LITTLE ROCK L. REV. 573, 573 (2004) (including the information that Professor Cordle is an Assistant Professor of Law at Appalachian School of Law, which lists Professor Cordle as teaching Legal Process); Suzanne E. Rowe, *The Bluebook Blues: ALWD Introduces a Superior Citation Reference Book for Lawyers*, 64 OR. ST. B. BULL. 31, 31 (2004) (noting that Professor Rowe, the director of the Legal Research and Writing Program at the University of Oregon School of Law, “is a member of ALWD, but she had no part in drafting the ALWD Manual”); Wanda M. Temm, *New Kid on the Block: The ALWD Citation Manual*, 59 J. MO. B. 16, 16 (2003) (including the information that Professor Temm “is director of legal writing and clinical professor of law at the University of Missouri-Kansas City School of Law”).

not made much entry to date into the world of law reviews, law firms, or the court system. One survey of the 140 journals housed at law schools ranked in the top fifty by *U.S. News & World Report* found that only one of the fifty journals responding had adopted “a citation guide other than the *Bluebook*.”<sup>42</sup> According to the ALWD website,<sup>43</sup> only three court systems in the United States have adopted the *ALWD Citation Manual* for use in the briefs that are filed with those courts: the Montana Bankruptcy Court, the United States District Court for the District of Montana, and the Eleventh Circuit. These adoptions, however, do not supplant use of *The Bluebook* in these jurisdictions. The rules for the Eleventh Circuit state that citations must conform to either *The Bluebook* or the *ALWD Citation Manual*.<sup>44</sup> Clearly, the ultimate factor that will determine whether the *ALWD Citation Manual* wins the citation war is whether courts eventually adopt or allow *ALWD Citation Manual* citations. A system whereby first-year law students learn citation via the *ALWD Citation Manual* but then must switch to *The Bluebook* during law school to join a law journal or upon graduation cannot be workable indefinitely.<sup>45</sup>

### B. Contributions to the Citation Industry

The *ALWD Citation Manual* will contribute to the future of citation regardless of whether it displaces *The Bluebook* as the dominant citation manual. Any improvements found in the *ALWD Citation Manual* may be seized upon and copied by *The Bluebook*, resulting in an improved citation system.

The greatest contribution of the *ALWD Citation Manual* to citation practice is its creation of one set of rules for use by law students, legal scholars, and practitioners,<sup>46</sup> in contrast to *The Bluebook*'s creation of a separate system for practitioner documents. In addition, the manual is also easier to read, with color distinctions, example boxes, and color-coded symbols to mark spaces within citations. One example of its user-friendly features is Appendix 4, which lists the abbreviations of the federal circuit

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42. See Mary Rumsey & April Schwartz, *Paper versus Electronic Sources for Law Review Cite Checking: Should Paper Be the Gold Standard?*, 97 LAW LIBR. J. 31, 32–33 (2005). The article does not name the alternative citation manual. Presumably, the other manual could have been the *ALWD Citation Manual* or the *Maroonbook*. According to Aspen Publishers, only nine of the top fifty law schools teach the *ALWD Citation Manual* in the first-year legal writing programs, so the nonuse of the *ALWD Citation Manual* by the journals at those schools is not surprising.

43. Ass'n of Legal Writing Dirs. & Legal Writing Inst., ALWD Citation Manual Adoptions, <http://www.alwd.org/cm/> (follow “Adoptions” hyperlink on left side of page, then follow “Courts” hyperlink on right side of page) (last visited Dec. 4, 2006).

44. 11TH CIR. R. 28-1(k) (“Citations of authority in the brief shall comply with the rules of citation in the latest edition of either the ‘Bluebook’ . . . or the ‘ALWD Manual’ . . .”). Interestingly, the Eighteenth Edition erroneously states that the Eleventh Circuit requires use of *The Bluebook*. EIGHTEENTH EDITION, *supra* note 1, at 27 tbl.BT.2.

45. See Cheslik, *supra* note 36, at 250 (predicting that complaints from employers concerning lack of training in *The Bluebook* will cause faculty and administration to pressure legal writing programs to abandon the *ALWD Citation Manual*).

46. See ALWD THIRD, *supra* note 30, at 4 (“This book contains a single citation system that can be used to develop citations for any type of legal document.”).



courts and district courts<sup>47</sup> so that writers do not have to construct the abbreviation of the Western District of Texas from *The Bluebook*'s cryptic formula that says only "close up adjacent single capitals."<sup>48</sup>

However, the *ALWD Citation Manual* is not that different from *The Bluebook* as a citation manual. Most rules, though numbered differently, are similar, if not identical. The authors made a conscious decision to create a manual that was familiar to its audience; the result of that decision is that although the manual is marketed as being far superior to *The Bluebook*, it is also marketed as being functionally identical.<sup>49</sup> Therefore, the manual is even longer than *The Bluebook*, and the rules are just as detailed and complex.<sup>50</sup> Unlike the *Maroonbook*, which sought to be the antithesis of *The Bluebook* in simplicity and flexibility, the *ALWD Citation Manual* is the product of a conscious decision to be sufficiently similar to *The Bluebook* to attract the path-dependent legal writer.<sup>51</sup>

### III. THE EIGHTEENTH EDITION

#### A. The Bluebook as Ratification: Electronic Sources

Because *The Bluebook* is published approximately every five years, its primary role is to retroactively ratify changes in how scholars are doing research and in the sources they use rather than to serve as a harbinger of changes on the citation horizon. For example, the increase in *The Bluebook* pages devoted to international and foreign law materials was a response to the growing number of scholarly articles that cited to non-U.S. sources.<sup>52</sup>

#### 1. Traditional Sources Available on the Internet

The clearest example of how *The Bluebook* must race to catch up with legal researchers is in the area of Internet research. Because *The Bluebook* is published in five-year cycles, it will always be a step or two behind current citation practice, but the Eighteenth Edition brings citation practice into the new millennium. In 1996, the

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47. See *id.* at 467–70.

48. See EIGHTEENTH EDITION, *supra* note 1, R. 6.1, at 72.

49. See Rowe, *supra* note 41, at 31 (explaining that because the *ALWD Citation Manual* merely restates "widely accepted citation rules," resulting citations that follow the *ALWD Citation Manual* rules "are virtually identical to those produced under *The Bluebook*'s rules for practitioners"); Pamela Wilkins, *The ALWD Citation Manual Grows Up: A Guide to the Second Edition*, 83 MICH. B.J. 48, 48 (2004) ("Importantly, the *ALWD Manual* does not substantially depart from traditional legal citation form.").

50. See Cheslik, *supra* note 36, at 243 (questioning the prudence of reinventing the complex "citation wheel" so closely instead of moving toward a simpler reporter-independent citation system).

51. See Hurt, *supra* note 11, at 1284 (describing the decision to create an interoperable citation product in order to recruit users of *The Bluebook* to switch to the *ALWD Citation Manual*).

52. See Gordon, *Oh No!*, *supra* note 10, at 1704 n.28 (predicting, based on the Fifteenth Edition, that Table T.2, Foreign Jurisdictions, will be updated in each edition).

Sixteenth Edition added just one rule on citing to e-mails and web pages,<sup>53</sup> but by the Seventeenth Edition, out of necessity, the authors created an entire system of rules under Rule 18 on citing to Internet sources.<sup>54</sup> Under the Eighteenth Edition, Rule 18 has been completely reworked, and the resulting rules allow researchers to cite more easily to materials found on websites. Although legal writers are citing to the same primary sources—cases, statutes, and regulations—these sources are routinely accessed at their locations on various websites.

The Eighteenth Edition rewrites the rules for citing to traditional sources available on an Internet website, and the result is a much clearer rule for citing to electronic and Internet sources. Instead of requiring citation to a traditional printed source that happens to appear on the Internet, as in the Seventeenth Edition, the new rule allows citation to the content of the website as the source. For example, if a writer wanted to cite to a statement of the CEO of General Electric on the General Electric website under Seventeenth Edition rules, the writer would have to decide if the statement was an article, a letter, a press release, or something altogether different.<sup>55</sup> Under the new rule, the writer simply cites to the statement in a logical manner.<sup>56</sup>

However, the bias toward paper sources in the Seventeenth Edition<sup>57</sup> is still present in the Eighteenth Edition.<sup>58</sup> For many sources, the preference toward paper sources over reproduced electronic copies is logical. An article that appears today in the *Wall Street Journal* will be the same ten years from now preserved in a library either in hard copy or on microfiche, but the text or title of the article may change on wsj.com (the newspaper's website) throughout the day. For other sources, such as statutes and government documents,<sup>59</sup> however, this advantage is not apparent. Electronic versions

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53. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 16th ed. 1996) [hereinafter SIXTEENTH EDITION] R. 17.3.3, at 124.

54. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 129 (Columbia Law Review Ass'n et al. eds., 17th ed. 1st prt. 2000) [hereinafter SEVENTEENTH EDITION]. The new Rule 18 seemed poorly drafted to those who worked with materials in an electronic format. The rule created a distinction between citations to the same materials based on the method of locating those materials that a researcher used. For example, a citation would be formed differently depending on whether a researcher read a case on Westlaw or in a West Reporter. In addition, Rule 18 omitted the Sixteenth Edition's Rule 17.3.3, which allowed writers to simply cite to a website, preferring the approach that citations were to sources, such as articles, not to locations, such as websites. This rule created some strange citations to material found on websites where the material was not a case, statute, or article.

55. See *id.* R. 18.2.7, at 140.

56. See EIGHTEENTH EDITION, *supra* note 1, R. 18.2.3, at 156.

57. See SEVENTEENTH EDITION, *supra* note 54, R. 18, at 129 ("This rule requires the use and citation of traditional printed sources, except when the information is not available in a printed source, or if the traditional source is obscure or hard to find . . ."); Rumsey & Schwartz, *supra* note 42, at 33–34 (analyzing whether law review editors insist on print copies of resources because *The Bluebook* requires them or because print resources are more reliable).

58. See EIGHTEENTH EDITION, *supra* note 1, R. 18, at 151 ("*The Bluebook* requires the use and citation of traditional printed sources unless (1) the information cited is unavailable in a traditional printed source; or (2) a copy of the source cannot be located because it is so obscure that it is practically unavailable.") (emphasis omitted).

59. See Rumsey & Schwartz, *supra* note 42, at 35 (noting the marked increase in federal documents now available only in electronic format).

of statutes are actually the most current available, whereas paper copies in libraries, despite being updated by supplements and pocket parts, may still not be timely or complete. More importantly, most practitioners do not have immediate access to hard copies of all statutes. The practitioner who is citing to an out-of-state statute is almost certainly researching the statute online and then making up a print copy date to use in the citation. If the practitioner drives to a local law library to check the copyright date on the statute volume, then the client that must pay for that extra time should complain very loudly.

The Eighteenth Edition, however, still requires a publication year for the latest volume or supplement and, in many cases, the name of the legal publisher for statutes, if that statute is available in print.<sup>60</sup> Although many websites run by commercial entities may be ephemeral, and links to those sites may become dead links over the years, websites run by state governments that contain current statutes should be granted some citation deference. This continued denial by the rules of *The Bluebook* of the reality of statute citation may be merely the consequence of the rules being written by law students who are working next to the world's largest law libraries<sup>61</sup> or the product of a deep-seated loyalty to Westlaw and LexisNexis<sup>62</sup> and a fear of medium-neutral citation.

The disconnect inherent in Rule 18 is not limited to mistaken presumptions about how practitioners research. Increasing numbers of legal scholars research using electronic media to find cases, statutes, governmental documents, and scholarly articles.<sup>63</sup> As law libraries are relying more heavily on electronic access,<sup>64</sup> finding a paper copy of many sources can be prohibitively expensive. For example, requiring a law review author or editor to obtain one article using interlibrary loan can result in a substantial fee, which becomes more substantial with each additional request.<sup>65</sup>

Lest we believe that there is no legal realism at work in *The Bluebook*, note that Rule 14.6, SEC and Stock Exchange Materials, has been amended, through the examples,<sup>66</sup> to reflect that some current Securities and Exchange Commission documents are more accessible online.<sup>67</sup>

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60. See EIGHTEENTH EDITION, *supra* note 1, R. 18.1.2, at 152.

61. See Rumsey & Schwartz, *supra* note 42, at 42 (listing as reasons that editors at prestigious law reviews prefer paper as both illogical, "finding paper sources is easier for readers," and dogmatic, "doing paper research is part of legal education").

62. See EIGHTEENTH EDITION, *supra* note 1, R. 18.1, at 151 ("Because of the reliability and authoritativeness of LEXIS and Westlaw and other commercial electronic databases such as Dialog, cite such sources, if available, in preference to the other sources covered by rule 18.").

63. Rumsey & Schwartz, *supra* note 42, at 36.

64. See *id.*

65. See *id.* (calculating the cost of a single interlibrary loan request to be over \$18 for the requesting institution and over \$9 for the lending institution).

66. See EIGHTEENTH EDITION, *supra* note 1, R. 14.6, at 126 (including a new example for citation of no-action letters to the Westlaw database).

67. This trend toward accessing federal documents electronically will continue. The Government Printing Office has stated that more than half of the federal government's documents are printed only on demand. See Rumsey & Schwartz, *supra* note 42, at 35 n.33.

## 2. Working Papers Available on the Internet

Another revolution in legal scholarship has been the ability to access and to cite works in progress compiled on databases such as Social Sciences Research Network (SSRN), National Bureau of Economics Research (NBER), and Berkeley Electronic Press (BEPress).<sup>68</sup> Law scholars are routinely turning to databases such as SSRN both to post working papers and research other scholars' working papers that are stalled in the lengthy journal publication pipeline. Authors in various disciplines and countries have uploaded over one hundred thousand working papers and abstracts.<sup>69</sup> In return, users of SSRN downloaded approximately three million documents in 2005 from the SSRN database.<sup>70</sup> This revolution in "disintermediation" greatly improves scholars' ability to both disseminate and access works in "Internet time."<sup>71</sup> Prior to the Eighteenth Edition, the rare citation to these forthcoming drafts was fairly difficult to formulate under existing rules. In addition, the citation only directed readers to where the paper would eventually be published, not to where the paper currently could be accessed. Furthermore, no citation form was deemed necessary for works that had not been accepted for publication, as if only a commitment to be published (by any publication) could guarantee the reliability of the source as authority.

New Rule 17.3 provides a citation format for citing to working papers.<sup>72</sup> It gives the following citation to a draft paper accessible on SSRN as an example:

Richard Briffault, *The Political Parties and Campaign Finance Reform* 16–17  
(Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No.  
12, 2000), available at <http://ssrn.com/abstract=223729>.<sup>73</sup>

In addition, "working papers" are included in the laundry list of sources given in Rule 1.4, Order of Authorities Within Each Signal.<sup>74</sup>

The ability to cite to these working papers should not be limited by concerns over the permanence of these databases. The SSRN network is twelve years old, and the NBER database and BEPress are maintained by stable, well-funded organizations with long histories. All legal scholars should applaud this new rule in *The Bluebook*.

## 3. Weblogs as Sources

Citation to weblogs ("blogs") must be considered mainstream now that the index to

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68. See Legal Theory Blog, [http://lsolum.blogspot.com/archives/2006\\_01\\_01\\_lsolum\\_archive.html#113683990156732487](http://lsolum.blogspot.com/archives/2006_01_01_lsolum_archive.html#113683990156732487) (Jan. 9, 2006, 17:20 CST).

69. See Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83, 95 (2006) (detailing how use has increased tremendously since the creation of the SSRN network in 1994).

70. *Id.* at 96.

71. See Legal Theory Blog, *supra* note 68.

72. "When citing an unpublished work designated as a working paper, provide a parenthetical indicating the name of the sponsoring organization, the working paper designation and number, and the year." EIGHTEENTH EDITION, *supra* note 1, R. 17.3, at 150.

73. *Id.*

74. See *id.* at 48.

*The Bluebook* has an entry for “Blogs.” As citation to posts on blogs has become more accepted,<sup>75</sup> Rule 18 has adapted. Revised Rule 18.2.4, E-Mail Correspondence and Online Postings, provides guidance and examples on citing to e-mails, listserv messages, and blog entries.<sup>76</sup> Interestingly, Rule 18.2.4 distinguishes between blogs with one author, or “poster” according to the rule, and blogs with more than one poster. If the blog has just one poster, then the name of the poster is omitted from the citation. For example, according to *The Bluebook*, a post on the blog How Appealing, authored solely by Howard Bashman, would be cited as follows:

How Appealing, <http://legallaaffairs.org/howappealing/> (Sept. 1, 2004, 21:20 EST).<sup>77</sup>

In contrast, a post on SCOTUSblog, a blog formerly authored by several attorneys and employees of Goldstein & Howe, P.C., would be cited as follows:

Posting of Lyle Denniston to SCOTUSblog, <http://www.goldsteinhowe.com/log/index.cfm> (Sept. 28, 2004, 13:26 EST).<sup>78</sup>

If history is any predictor, future editions of *The Bluebook* will eventually abolish this distinction. The most-amended rules in *The Bluebook* regime are those that regulate the identification of authorship. Like the Dustin Hoffman character in *Wag the Dog*,<sup>79</sup> legal scholars know that receiving visible credit for one’s work is of utmost importance. Prior to the Fifteenth Edition, authors of books were identified by their last names and first initials only, and authors of scholarly articles were identified by only their last names.<sup>80</sup> Student authors were not identified in a citation at all.<sup>81</sup> The Fifteenth Edition changed the rules to allow for the use of an author’s last name, first name, and middle initial.<sup>82</sup> Responding to an outcry from readers who felt that the rule

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75. Doug Berman’s blog Sentencing Law and Policy was cited in the dissent by Justice Stevens in one of the most important Supreme Court cases of the October 2004 term. *United States v. Booker*, 543 U.S. 220, 277 n.4 (2005) (Stevens, J., dissenting). That same blog has been cited twenty-one times in seventeen cases, and at least twenty-three cases have cited a blog. 3L Epiphany, [http://3lepiphany.typepad.com/3l\\_epiphany/2006/04/cases\\_citing\\_le.html](http://3lepiphany.typepad.com/3l_epiphany/2006/04/cases_citing_le.html) (Aug. 6, 2006).

76. See EIGHTEENTH EDITION, *supra* note 1, R. 18.2.4, at 158.

77. *Id.*

78. *Id.*

79. In *Wag the Dog*, a Hollywood movie producer, Stanley Motss, helps stage a phony war with Albania to divert media attention away from the President’s indiscretion with a young girl. The diversion is so successful that Motss demands public recognition for his masterful orchestration, even though he suspects that the CIA will do anything to stop him from publicly taking credit. Near the end of the film, Stanley says, “Fuck my life. I want the credit.” *WAG THE DOG* (New Line Cinema 1997).

80. Paulsen, *supra* note 2, at 1792; Posner, *supra* note 28, at 1344–45 (reminding readers of the last names shared by multiple authors such as Dworkin, Ackerman, and Epstein).

81. Gordon, *supra* note 4, at 1692.

82. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds., 15th ed. 2nd ptg. 1991) [hereinafter FIFTEENTH EDITION]; see also Gordon, *supra* note 4, at 1692 (applauding the change due to concerns of criticism and anti-feminism). *But see* Louis J.

disrespected such notable legal scholars as Oliver Wendell Holmes, John Hart Ely, and Charles Alan Wright,<sup>83</sup> the Sixteenth Edition amended Rule 15.1 to require “the author’s full name as it appears on the publication, including any designation such as ‘Jr.’ or ‘III.’”<sup>84</sup> In addition, for works with more than one author, *The Bluebook* traditionally required only the first-listed author’s name, with the phrase “et al.” added to indicate co-authorship.<sup>85</sup> Under this rule, “Wright & Miller, Federal Practice & Procedure” became merely “Wright, et al.” This rule was changed in the Fifteenth Edition to allow for the identification of two authors, but not more than two.<sup>86</sup> The Seventeenth Edition loosened this rule somewhat for citations to works by three or more authors in which “inclusion of other authors is particularly relevant.”<sup>87</sup> The Eighteenth Edition is the first edition to permit listing of all authors’ names regardless of relevance.<sup>88</sup>

Although this new citation format for weblogs is warmly welcomed, as the citation norms in this area develop, the rule will ultimately become more tailored to reflect the importance of the individual parts of the citation. Once the novelty of the blog format wears off, the citation format may focus on information that has been historically important, such as the author’s name and the title of the specific blog entry. Of course, one of the most liberating features of blog posting, or blogging, is that blog posts do not commonly use any citation form. Generally, when bloggers cite to other blog posts, newspaper articles, or scholarly works, they merely embed a hyperlink to an electronic version in the post.

### B. The Bluebook as Response: Practitioners’ Notes

*The Bluebook* has a history of responding to earlier criticism in the next editing cycle, but the editors of the Eighteenth Edition were the first editors with the perhaps unenviable position of being able to respond to the new rules and format of a competitor, the *ALWD Citation Manual*. The Eighteenth Edition’s substantial reworking of the Practitioners’ Notes seems to be in direct response to the most significant difference between the two manuals.

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Sirico, Jr., *Fiddling with Footnotes*, 60 U. CINN. L. REV. 1273, 1276 (1992) (criticizing the new rule because interested readers can always consult the original source to glean an author’s full name).

83. Paulsen, *supra* note 2, at 1792–93 (noting that Oliver Wendell Holmes was actually known to his family by his middle name).

84. SIXTEENTH EDITION, *supra* note 53, R. 15.1.1, at 103.

85. In one of very few ways that the *Maroonbook* required more information than the analogous rule in *The Bluebook*, Rule 4.1(c) of the *Maroonbook* requires that the full names of all authors be given if a work is authored by two or three authors. See THE UNIVERSITY OF CHICAGO LAW REVIEW STYLE SHEET FOR VOLUME 73, 19, available at <http://lawreview.uchicago.edu/resources/docs/stylesheet-v73.pdf> (last visited Dec. 4, 2006).

86. See FIFTEENTH EDITION, *supra* note 82, at 101 (requiring in Rule 15.1.1 that “[i]f a work has more than two authors, use the first author’s name followed by ‘ET AL.’”); Paulsen, *supra* note 2, at 1793 (noting that the Harvard Law Review did not even comply with the new rule but would list three authors if preferable).

87. SEVENTEENTH EDITION, *supra* note 54, R. 15.1.1, at 108.

88. EIGHTEENTH EDITION, *supra* note 1, R. 15.1(b), at 130 (“Either use the first author’s name followed by ‘ET AL.’ or list all of the authors’ names. Where saving space is desired, and in short form citations, the first method is suggested.”).

As stated earlier,<sup>89</sup> the most beneficial innovation that the *ALWD Citation Manual* brought to the citation market was a single typeface for all legal documents, whether scholarly articles, office memoranda, or court documents.<sup>90</sup> *The Bluebook* has long maintained two typeface conventions; one for practitioner documents (normal font and either underline or italics) and one for scholarly documents (normal font with both italics and large and small caps).<sup>91</sup> This distinction is a vestige of an era in which scholarly manuscripts were published by a printing press and practitioner documents were produced by a typewriter. This dichotomy is meaningless, however, in an era of word processing and desktop publishing where any font variation is simple and painless.<sup>92</sup> The origins of this system seem innocent enough. The Practitioners' Notes were created in the Fifteenth Edition<sup>93</sup> as a response to complaints from practitioners that *The Bluebook* was too focused on scholarly writing that only a small percentage of law school graduates actually do.<sup>94</sup> These scant pages appeared in light blue at the beginning of the book, in ugly courier type, with primitive underlining instead of italics, and of course no large and small caps.<sup>95</sup> The rules in the Practitioners' Notes were not vastly different from the main rules, so the Practitioners' Notes seemed merely to be the rules of *The Bluebook* for commonly-used sources reprinted in a font now rarely used by anyone, accessorized with rarely-used underlining. These anemic rules frequently referred users to the main body of *The Bluebook*, causing the reader to flip back and forth to compose a citation for a brief or a memo. First-year law students bore the brunt of this burden.

In response to objections that users of the Practitioners' Notes were forced to refer to different parts of *The Bluebook*, the editors have now made a change. The resulting change, however, was not the suggested elimination of the Practitioners' Notes, but a swelling of the Practitioners' Notes to be more all-inclusive. The Eighteenth Edition renames the Practitioners' Notes the "Bluepages,"<sup>96</sup> which almost stand alone, but not quite. Although the Practitioners' Notes were created to be responsive to law practitioners, the Bluepages seem to reflect an attempt to be responsive to the needs of law students and first-year writing programs<sup>97</sup> and to be competitive with the student-

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89. See *supra* text accompanying note 46.

90. Ruth Piller, Book Review, 40 HOUSTON LAWYER 49 (2003) ("One of the simpler, yet long overdue changes from the *Bluebook* is that the *ALWD Citation Manual* contains one system for all legal documents, making no distinction between law review articles and other types of writing.").

91. SEVENTEENTH EDITION, *supra* note 54, P.1 and R. 2, at 11, 30 (requiring different typefaces in P.1 for court documents and legal memoranda and in Rule 2 for law reviews).

92. When the editors of the Eighteenth Edition posted an online survey that asked users for comments and answers to specific questions, Tracy McGaugh and I wrote the editors a lengthy letter in which we urged the editors to abolish the antiquated two-typeface system.

93. FIFTEENTH EDITION, *supra* note 82, at 10–19. The introduction to this edition explained: "Another new feature is a short reference section for practitioners printed on light blue stock following the introductory section . . ." *Id.* at v.

94. See Gordon, *Oh, No!*, *supra* note 10, at 1699.

95. FIFTEENTH EDITION, *supra* note 82, at 11 ("The practitioner should be sure to substitute the simpler typeface conventions set forth in this section in place of the law review typeface style found in the examples in the rest of the book.").

96. EIGHTEENTH EDITION, *supra* note 1, at 3–43.

97. See *id.* at 2 ("The best place to begin study of the *Bluebook* system of legal citation is

friendly *ALWD Citation Manual*.<sup>98</sup> For example, the Bluepages seem to be aimed at the law student demographic, with handy “tips” in blue font.<sup>99</sup>

The Bluepages are clearly more comprehensive than the Practitioners’ Notes, and they number forty-one pages to prove the point. In addition to detailing short versions of most of the major rules of *The Bluebook* (cases, statutes, legislative materials, books, journals, and newspapers), the Bluepages also contain some of the style rules found in the single-digit rules of *The Bluebook* (capitalization, block quotations, signals, and parentheticals). In addition, the Bluepages have their own tables: Court Documents<sup>100</sup> and Jurisdiction-Specific Citation Rules and Style Guides.<sup>101</sup> However, almost every rule found in the Bluepages still refers the reader to the rules in the main body,<sup>102</sup> and readers will again have to consult the main tables for abbreviations of courts, reporters, words in titles, journal names, months, and geographical regions. If the purpose of expanding the Bluepages was to limit page-flipping by a law practitioner or law student user, then that goal was probably not fully realized.

### C. The Bluebook as Reflection: Unpublished Federal Opinions

Each edition of *The Bluebook* serves as a time capsule of the era that produced it. For example, the Fifteenth Edition, published in 1991, reflected aspects of critical feminist theory in both rule changes and choices of scholarly works used as examples.<sup>103</sup> In addition, this edition moved away from using classic works as examples to using works that reflected the topics currently in discussion: “feminism, sexual orientation, sexual harassment, reproductive rights, AIDS, blacks, Native Americans, Americans with disabilities, police brutality, prisoners’ rights, apartheid, the Iran-contra scandal, ozone depletion, ocean dumping, oil spills, Bhopal, nuclear testing, Pacific fur seals, and whales.”<sup>104</sup> Two editions later, the Seventeenth Edition’s Table 1 reflected a more mundane appreciation of the vendor-neutral citation

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the Bluepages. Indeed, first-year legal writing instructors may wish to rely on the Bluepages as a teaching aid.”)

98. William A. Hilyerd, *Using the Law Library: A Guide for Educators—Part II: Deciphering Citations & Other Ways of Locating Court Opinions*, 33 J. L. & EDUC. 365, 367 (noting anecdotally that “law students and others who use the *ALWD Citation Manual* find it easier to use than the *Bluebook*”).

99. For example, Rule B4 “Bluepages Tip” states: “Signals are capitalized when used to begin a citation sentence but in lower case when used to begin a citation clause.” EIGHTEENTH EDITION, *supra* note 1, at 4.

100. *Id.* at 25 BT.1.

101. *Id.* at 27 BT.2.

102. *See, e.g., id.* R. B5.1.1, at 6 (“Learning to reduce [case name] information to a properly formatted case name citation takes practice. Rule 10.2 provides numerous rules to guide you along the way, the most important of which are introduced here.”).

103. In 1990, *Harvard Law Review* author Katharine T. Bartlett publicly criticized the then-current rule requiring only last names of authors as being hierarchical and obscuring of women’s identities. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 829 n.\* (1990). This rule, 15.1.1, was changed in the Fifteenth Edition. *See* FIFTEENTH EDITION, *supra* note 82, at 101. In addition, the Fifteenth Edition included new examples, using as sources works by feminist authors. *See id.* at 101 (using as an example a monograph by Catharine A. MacKinnon).

104. Paulsen, *supra* note 2, at 1792.



movement and the growing interest in state court administrators placing recent court opinions on websites for free public access.<sup>105</sup>

Since the publication of the Seventeenth Edition in 2000, one of the more surprising and heated debates that has arisen in the world of legal analysis surrounds judicial decision making, and the Eighteenth Edition reflects an appreciation and recognition of this debate. Numerous recent articles have empirically examined this enigmatic process, typically measuring the effect of judges' characteristics on how judges vote on certain cases.<sup>106</sup> A subsidiary issue has also arisen that questions the long-held practice of federal courts of issuing unpublished opinions that may not be cited in court proceedings.

Although the federal courts of appeal had effectively adopted a pattern of publishing certain opinions and preparing others for "unpublication" in the 1970s,<sup>107</sup> this practice came under public scrutiny in part because of differing court rules for citing these unpublished opinions. Although the frequency of the practice of issuing opinions marked "not for publication" varies somewhat among courts, generally eighty percent of federal appellate decisions are marked not for publication.<sup>108</sup> Although since the 1990s these opinions have been easily accessible on electronic databases such as Westlaw and LexisNexis,<sup>109</sup> legal researchers have historically been prohibited from using these opinions to argue the state of the law. Of the thirteen federal circuits, only four circuits allow litigants to cite unpublished opinions in briefs, and only for persuasive, not precedential, value. Five circuits discourage the citation of unpublished opinions for any reason, and four circuits specifically prohibit the practice altogether.<sup>110</sup> After two cases challenging the constitutionality of prohibiting the

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105. The Seventeenth Edition included in Table 1, United States Jurisdictions, the website address for each state's court system. *E.g.*, SEVENTEENTH EDITION, *supra* note 54, at 236 (providing the URL for the Utah courts website). In addition, for state jurisdictions that had adopted a public domain citation format for state cases, Table 1 also included that information. *Id.* (providing the public domain citation format for Utah cases, effective December 31, 1998).

106. *See, e.g.*, Jason J. Czarnecki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Judicial Decisionmaking*, 65 MD. L. REV. 841 (2006); Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction to the Symposium*, 32 FLA. ST. U. L. REV. 1001 (2005); William M. Landes, Lawrence Lessig, & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeal Judges*, 27 J. LEGAL STUD. 271 (1998).

107. *See generally* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004) (analyzing thoroughly the federal courts' practices of unpublishing, depublishing, and withdrawing opinions and the impact of these practices on present and future litigants).

108. *See* David Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667 (2005) (citing to statistics published by the Administrative Office of U.S. Courts for the twelve-month period ending September 30, 2004).

109. *See* J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIRCUIT REV. 27, 33 (2005) (characterizing no-citation rules as anachronisms due to technological innovations in research that publish all opinions, even those marked not for publication).

110. *See* Vladeck & Gulati, *supra* note 108, at 1677 (giving citations to court rules for all circuit courts of appeals). The Second, Seventh, Ninth, and Federal Circuit Courts of Appeal

citation of unpublished opinions brought publicity to this topic,<sup>111</sup> the Advisory Committee on Appellate Rules began to study the issue.

The practice of releasing unpublished opinions raises concerns that involve judicial practices both after and before the opinions are written. If opinions cannot be cited, then this leaves future litigants with a common law record that is less than complete. In addition, if opinions will not be cited, then judges writing those opinions will write perfunctory opinions without thorough analysis that might change the holdings of those opinions. However, members of the judiciary who support the current publication and citation practice argue that the caseload of federal appellate courts realistically prohibit the kind of painstaking review that Professors Vladeck and Gulati call the “Learned Hand Analysis” of each individual appeal.<sup>112</sup>

In 2003, the Advisory Committee proposed a new rule, Federal Rule of Appellate Procedure 32.1 that would effectively permit the citation of unpublished opinions in all federal courts but would not require that these opinions have precedential value. Although this rule was highly controversial<sup>113</sup> and generated much opposition from very well-known federal judges,<sup>114</sup> the rule was passed by the Committee on Rules and Practice of U.S. Courts on June 15, 2005, and then by the Judicial Conference of the United States on September 20, 2005.<sup>115</sup> The rule then awaited Supreme Court approval and statutorily required congressional review.<sup>116</sup> During this time of debate, the Eighteenth Edition was prepared.

Pending final approval of Federal Rule of Appellate Procedure 32.1, the federal circuit courts have retained their original rules on citation of unpublished opinions. Although no earlier edition contained this information, the Eighteenth Edition publishes these rules in the Bluepages.<sup>117</sup>

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prohibit the citation of unpublished opinions, and the Fourth, Fifth, Sixth, Eighth, and Tenth discourage the practice. The other four circuits do not prohibit or discourage the citation of unpublished opinions; however, the rules of these courts also warn litigants that these citations have no precedential value.

111. See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (holding that court rule that prohibited citation of unpublished opinions was constitutional); *Anastoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (vacating as moot opinion in which an Eighth Circuit panel held that prohibiting citation of unpublished opinions was unconstitutional).

112. Vladeck & Gulati, *supra* note 108, at 1668–70 (describing the two-track process of disposing with appeals as having a “Learned Hand” track and a much inferior “black box” track).

113. Patrick J. Schiltz, *Response: The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 23 (2005) (reporting that over five-hundred public comments were received).

114. See Letter from Judge Alex Kozinski, Ninth Circuit Court of Appeals, to Judge Samuel A. Alito, Third Circuit Court of Appeals and Chairman of the Advisory Committee on Appellate Rules (Jan. 16, 2004), <http://www.nonpublication.com/kozinskiletter.pdf>.

115. See Tony Mauro, *Judicial Conference Endorses Citing Unpublished Opinions*, *LEGAL TIMES*, Sept. 21, 2005.

116. See Vladeck & Gulati, *supra* note 108, at 16 (describing the “report and wait” procedure that causes any approved rule to be pending for seven months while Congress decides to “reject, modify or defer” the new rule).

117. EIGHTEENTH EDITION, *supra* note 1, BT.2, at 27–32 (compiling rules for federal and state courts, including rules on citation of unpublished opinions).

Interestingly, newly minted Supreme Court jurists Chief Justice John Roberts and Justice Samuel A. Alito were members of the 2003 Advisory Committee, and Justice Alito was the chair of that committee.<sup>118</sup> At the time of this writing, the Supreme Court has approved the new rule, and congressional review is pending.<sup>119</sup> If Congress takes no action by December 1, 2006, the new rule will become effective in 2007.

#### D. The Bluebook as Accretion: Small, Inevitable Changes

In each new edition, some changes are major and some are minor. Minor changes in the Eighteenth Edition include numbering changes<sup>120</sup> and additional examples.<sup>121</sup> Also, as sources are added to our legal bibliography, those sources will be included.<sup>122</sup> Even the creation of new courts, such as the Foreign Intelligence Surveillance Act Court,<sup>123</sup> results in tinkering with the rules. And small variances from former rules that are universally used eventually get codified, such as the use of a shortened version of one party's name in a short form<sup>124</sup> and the citation to an unofficial federal code when the *United States Code* is inevitably out-of-date.<sup>125</sup> However, some changes just seem to be inexplicable, such as the new convention that all citations to documents promulgated by the Internal Revenue Service, such as private letter rulings and technical advice memoranda, must begin with "I.R.S."<sup>126</sup> And other changes are only explainable as the continued struggle of the editors of *The Bluebook* to improve the status of law review members, such as a new rule for the citation of unpublished student notes.<sup>127</sup>

Part of the excitement of a new edition is seeing what words are now so ubiquitous in our court system that abbreviations for those words are added to Table T.6. The new words in this edition, however, are not that exciting:

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118. See Tony Mauro, *Rule Allows Citing of Unpublished Opinions as of 2007*, N.Y. L.J., Apr. 13, 2006.

119. Tony Mauro, *Supreme Court Votes to Allow Citations to Unpublished Opinions*, LEGAL TIMES, Apr. 13, 2006.

120. For example, Rule 3, Volumes, Parts, and Supplements, has been renumbered. The text of former Rule 3.1(a) is now just unnumbered text. Therefore, the former Rule 3.1(b) is now subsection (a) and so on. EIGHTEENTH EDITION, *supra* note 1, at 58.

121. Some new examples are inserted to help clear up confusion, others to reflect amendments to the rule, and others just to reflect the currentness of the new edition. See *id.* R. 12.2.2(b), at 103 (adding an example citing to the Sarbanes-Oxley Act of 2002).

122. For example, Table T.1 has added an abbreviation (F. App'x) for *Federal Appendix*, a reporter first published in 2001. *Id.* T.1, at 193.

123. See *id.* R. 10.4(a), at 89 (amended to include a citation form for the Foreign Intelligence Surveillance Court and the Court of Review).

124. See *id.* R. 10.9(i), at 98 (amended to state, "Use of only one party's name (or a readily identifiable shorter version of one party's name) in a short form citation is permissible if the reference is unambiguous.>").

125. See *id.* R. 12.2.1(a), at 102 (amended to state, "[F]ederal laws enacted after the most recent publication of the *Code* should be cited to an unofficial code until publication of the next edition of the *United States Code*.>").

126. See *id.* R. 14.5.2(b)-(e), at 125-26.

127. *Id.* R. 17.1.1, at 148 (amended to state, "Also use this format for student-written comments and notes written under faculty supervision for a law journal, but not selected for publication . . .").

Coalition	Coal.
Communication	Commc'n
Northeast[ern]	Ne.
Northwest[ern]	Nw.
Number	No.
Southeast[ern]	Se.
Southwest[ern]	Sw.
Township	Twp.

Furthermore, the abbreviation for “Communication,” which understandably has to compete with the abbreviation for “Commission,” just seems wrong.

*E. And, Finally, The Bluebook as Copycat: Taking Design  
Advice from the ALWD Citation Manual*

Perhaps stealing another cue from the *ALWD Citation Manual*, the latest edition of *The Bluebook* has laminated front and back covers and a sturdier spiral binding.<sup>128</sup> Perhaps the back cover of this edition will last until the next one is published, unlike the Seventeenth, Sixteenth, and the Fifteenth Editions that I have owned. In addition, the editors of *The Bluebook* have imitated the *ALWD Citation Manual*'s two-color scheme<sup>129</sup> by introducing new blue text for emphasis.<sup>130</sup>

#### IV. RADICAL HOPES FOR *THE BLUEBOOK* AND THE FUTURE OF CITATION

No other discipline has a publication manual that attempts to cover both scholarly articles and practical documents. This distinction may be because most other disciplines have at their cores the production of scholarly articles, not the daily production of written materials that are either formally delivered to clients or filed with a government tribunal or agency. Publication manuals in other disciplines, however, cover submission procedures, research procedures, citation rules, and writing style, with style usually constituting the bulk of the manual.<sup>131</sup> I would suggest that the

128. J. James Christian, *The New Bluebook*, ARIZ. ATT'Y 26 (2005) (rejoicing in the “shimmering bright-blue-plastic laminate covers”).

129. See Rowe, *supra* note 41, at 31 (commenting on the logical layout of the *ALWD Citation Manual* that creates readability by using green text for examples).

130. See Christian, *supra* note 128, at 126 (describing the new font convention as “undeniably eye catching”).

131. See, e.g., AM. PSYCHOLOGICAL ASS'N, PUBLICATION MANUAL (5th ed. 2001); THE CHICAGO MANUAL OF STYLE (15th ed. 2003); JOSEPH GIBALDI, MLA STYLE MANUAL AND GUIDE TO SCHOLARLY PUBLISHING (2d ed. 2001). Cf. JOSEPH GIBALDI, HANDBOOK FOR WRITERS OF RESEARCH PAPERS (6th ed. 2003) (focusing on student papers rather than on the papers of

discipline of law needs two publication manuals. One manual would govern the submission and production of scholarly articles, and the other manual would govern the production and filing of practitioner documents. The editors of *The Bluebook* could realize this brave new world by simply splitting *The Bluebook* into two books and selling to two different markets. Alternatively, a new competitor could come to the market with a more streamlined citation manual just for practitioners.

#### CONCLUSION

The Eighteenth Edition of *The Bluebook* is similar in one respect to all other editions of the venerable publication. Each edition reflects the angst of the age that produced it. This twenty-first century variety appropriately gives attention to the single most important change in legal research: electronic sources, both traditional sources now accessible electronically and new sources never available before the disintermediation revolution of the Internet. In addition, smaller changes hint at rumblings in legal writing practice, such as new proposed Federal Rule of Appellate Procedure 32.1. Lastly, as long as a competitor such as the *ALWD Citation Manual* gets attention for its improvements over *The Bluebook*, each new edition will attempt to reduce any qualitative advantage, much like the creators of Microsoft Word and WordPerfect borrow ideas from each new version of the other's word processing software. Although no edition of *The Bluebook* has ever reached citation perfection, or been successful at hunting the "snark of delusive exactness,"<sup>132</sup> each edition does get somewhat closer to the unattainable goal of completeness as a perfect restatement of citation "good practices."

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scholars, which are covered by the *MLA Style Manual and Guide to Scholarly Publishing*).

132. No review of *The Bluebook* would be complete without a quotation from Richard A. Posner, a harsh critic of *The Bluebook* and supporter of the more flexible guidelines of the *Maroonbook*. In 1986, Posner described the Fourteenth Edition as "the hyper trophy of law." Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1343 (1986). Posner's disdain for unnecessarily (and inefficiently) complex devices to achieve comparable results is even evident in his application of federal antitrust law. See *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1411 (1996) (showing preference for a "simpler and we suppose just as good" analysis to "a hunt for the snark of delusive exactness").