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## **PLAGIARISM PEDAGOGY:**

### **WHY TEACHING PLAGIARISM SHOULD BE A FUNDAMENTAL PART OF LEGAL EDUCATION**

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As a practicing lawyer, if you aren't plagiarizing, you're committing malpractice. Litigators copy forms and arguments from winning briefs rather than bill their clients for reinventing the wheel. Transactional lawyers copy enforceable agreements to ensure their agreements are enforceable too. Partners routinely present documents prepared by associates (and sometimes even paralegals) as their own work. And judges are the most prolific plagiarists of all, copying briefs, opinions, treatises, and legal and

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nonlegal scholarship, adopting arguments from lawyers and holdings from other judges as their own and claiming authorship of opinions written primarily by their clerks or the parties to the litigation.

Legal writing professors are tasked with teaching law students the practical writing skills they will need as practicing lawyers.<sup>1</sup> One of those skills is plagiarism. Lawyers need to know why to plagiarize, rather than paraphrase. They need to know when to plagiarize to save time and produce better work. They need to know how to plagiarize to do it effectively. They need to know what to plagiarize to ensure they copy from the best sources. And they need to know who to plagiarize and who not to plagiarize.

Unfortunately, legal writing professors fail to teach law students how to plagiarize effectively. Even worse, they prohibit plagiarism in legal writing assignments and severely punish students who are caught plagiarizing. As a consequence, legal writing instruction does not fully prepare law students for the practice of law, and may even discourage them from plagiarizing as practitioners, to the detriment of their clients.

Of course, legal writing professors are not entirely to blame. They are obligated to enforce academic plagiarism policies, which uniformly prohibit plagiarism of any kind, including the kinds of plagiarism that are essential to the practice of law. The best legal writing professors recognize the irony of prohibiting and punishing plagiarism in the classroom, knowing that it is encouraged or required in practice, and explicitly acknowledge the tension between academic and practice norms. But many professors come to internalize academic plagiarism norms and accept them as an expression of moral truth, rather than mere social norms which can—and should—vary depending on the social context.

Legal writing instruction should include teaching law students how to plagiarize effectively. If practicing lawyers plagiarize, then plagiarism is a skill we should teach our students. At the very least, legal writing professors should explain that plagiarism is an essential part of the practice of law and encourage students to reflect on when and why plagiarism is useful in practice, even though it is prohibited in the academic realm. We owe it to our students to be honest about what the practice of law entails, even if it conflicts with our own academic norms. After all, academic plagiarism norms are just a means to the end of managing the academic gift economy. We should not elevate the interests of our guild over the interests of our students, who plan to join a different one.

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1. James B. Levy, *Legal Research and Writing Pedagogy—What Every New Teacher Needs to Know*, 8 PERSPEC. 103 (2000).

## PLAGIARISM IS LAW PRACTICE

The canonical definition of plagiarism is “copying without attribution.” So defined, the practice of law consists substantially of plagiarism; indeed, “an expectation of plagiarism is baked into the common law system.”<sup>2</sup> Legal practice and legal writing are “built on borrowing.” and “[o]ur precedent-based system emphasizes consistency over originality.”<sup>3</sup>

Publishers sell treatises and form contract books “for the *primary* purpose of being copied.”<sup>4</sup> No practitioner considers using these resources without attribution to be plagiarism—use without attribution is expected.<sup>5</sup>

Practitioners also use language from previously filed documents—their own and those of other attorneys or judges. Self-plagiarism is “common practice” in the legal profession, and lawyers generally agree that “there is nothing improper about a lawyer reusing his or her own previous work.”<sup>6</sup> Using the work of others without attribution is more controversial but still common (and not commonly punished or prohibited) in the legal profession, though there are some reported cases in which lawyers have been disciplined for this conduct.<sup>7</sup>

Lawyers routinely use form documents and previously filed documents in similar cases as the model when preparing new documents, often making only minimal changes to ensure consistency in interpretation.<sup>8</sup> In many smaller jurisdictions, particular filings become well known and are widely copied, and it is seen as a badge of honor to have one of your documents adopted as a model.<sup>9</sup>

In the practice of law, copying is not just accepted, it is required. While the obligations imposed by the rules of professional responsibility are often opaque, they are a model of clarity about the duties lawyers owe their clients: absolute candor and fiduciary trust. Lawyers must do everything in

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2. Andrew Carter, *The Case for Plagiarism*, 9 U.C. IRVINE L. REV. 531, 554 (2019).

3. K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, 32 COLO. LAW. 53, 53 (2003).

4. David L. Brandon, *The Ethics of Plagiarism: The Narcissism of Small Differences*, DRI FOR DEF., Oct. 2016, at 55 (emphasis added). Strangely, some have argued that copying forms from form books does not constitute plagiarism while simultaneously condemning copying material without attribution from sources that “deserve[ ] attribution”—an illogical, unworkable, and confusing standard. See David E. Sorkin, *Practicing Plagiarism*, 87 ILL. BAR J. 487, 488 (1993).

5. The United States Courts make federal court forms available online and encourage their use in the federal courts. See *Forms*, UNITED STATES COURTS, <https://www.uscourts.gov/services-forms/forms> [<https://perma.cc/SE9D-482E>]. In many states, forms are approved by the legislature or a council of court judges for copying, and use without attribution is expected. See DuVivier, *supra* note 3, at 53.

6. DuVivier, *supra* note 3, at 53.

7. See THE PLAGIARISM CASES, *infra*.

8. See DuVivier, *supra* note 3, at 53.

9. As related to Brian L. Frye by Maybell Romero.

their power to advance the legal interests of their clients and must ignore competing values.

Specifically, lawyers must copy whenever it will benefit their clients, even when copying violates academic plagiarism norms. After all, lawyers have a professional responsibility to represent the interests of their clients, not to produce original works of authorship. A lawyer who writes something new, when copying will do, is not only wasting their client's money but also creating unnecessary risk. If an existing document has worked in the past, lawyers should use it, whenever and however possible.

Imagine telling a client that you could prepare a filing for them in an hour by copying an existing filing and making relevant changes, or you could prepare an equivalent filing in twenty hours by writing it from scratch. No client would request the novel filing, as it would be a waste of the lawyer's time and the client's money. And if the attorney insisted on writing a novel filing, merely in order to avoid an allegation of plagiarism, the client would probably fire them.

What does that mean in practice? Litigators must copy winning arguments from existing motions and briefs. Transactional lawyers must copy existing agreements that have proven enforceable. Associates must begin a project by copying existing documents, rather than rewriting them anew, and partners must end the project by signing their name to the document the associate drafted substantially or entirely. Across the board, lawyers do not give a fig about attribution, except insofar as it lends additional force to the argument at hand.

While academic plagiarism norms condemn plagiarism as the ultimate academic crime, many lawyers and judges, whether they are willing to say so publicly, acknowledge plagiarism as not merely unobjectionable but a "virtue" to be encouraged.<sup>10</sup>

Why is plagiarism justified in law practice? Because it enables lawyers to spend "less time and money to produce effective written advocacy."<sup>11</sup> Plagiarism, therefore, is good for clients, so long as the lawyer has taken the time to "properly contextualize[ ] and edit[ ] the copied material."<sup>12</sup> And plagiarism might be most beneficial to those least able to afford legal services: "[M]any of those in need of legal services simply do not have the resources to pay for their lawyer's 'high-end' cognitivist endeavors. For those under-resourced Americans, a plagiarised brief is surely better than no brief at all."<sup>13</sup>

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10. See Sorkin, *supra* note 4, at 535.

11. *Id.* at 536. Of course, "the plagiarist's act of copying, not the failure to give attribution to the original author" is the time—and money—saver. *Id.* at 537.

12. *Id.* at 536.

13. *Id.* at 545.

It is efficient for an attorney to spend one hour copying an effective document, rather than twenty hours drafting an equivalent new document. But it is fraudulent for an attorney to spend one hour copying a document and bill the client for twenty hours drafting the document.

Similarly, copying documents is good practice only if the documents are relevant and effective. If the copied document is on point and provides the court with the information and arguments it needs, then copying should be encouraged. But copying documents that are irrelevant or unhelpful is malpractice and should be discouraged. Likewise, copying and refiling ineffective documents should also be discouraged. The relevant question should be whether the document advances the client's cause, not whether it is original.

Relatedly, attribution establishes the legal authority of an argument but is irrelevant for plagiarism purposes. Accordingly, a passage copied from a judicial opinion should be attributed, not to avoid plagiarism but because the attribution establishes the authority of the passage. Citation of legal authority, then, is the lawyer's stock in trade.

Likewise, a passage copied from a restatement, treatise, or even law review article should be attributed, but only because the attribution (hopefully) increases the credibility of the argument or conclusion advanced. By contrast, a passage copied from another attorney's brief generally should not be attributed to the attorney because the attribution is irrelevant. The fact that another attorney made an argument generally does not affect the authority of that argument.

In transactional practice, it is probably negligence per se not to copy previous contracts—uniform contract language results in “interpretive efficiencies”<sup>14</sup> and “reduce[s] errors and improve[s] . . . quality.”<sup>15</sup> And attribution in contracts is uniformly considered irrelevant. The purpose of a contract is to memorialize an agreement between the parties, not to express original ideas requiring attribution.

Lawyers do not even spare legal academics, who they mostly just ignore, as a source from which to plagiarize when it suits their purposes. After all, for a lawyer, legal scholarship comprises the quality of the argument and the ipse dixit of the author's pedigree. For better or worse, the latter is in ample supply but low demand. As a general rule, a law professor's credibility and two bits'll buy you a cup of coffee. It is not uncommon for legal academics to discover years later that their work has been plagiarized

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14. *Id.* at 535.

15. TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 335 (2d ed. 2014).

in legal filings and to become frustrated, not because their work has been helpful but because they haven't gotten credit for it.

For legal scholars, attribution is the alpha and omega of the scholarly gift economy. They are delighted when people copy their expressions and ideas, so long as they receive attribution, the coin of the scholarly realm. Legal scholars typically receive no additional compensation for producing legal scholarship, other than potential accolades in the form of citations, the rarest and sweetest fruit of the scholarly enterprise. Many legal scholars taste of it only occasionally, if at all, and so relish each morsel all the more jealously.

But lawyers and judges do not care about the vicissitudes of legal academia. For them, attribution is merely a rhetorical tool, not a moral obligation.<sup>16</sup> Lawyers attribute what they copy only if it will bolster their arguments, and judges attribute what they copy only if it will cement their conclusions. Both lawyers and judges alike see attribution as merely a means to the end of achieving an outcome, not an end value in its own right. Lawyers cite *all night to get lucky*,<sup>17</sup> and judges cite to justify their conclusions. Academic plagiarism norms are meaningless and irrelevant to the both of them, as they should be.

In a nutshell, plagiarism is the foundation of legal practice, and attribution is but an ornament. As usual, the truth of this maxim is best illustrated by the odd and unusual circumstances in which that ornamentation is ignored. After all, nothing proves the effective universality of a legal principle like the rarity of its exceptions, and few legal principles are more universal than the irrelevance of academic plagiarism norms. It is always surprising to hear a lawyer complain about plagiarism, and truly shocking for a judge to take such complaints seriously. While lawyers and judges obviously understand the concept of plagiarism, it is a non sequitur to accuse them of plagiarizing a pleading, contract, or opinion, because the authorship of such a document is simply irrelevant.

#### WATCHING THE PLAGIARISM POLICE

Nearly all academics, but also some courts and bar associations, have operated and continue to operate under the mistaken belief that plagiarism violates not just lawyer norms (which it plainly does not) but ethics rules and rules of procedure. As we explain below, plagiarism in practice does none of these things.

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16. Plagiarism in the legal academy, where "originality has a unique value," is an entirely different topic altogether and beyond the scope of this article. See Sorkin, *supra* note 4, at 534.

17. DAFT PUNK FT. PHARRELL WILLIAMS, *Get Lucky*, on RANDOM ACCESS RECORDS (Colum. Records 2013).

### PLAGIARISM AS A VIOLATION OF ETHICS RULES

Some have attempted to argue that plagiarism is a violation of lawyer ethics rules, specifically, Model Rule of Professional Conduct 8.4, which prohibits a lawyer from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>18</sup> Under Rule 11 of the Federal Rules of Civil Procedure and similar state rules, when a lawyer files a pleading, the lawyer is certifying that the document (1) is not being filed for an improper purpose, such as harassment or delay; (2) legal arguments are warranted by law or an argument for extension, modification, reversal, or creation of new law; (3) factual contentions are or are likely to be supported by evidence; and (4) factual denials are warranted.<sup>19</sup> Similarly, Rule 3.1 of the Model Rules of Professional Conduct requires that any attorney only present arguments when “there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”<sup>20</sup>

But does plagiarism constitute dishonesty, fraud, deceit, or misrepresentation? No. Nowhere do any of the relevant rules require that an attorney present that a legal pleading, contract, or any other work is original or otherwise contains proper attribution, and thus an attorney is not acting dishonestly or fraudulently merely by filing a pleading that contains unattributed copying. In filing the pleading, the lawyer is not certifying that the document is original, and thus even if the document is plagiarized, the mere presentation of it to the court is not fraudulent or misrepresentative. The only possible way for plagiarism to constitute a violation of Rule 8.4 is if plagiarism itself is deceitful. But the practice of law is not journalism or academia, where original thought is prized and the assumption is that unattributed words are the writer’s own. The American legal system is one built on precedent and in which it is unoriginal thought—the equation of one’s case with existing precedent or an argument for the extension of precedent to one’s facts—that carries the day.

### THE PLAGIARISM CASES

Nevertheless, lawyers and judges still occasionally accuse members of the legal profession with plagiarism, though the reported number of cases is miniscule, suggesting, as we argue, that plagiarism is widely accepted in practice among both lawyers and judges. Plagiarism objectors are rare in practice, but occasionally an objector will raise a fuss about “plagiarized”

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18. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (Am. Bar Ass’n) [hereinafter MODEL RULES].

19. FED. R. CIV. P. 11.

20. MODEL RULES, *supra* note 18, at r.3.1.

filings, or filings that consist in part or in whole of material copied from previous filings without attribution.<sup>21</sup>

While it is tempting to question the sincerity of those who have anointed themselves the plagiarism police, they are typically just confused or upset. It is understandable! Long indoctrination makes it hard for some lawyers and judges to ignore academic plagiarism norms, even though they don't apply to the practice of law. And everyone wants to own their 15 minutes of fame, even if it comes in the form of someone borrowing passages from their motion in limine.

To be frank, nearly all allegations of plagiarism in legal practice are absurd and misplaced, at least with respect to copying without attribution. If the copied document is relevant and effective, attorneys arguably have a duty to their client to use it, rather than rewrite the document from scratch, which would merely be a waste of their client's resources—economic efficiencies dictate that the lawyer use the copied document so long as the lawyer independently determines that the document is appropriate to the client's legal issue and modifies the document to reflect that.<sup>22</sup>

The problem with copying filings is not plagiarism. The problem is fraud. Ethical violations come from fraudulent billing, not from plagiarism in and of itself. Judges and bar associations who continue to insist on couching attorney discipline for fraud in terms of plagiarism do the profession a disservice by failing to acknowledge the realities of law practice, and perpetuate the mistaken belief that plagiarism is *malum in se*.

#### *IOWA V. LANE*

In nearly all the reported legal plagiarism cases, judges purport to punish plagiarism when they should be punishing fraud. For example, in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Lane*, the Iowa Supreme Court punished a lawyer for filing a brief that consisted primarily of text plagiarized from an employment discrimination treatise.<sup>23</sup>

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21. The most notorious of these objectors was Milberg Weiss, once considered “the most influential plaintiffs’ securities firm in the United States.” Martha Neil, *Milberg Weiss on the Hot Seat*, ABAJOURNAL (Dec. 25, 2006, 7:54 AM), [https://www.abajournal.com/magazine/article/milberg\\_weiss\\_on\\_the\\_hot\\_seat](https://www.abajournal.com/magazine/article/milberg_weiss_on_the_hot_seat) [https://perma.cc/EF2T-NUGA]. In 2002, Milberg, known for its aggressive litigation tactics, began placing copyright notices on its complaints and registering those complaints with the Copyright Office, ostensibly to stop other firms from using Milberg’s complaint language in their own pleadings. Milberg even went so far as to send cease and desist letters to firms that it believed had copied language from its complaints. Milberg apparently never followed through on any of those threats, perhaps because, in 2006, Milberg found itself with bigger problems when the entire firm and two of its most prominent partners were indicted for bribery and fraud. *Id.*

22. See Brandon, *supra* note 4, at 54.

23. 642 N.W.2d 296 (Iowa 2002).

The lawyer, Lane, represented the client in a civil rights action, which the client won at trial.<sup>24</sup> Lane then filed a post-trial brief that consisted primarily of text plagiarized from an employment discrimination treatise. He then sought \$16,000 in attorney fees for preparing the plagiarized brief, claiming he worked eighty hours at \$200 per hour.<sup>25</sup>

At the fee hearing, the magistrate judge observed that much of the post-trial brief appeared to be copied from another other source, and Lane admitted that he had “borrowed liberally from other sources.”<sup>26</sup> The court asked him to produce the source or sources, which he failed to do, yet the court still awarded him some fees but reduced the award from \$80,000 to \$20,000.<sup>27</sup>

But that was not the end of the story, because the Iowa Supreme Court Board of Professional Ethics and Conduct filed an ethics complaint against Lane, alleging that he “passed someone else’s writing as his own and claimed he spent almost two weeks writing that which he used.”<sup>28</sup> The Grievance Commission found several ethical violations and recommended a three-month suspension.<sup>29</sup> The Supreme Court agreed that Lane had committed the violations but doubled the suspension to six months.<sup>30</sup>

The Iowa Supreme Court held that Lane’s plagiarism of the treatise was unethical because he misrepresented the plagiarized text as his own.<sup>31</sup> The court analogized Lane’s conduct to that of an attorney who drafts a document for a pro se litigant to avoid “the responsibilities imposed on attorneys.”<sup>32</sup> The court observed: “Just as ghost writing constitutes a misrepresentation on the court, so does plagiarism of the type we have before us.”<sup>33</sup> And it flatly stated, “[p]lagiarism itself is unethical.”<sup>34</sup>

The court’s reasoning wasn’t just wrong, but comically hypocritical. The problem wasn’t that the lawyer plagiarized his brief. The problem was that he defrauded his client. The Iowa Supreme Court employs clerks, who draft opinions for its judges. The judges then incorporate those drafts into opinions they publish under their own names, often with minimal changes. In other words, every Iowa Supreme Court opinion is presumptively

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24. *Id.* at 298.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 297.

29. *Id.*

30. *Id.*

31. *Id.* at 299.

32. *Id.* at 300.

33. *Id.*

34. *Id.*

“ghostwritten,” to a greater or lesser degree, and literally “plagiarized” from the clerks, according to the standard advanced by the court itself.

Lane deserved to be punished, and the punishment was fair, but the court punished him for the wrong reason. The problem was not plagiarism; it was fraud. Copying is fine, especially when it works. But lawyers cannot bill for time they did not actually work—*that*, not plagiarism—is ethically and morally wrong.

The court should have punished Lane for lying about how many hours he worked on the brief. After all, Lane’s plagiarism did not harm his client or the court. He won the case for his client and the brief he filed was effective. The problem was that he tried to overcharge his opponent.<sup>35</sup>

Of course, Lane’s plagiarism arguably could have harmed his client, but not for any of the reasons advanced by the court. Lane did not attribute the text he copied from the treatise because he wanted to pretend he wrote the language himself. But the copied text would have been more persuasive if it had been attributed to the authors of the treatise, rather than Lane. After all, they are impartial authorities who are experts in an area of practice, and Lane was an advocate. Again, the problem is not that Lane plagiarized but that he plagiarized when attribution would have been more effective. Or rather, the problem is that he put his own interest in defrauding his opponent ahead of his fiduciary duties to his client.<sup>36</sup>

Unfortunately, the Iowa Supreme Court allowed its disdain for Lane’s misconduct to cloud its own judgment. Everyone hates a plagiarist, so the court made the most scurrilous accusation against him it could. But it failed to recognize the hollowness of its accusation and failed to see that the real problem sounded in actual fraud, not literary fraud. It is a testament to the insidious persuasiveness of the plagiarism police that they have managed to make even judges deplore plagiarism in plagiarized opinions.

#### *NEWEGG V. SUTTON*

Other times, courts punish plagiarism because they think it is unfair, and call it copyright infringement to justify the punishment. For example, in

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35. Lane’s client wasn’t hurt because there is no evidence that Lane’s client was ever going to have to pay or even be asked to pay the inflated fee. Lane had sought attorney fees on his client’s behalf and his misrepresentation occurred in the amount he was asking the court to order the opposing party to pay.

36. Notably, when courts punish attorneys for “plagiarism,” they typically impose monetary sanctions only for fraudulent billing. *See, e.g., In re Burghoff*, 374 B.R. 681 (Bankr. N.D. Iowa 2007) (finding that attorney had unreasonably billed client for time spent preparing brief that was substantially plagiarized and sanctioning attorney by disgorging fees); *Columbus Bar Ass’n v. Farmer*, 855 N.E.2d 462, 465 (Ohio 2006) (ordering attorney to return nearly \$9,000 of fees paid where attorney filed brief on client’s behalf that was “a nearly verbatim recasting” of brief filed by previous attorney).

2016, Newegg sued Ezra Sutton for copyright infringement after Sutton had plagiarized Newegg's appellate brief in a separate action in which Sutton's client and Newegg were similarly aligned and had worked together in the proceedings before the trial court.<sup>37</sup>

The parties stipulated that Sutton had plagiarized "substantial" portions of the Newegg appellate brief without permission and that the Newegg's brief had been registered with the United States Copyright Office.<sup>38</sup> Thus, Sutton's only defense was fair use, but the court found that the relevant factors weighed against a finding of fair use because Sutton "did not add new expression, meaning or message" and copied "most, if not all" of Newegg's brief.<sup>39</sup>

The court essentially sanctioned Sutton's questionable conduct. The brief that Sutton copied was not copyright protected at the time the plagiarism occurred and Sutton immediately withdrew the offending brief when Newegg's counsel requested that he do so. After all this, Newegg filed for copyright registration, essentially setting up Sutton for its later copyright claim.

But why? Newegg's excellent brief efficiently and effectively made the exact arguments that Sutton's client needed. Why should the court force Sutton to rewrite it from scratch or gin up an inferior paraphrase. A filing is just a tool for achieving the client's goals, and Newegg's brief was the perfect tool for Sutton's client. He should have been commended for noticing it and saving his client money, not punished.

#### MICHAEL FLYNN

While these examples are bad, what is worse is when courts punish plagiarism for no reason at all. In late 2019, President Donald Trump's former national security advisor, Michael Flynn, was awaiting sentencing after he pleaded guilty to lying to the FBI during its investigation of Russian interference in the 2016 election.<sup>40</sup> Flynn's lawyers argued that the FBI's investigation was seriously flawed and that Flynn was effectively duped into confessing to criminal conduct.<sup>41</sup> In response to Flynn's motions to compel

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37. Complaint for Copyright Infringement, *Newegg, Inc. v. Sutton, P.A.*, 2015 WL 1228086 (W.D. Cal. Feb. 26, 2015). See also Mike Masnick, *Newegg Sues Over Copied Legal Filing: Judge Rules That It's Not Fair Use*, TECHDIRT (Sept. 19, 2016, 11:41 AM), <https://www.techdirt.com/articles/20160917/00092935545/newegg-sues-over-copied-legal-filing-judge-rules-that-not-fair-use.shtml> [<https://perma.cc/9Z29-48NS>].

38. *Newegg, Inc. v. Sutton, P.A.*, 2016 WL 6747629, at \*1 (W.D. Cal. 2016).

39. *Id.* at \*2.

40. Aaron Blake, *Another Embarrassing Day in Court for Michael Flynn*, WASH. POST (Dec. 16, 2019), <https://www.washingtonpost.com/politics/2019/12/16/michael-flynn-embarrassing-legal-strategy/> (last accessed May 8, 2020).

41. *Id.*

the prosecution to turn over certain evidence, Judge Emmet G. Sullivan chastised Flynn's lawyers for "lift[ing] verbatim portions [of Flynn's brief] from a source without attribution."<sup>42</sup> That source was an amicus brief filed by the New York Council of Defense Lawyers in *Brown v. United States*,<sup>43</sup> in which the Council argued that the Court should clarify the scope of prosecutors' *Brady* obligations.<sup>44</sup> Flynn's lawyers included a hyperlink to the amicus brief, but Judge Sullivan found that they had not properly cited it and that their failure violated the District of Columbia's Rules of Professional Conduct 8.4, which defines professional misconduct to include engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation."<sup>45</sup>

Did Flynn's lawyers truly fail to cite the Council's brief? This is not a *Lane* situation—these lawyers actually included a hyperlink to the brief, so the court was at least aware that the substance of Flynn's arguments was not original, even if it was not initially aware that Flynn's lawyers quoted the language in the Council's brief directly. But even if Flynn's lawyers did fail to notify the court that they were quoting the Council, does that failure constitute dishonesty, fraud, deceit, or misrepresentation? Hardly.

And what harm occurred? No one was deceived and there is no evidence that Flynn's lawyers failed to act competently or diligently or harmed their client by using the Council's *Brady* arguments. The lawyers apparently had exercised their professional judgment in deciding that the Council's arguments in *Brown* applied to Flynn's case—arguably, finding the *Brown* brief and adopting the arguments made in it demonstrate Flynn's lawyers' competence and diligence.<sup>46</sup> And even though Judge Sullivan ultimately was unpersuaded by the adopted arguments, there can be little question that they were appropriate.<sup>47</sup>

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42. Memorandum and Opinion at 17, *United States v. Flynn*, No. 17-232 (D.D.C. Dec. 16, 2019), <https://drive.google.com/file/d/1zOHaoYTTz2gUGcJ1eFY1YTC9aSynAveR/view> [<https://perma.cc/9FJF-T3KD>].

43. 566 U.S. 970 (2012).

44. See Brief of the N.Y. Council of Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *Brown v. United States*, 566 U.S. 970 (2012) (No. 11-783), 2012 WL 242906 (Jan 23, 2012).

45. Memorandum and Opinion at 18, *Flynn* (No. 17-232) (quoting D.C. RULES OF PROFESSIONAL CONDUCT r. 8.4(c)).

46. Under the comments to the Model Rules of Professional Conduct, competence requires "inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." MODEL RULES, *supra* note 18, at r. 1.1, cmt. 5. The Model Rules also require that a lawyer exercise "diligence and promptness in representing a client," which includes "tak[ing] whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and "act[ing] with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* at r. 1.3, cmt. 1.

47. Rule 3.1 of the Model Rules of Professional Conduct requires that lawyers advance only those arguments for which there is a non-frivolous "basis in law and fact . . . , which includes a good faith argument for an extension, modification or reversal of existing law." *Id.* at r. 3.1. Judge Sullivan's order does not contain any finding that the adopted *Brady* arguments were frivolous or made in bad faith.

## OTHER JUSTIFICATIONS FOR POLICING PLAGIARISM

Ultimately, courts either fail to or are unable to articulate the true reasons for punishing plagiarism and instead operate under the assumption that “plagiarism warranted a sanction because, well, it was plagiarism.”<sup>48</sup>

Courts have tried, but ultimately failed, to offer other bases to prohibit and punish plagiarism, including that plagiarism (1) burdens the court; (2) harms clients; (3) brings the legal profession into disrepute; and (4) violates the true authors’ intellectual property rights.<sup>49</sup> These justifications were all offered by a bankruptcy judge in *Burghoff*, a case in which an attorney copied seventeen pages of a nineteen-page brief from an article. In sanctioning the attorney, the court found that his plagiarism “burdened the Court, undercut the client’s cause, and generated criticism of the legal profession.”<sup>50</sup> The court also criticized the attorney’s “parroting” of the article as “not an effective type of advocacy” and called his “disregard for the true authors’ property rights” evidence of a “lack of integrity that reflects poorly on the legal profession.”<sup>51</sup>

These justifications are weak. Why would the court be burdened by attorney plagiarism? Perhaps because someone brought it to the court’s attention, but the court was not under any obligation to deal with a plagiarism complaint that had nothing to do with the merits of the bankruptcy proceedings. Similarly, how did the attorney’s failure to cite the article he copied undercut the client’s cause? The court apparently denied the lawyer’s client’s motion, but the plagiarized arguments were relevant, and it is simply indefensible to claim that an attorney’s failure not to make relevant arguments but to cite an authority undercut his arguments on the substantive bankruptcy issue.

While the court is correct that the lawyer’s unattributed copying was perhaps not the best possible advocacy, it was certainly not so poor as to constitute legal malpractice and, at any rate, no such claim was before the court. In the American system, we generally do not punish lawyers for reasonable errors in judgment.<sup>52</sup>

As for disregard of the authors’ property rights, there is absolutely no suggestion in the written opinion or elsewhere that the authors themselves

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48. See Sorkin, *supra* note 4, at 533.

49. See *In re Burghoff*, 374 B.R. 682, 686 (N.D. Iowa 2007).

50. *Id.*

51. *Id.*

52. Many jurisdictions follow the “judgmental immunity doctrine” under which an attorney’s “informed professional judgment made with reasonable care and skill cannot be the basis of a legal malpractice claim.” *Biomet, Inc. v. Finnegan Henderson, LLP*, 967 A.2d 662, 666 (C.A.D.C. 2009); see also *Inlet Condominium Ass’n, Inc. v. Childress Duffy, Ltd., Inc.*, 615 Fed App’x 533 (11th Cir. 2015); *Blanks v. Seyfarth Shaw*, 171 Cal. App. 4th 336 (2009); *Roberts v. Chimileski*, 820 A.2d 995 (Vt. 2003).

were concerned about their “property rights” in the article, a fact that one would certainly expect to have been included in the opinion if this was a serious concern. This is not a *Newegg* situation where the author of the plagiarized material complained.<sup>53</sup> Though the court refers to the plagiarized work as a “scholarly article”<sup>54</sup> it appears that the article was only ever published in a Morgan Lewis law firm newsletter.<sup>55</sup> Though the *Sutton* court’s finding that Sutton committed copyright infringement is a reach, at least that issue was before that court. In *Burghoff* and the vast majority of cases in which plagiarism allegations arise, the “owner” of the plagiarized material never complains.

That leaves only the argument that the plagiarism reflected poorly on the legal system as a whole. Yet the court provides no support for this statement and the authors can find none. A mild violation of citation norms can hardly reflect poorly on a legal system that routinely disciplines lawyers for engaging in actual criminal conduct, such as fraud and embezzlement. And it is doubtful that few if any people outside the parties to *Burghoff* and those associated with the legal profession ever became aware of the plagiarism, much less thought poorly of the legal system because of it.<sup>56</sup>

Though the reported cases are poorly reasoned, they are few and far between. Most lawyers and judges recognize that plagiarism is not a crime in law practice and the rampant plagiarism that occurs either goes unnoticed or is considered entirely acceptable. And, ultimately, when the argument that plagiarism is itself a “crime” disappears, there is very rarely any justification for punishing plagiarism, though as we have outlined above, plenty of justification for punishing fraud, which plagiarism is not.

#### PLAGIARISM IN LAW SCHOOLS AND LEGAL WRITING

As we have shown, effective plagiarism is an essential skill—if not the essential skill—of lawyering. But ironically, most legal research and writing professors never teach copying, even though legal academics, including legal writing professors, “borrow problems, wording in syllabi, and arrangements of materials from others, with or without permission, without attribution . . . [and] [ ] use the ideas of others in formulating assignments.”<sup>57</sup> “[The academy] seldom discuss[es] the inconsistencies in what we do and

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53. Link rot has claimed the original citation to the plagiarized article and the authors of this article have been unable to locate it.

54. See *Burghoff*, 374 B.R. at 683.

55. See *id.* at 683.

56. The references to the *Burghoff* situation that the authors of this article could locate were to legal newspapers and websites, law reviews and legal journals, and similar academic articles.

57. Marilyn V. Yarbrough, *Do as I Say, Not as I Do: Mixed Messages for Law Students*, 100 DICK. L. REV. 677, 679 (1996).

what we say. Our hypocrisy, however, does not go unnoticed by our students.”<sup>58</sup>

On the contrary, the legal academy prohibits copying by our students and punishes it severely under the theory that plagiarism is an “academic capital offense.”<sup>59</sup> We operate on the foundation that plagiarism is “a practice of . . . obvious moral turpitude”<sup>60</sup> and thus a violation of the rules of professional ethics.<sup>61</sup> But, as Professor Andrew Carter notes in *The Case for Plagiarism*, given that copying without attribution is a professional norm in the practice of law, “[o]nce you take a presumed universal morality [against plagiarism] off the table,” a rule against plagiarism in practice becomes much more difficult to justify.<sup>62</sup> Few practicing lawyers would consider copying arguments from a previously filed brief to be plagiarism, and as we have shown above, it is almost certain that plagiarism does not violate any ethical rules, including those that proscribe deceit or misrepresentation.<sup>63</sup>

Yet every academic plagiarism policy we are aware of prohibits unattributed copying and prohibits the very conduct that lawyers engage in on a daily basis.<sup>64</sup>

Law school plagiarism policies vary in the level of detail but contain the same basic guidance: a student’s work must be the student’s own, and all sources, whether quoted directly or paraphrased, must be cited. For example, Harvard Law School’s Academic Honesty policy states:

All work submitted by a student for any academic or nonacademic exercise is expected to be the student’s own work. In the preparation of their work, students should always take great care to distinguish their own ideas and knowledge from information derived from

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58. *Id.* at 682.

59. Kevin J. Worthen, *Discipline: An Academic Dean’s Perspective on Dealing with Plagiarism*, *BYU EDUC. & L.J.* 441, 442 (2004) (quoting K.R. ST. ONGE, *THE MELANCHOLY ANATOMY OF PLAGIARISM* 39 (Rowman & Littlefield 1988)).

60. Carter, *supra* note 2, at 534.

61. Carol M. Bast and Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 *CATH. U.L. REV.* 777, 792 (2008) (“Academic institutions, governmental agencies, and professional organizations police plagiarism as a violation of ethics rules.”)

62. *See* Carter, *supra* note 2, at 536.

63. As Professor Carter notes, courts do not operate “on a presumption that a brief is an original work product,” and the outcome of cases is to be decided “based on the force of the arguments presented, not their originality.” *Id.* at 540. Similarly, there is no evidence that clients generally form any opinion about whether their lawyers’ briefs are original. If courts and members of the profession know that briefs aren’t or may not be original, and clients don’t form any opinions at all on that issue, then no deceit or misrepresentation can occur.

64. Many schools’ academic honesty policies also prohibit conduct such as working collaboratively to complete legal writing assignments and require that students complete all written legal writing assignments without any assistance. The wisdom of such policies is beyond the scope of this article.

sources. The term “sources” includes not only published or computer-accessed primary and secondary material, but also information and opinions gained directly from other people.

The responsibility for learning the proper forms of citation lies with the individual student. Quotations must be properly placed within quotation marks and must be fully cited. In addition, all paraphrased material must be completely acknowledged. Whenever ideas or facts are derived from a student’s reading and research, the sources must be indicated.<sup>65</sup>

Similarly, the University of Michigan Law School’s Standards of Conduct prohibits academic misconduct including “[p]resenting another’s work as a student’s own” and committing plagiarism, which is defined as “restating, without attribution, either the exact words or the substantive ideas of another person.”<sup>66</sup>

These plagiarism policies certainly cover plagiarism in scholarly papers, which may or may not be important, but at least prohibiting plagiarism in scholarly works is consistent with academic plagiarism norms. However, these policies also prohibit unattributed copying and paraphrasing others in any work submitted during a student’s academic career. These policies thus cover not only scholarly works but also pleadings and other types of documents that lawyers routinely copy without attribution.

Our sense is that many students who get caught by the plagiarism police did not really intend to plagiarize. Certainly there are some students who, because of the extremely competitive nature of law school or poor time management or laziness, will choose to plagiarize and hope that they are not caught. But many student plagiarists lack the mens rea to commit that “offense.” Anecdotally, the plagiarism of many accused students results from a lack of understanding of what constitutes plagiarism. The line between lifting language verbatim from others and working to structure sentences, paragraphs, and analyses in ways that mirror sample documents (which many law professors provide, especially legal writing professors) is not always black and white. And the citation norms inherent in legal academia, which require citation for nearly every sentence,<sup>67</sup> are not like

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65. HARV. L. SCH., HANDBOOK OF ACADEMIC POLICIES 70 (2020–2021), [https://hls.harvard.edu/content/uploads/2020/09/2020-2021\\_HAP\\_Final.pdf](https://hls.harvard.edu/content/uploads/2020/09/2020-2021_HAP_Final.pdf) [https://perma.cc/NR5K-SPFT].

66. MICH. L. SCH., STANDARDS OF CONDUCT AND COMMENTARY 2 (2010), [https://michigan.law.umich.edu/sites/default/files/2021-05/Student%20Life%20-%20Law%20School%20Standards%20of%20Conduct\\_a11y.pdf](https://michigan.law.umich.edu/sites/default/files/2021-05/Student%20Life%20-%20Law%20School%20Standards%20of%20Conduct_a11y.pdf) [https://perma.cc/JM7G-846N] [hereinafter MICH., STANDARDS OF CONDUCT].

67. Legal academics often joke about the pedantic law review editors who ask for citations for ideas or concepts that are common knowledge, but this obsession with citation is at the very heart of the

those in other disciplines. Some law schools and professors spend a nominal amount of time reviewing plagiarism policy language and discussing plagiarism with students, but many do nothing more than provide the policies to students and leave students to intuit them on their own.

Additionally, note taking and organizing large amounts of research are difficult and oftentimes learned skills. Many law students have not mastered them yet, and at least some allegations of plagiarism in law schools result from poor note taking skills. Language is unintentionally lifted directly from a source in the student's notes and contains no attribution, and then makes its way into a paper or assignment without the student ever realizing that the language is not their own.

Examples of cases in which students have been accused of violating plagiarism policies are difficult to come by. Most, if not all, law school disciplinary proceedings are conducted behind closed doors, and any discipline is not generally announced publicly. Thus, the frequency of plagiarism allegations in United States law schools and the severity of discipline for plagiarism are unknown.

Several reported cases shed some light on the issue. For example, the student in *Walker v. President and Fellows of Harvard College*<sup>68</sup> received a reprimand in her transcript for submitting a draft law journal note with "significant portions" copied from third-party commentary.<sup>69</sup> Other students have been suspended and expelled for similar conduct involving academic papers, including copying a source "line-by-line and footnote-by-footnote" without attribution,<sup>70</sup> submitting a paper almost none of which was the student's "original work,"<sup>71</sup> and submitting a research paper, the "first 12 pages [of which] were taken verbatim or nearly verbatim from a number of law review articles without proper citation."<sup>72</sup>

Many law school policies also prohibit students from self-plagiarism by defining prohibited conduct to include "submitting substantially the same work for credit in more than one course without informed permission from

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plagiarism problem. Law review articles typically contain hundreds of footnotes, many for basic ideas that no one would believe are original to the author and which the context of the work makes clear are not original. In other disciplines, such as literature, there is not this obsession with citation, and works in these fields generally contain far fewer citations.

68. 82 F. Supp. 3d 524 (D. Mass. 2014).

69. *Id.* at 528.

70. *Beauchene v. Miss. Coll.*, 986 F. Supp. 2d 755, 760 (S.D. Miss. 2013).

71. *Kerr v. Bd. of Regents*, 739 N.W.2d 224, 226 (Neb. Ct. App. 2007).

72. *In re Zbiegien*, 433 N.W.2d 871, 872 (Minn. 1988); *see also In re White*, 656 S.E.2d 527, 528 (Ga. 2008) (student was suspended for a year from law school for submitting paper with "virtually verbatim reproduction of sections of five previously published sources, none of which was cited in the paper"); *In re Application of Valencia*, 757 N.E.2d 325 (Ohio 2001) (student was publicly reprimanded and suspended for submitting seminar paper, parts of which were plagiarized from law review articles).

the instructor for each course.”<sup>73</sup> Under these policies, students can be disciplined for self-plagiarism, even though it is encouraged in law practice.<sup>74</sup>

Other students have been disciplined for engaging in the exact conduct that the legal profession acknowledges is not only acceptable but encouraged in practice: copying contract provisions. In *Yu v. University of La Verne*,<sup>75</sup> the student was assigned to draft a coffee supply contract, found a similar contract online, and included provisions of the online contract in the contract she submitted for the course. She was suspended from the law school for the remainder of the semester, and a censure letter was placed in her academic transcript.<sup>76</sup>

With the exception of *Yu*, most of the reported discipline cases involve papers or law review notes, which are more akin to academic writings, where original thought is prized. But practicing lawyers do not write academic papers for their clients—they write briefs, in which original thought is rare and rarely wins the day.

At least some legal academics have acknowledged that “[i]f using the thoughts or words of another without attribution is permissible in some instances but not in others, then legal professionals have an ethical obligation to articulate the differences.”<sup>77</sup> In this article, we go further and argue that not only should we articulate the differences, we should teach students that copying is accepted in the legal profession and show students how copying the work of others actually advances the profession of law.

But legal academics have internalized those academic plagiarism policies and the social norms they codify—that plagiarism is an “obvious ethical breach.”<sup>78</sup> Instructors enforce plagiarism policies because they believe those policies are justified. They punish students who violate those policies because they believe those students are engaging in academic dishonesty. They refuse to teach students how to copy because they believe copying is bad. And they defend the plagiarism policies because, whether they realize it or not, they believe plagiarism is bad, even though they know perfectly well that every practicing attorney plagiarizes all day every day.

And this adherence to academic plagiarism norms is even less justified when you consider that the vast majority of law professors are not teaching students who will become academics subject to the plagiarism norms in academia. The statistics show that legal academics come almost exclusively

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73. MICH., STANDARDS OF CONDUCT, *supra* note 66, at 2.

74. See RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 11, 108 (2007).

75. 196 Cal. App. 4th 779 (2011).

76. *Id.* at 785–86.

77. Yarbrough, *supra* note 57, at 683.

78. *Id.* at 678.

from T14 law schools.<sup>79</sup> Thus, the rest of us are teaching law students whose careers will be spent practicing law, and we are doing those students a disservice by refusing to acknowledge the realities of law practice.

#### PLAGIARISM PEDAGOGY

The purpose of legal research and writing instruction is to teach law students the research, writing, and analytical skills they will need as practicing attorneys.<sup>80</sup> This legal rhetoric, taught through the use of legal memoranda, briefs, and other written vehicles, includes instruction in “patterns of analysis,” such as “identification and statement of the issue, statement of the rule, and application of rule to facts—that translate into conventionalized patterns for organizing” legal documents.<sup>81</sup> These patterns of analysis, then, are used to teach students the expected conventions in real-world legal writing: “rational and logical” communication that is “clear, orderly, and linear” and presented in the appropriate “style, tone, and voice” for the audience.<sup>82</sup> Inherent in lawyerly writing is “legal analysis and legal argumentation—acts of thinking that require interaction between writer and audience, writer and subject matter, and writer and language.”<sup>83</sup>

Yet as some have noted, law school instruction has generally “abandon[ed] the practical for the esoteric, widening the gulf” between the law school curriculum and the practice of law<sup>84</sup> and creating a “chasm between the values of law professors and those of the legal profession.”<sup>85</sup> The legal academy’s treatment of plagiarism is particularly problematic, given that “students are studying to enter a profession that does not adhere to [the academy’s] standards.”<sup>86</sup>

At least some legal writing professors have recognized that plagiarism norms are unique to or at least mostly the product of American thinking, and other countries and cultures do not adhere to the belief that language is “personal property” and using another’s language without attribution is akin

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79. *Where Law Professors Went to Law School*, NAT’L JURIST (Aug. 11, 2020, 7:11 AM), <https://www.nationaljurist.com/national-jurist-magazine/where-law-professors-went-law-school#:~:text=The%20majority%20of%20professors%20attended,of%2080%25%20of%20law%20professors> [https://perma.cc/YMD9-JGVF]. See also Eric J. Segall & Adam Feldman, *The Elite Teaching the Elite: Who Gets Hired by the Top Law Schools?*, 68 J. LEGAL EDUC. 614 (2019).

80. See Christopher J. Rideout, *Knowing What We Already Know: On the Doctrine of Legal Writing*, 1 SAV. L. REV. 103, 106, 110 (2014).

81. *Id.* at 111.

82. *Id.*

83. *Id.* at 116.

84. See Yarbrough, *supra* note 55, at 677; see also generally MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994).

85. Yarbrough, *supra* note 55, at 678.

86. *Id.*

to “stealing.”<sup>87</sup> Professors Oates and Enquist further note that while plagiarism is a “serious ethical offense” in academia, “very different standards apply” in law firms, where attorneys routinely share documents, often have brief banks, and where use of these resources is considered “a practical way to save time and resources.”<sup>88</sup>

And a few others have gone further and criticized law schools’ failure to teach students the differences between plagiarism in the academy and plagiarism in practice.<sup>89</sup> Professor Terri LeClercq, for example, has also noted that “useful” law school plagiarism policies should also “differentiate plagiarism standards for law students from standards for legal practitioners,” a distinction she calls a “sharp contrast.”<sup>90</sup> LeClercq criticizes the academy for failing to teach students about the “cataclysmal shift” between academic plagiarism standards and those of practicing attorneys, leaving students to “intuit the difference in attitudes,”<sup>91</sup> and argues that “teaching the contrast between attribution in school and attribution in the workplace” should be an “integral part” of the law school curriculum.<sup>92</sup>

The question becomes, though, why do we in the academy create and mandate compliance with policies that have no effective applicability in the real world into which we will send our students to practice?

The academic-practice plagiarism distinction has been justified as necessary because in the academy, “the emphasis is on learning, on evaluation,” and there is a “sensitiv[ity] to the ownership of ideas.”<sup>93</sup> Thus, according to traditionally accepted academic justification, students must be judged on academic plagiarism standards because they are graded on “their ability to think and analyze,” making “the process . . . more important than any final ‘answer.’”<sup>94</sup>

But as others have acknowledged, “the strict academic intolerance of plagiarism” undermines instruction on the important legal writing skill of

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87. ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER* 289 (3d ed. 2009).

88. *Id.* at 290–91.

89. Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. LEGAL EDUC. 236, 237 (1999) (“Our failure to instruct students about what plagiarism is and how to avoid it is based on ambiguous standards, the cowardice of faculty, the lack of oversight by administrators, and a naive and outdated picture of the typical law student.”).

90. *Id.* at 250.

91. *Id.*

92. *Id.* at 251.

93. *Id.* at 250.

94. *Id.* at 251. This is ironic given the academy’s own proclivity for unattributed copying. As Professor Yarbrough notes, “[w]e borrow problems, wording in syllabi, and arrangements of materials from others, with or without permission, without attribution. We use the ideas of others in formulating assignments for our students, again without attribution. We also use the work of research assistants, verbatim or paraphrased, without appropriate credit given.” See Yarbrough, *supra* note 57, at 679.

“patch-writing”<sup>95</sup> or “remixing”;<sup>96</sup> that is, taking language from a source and deleting unnecessary words or phrases,<sup>97</sup> “altering grammatical structures, or plugging in one-for-one synonym substitutes.”<sup>98</sup> Surely teaching students to take a source and decide which laws and legal arguments are relevant to the client’s situation and modify the relevant parts to fit the client’s facts and legal issues is no less important.

Few legal writing texts address plagiarism at all, leaving discussions of plagiarism up to individual professors and schools. But like other texts, legal writing texts that do address plagiarism have also failed to provide any credible justifications for the academy’s adherence to outdated plagiarism norms in skills practice. Some have attempted to distinguish between form documents and copied pleadings by arguing that form documents “enable[] a lawyer to practice efficiently, avoid duplication of effort, and save clients fees”<sup>99</sup> while legal arguments in pleadings are a “different matter.”<sup>100</sup> Yet none of these authorities have been able to articulate any practical differences between the two types of documents, and the reasons to support the use of form documents—efficiency and client savings—are equally applicable to copied arguments in pleadings.

Ultimately, we have to educate students about how plagiarism works in law practice and discuss the widespread belief among practicing lawyers that plagiarism is good for clients and the profession. Students working in their first legal jobs and young lawyers often express “shock” when they are shown brief banks and told that starting drafts from scratch is akin to stealing from clients.<sup>101</sup>

All of this is to say that if we in the academy are going to truly serve the interests of our students who become practicing lawyers, as the vast majority of students who graduate from United States law schools and pass state bar exams do, we must teach them the realities of plagiarism in practice and we must be honest with ourselves in recognizing that outside academia, plagiarism is both accepted and expected. We must recognize that plagiarism in practice is not a moral or ethical offense and we must stop

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95. This term comes from Rebecca Moore Howard, *A Plagiarism Pentimento*, 11.3 J. TEACHING WRITING 233, 233 (1993).

96. This term comes from Kim D. Chanbonpin, *Legal Writing, the Remix: Plagiarism and Hip Hop Ethics*, 63 MERCER L. REV. 597 (2012).

97. *See id.* at 633–34.

98. *See* Howard, *supra* note 95, at 233.

99. MELISSA H. WERESH, *LEGAL WRITING: ETHICAL AND PROFESSIONAL CONSIDERATIONS* 187 (2d ed. 2009).

100. *Id.* at 187.

101. Lila Bailey (@lilabailey), TWITTER (Apr. 28, 2020, 11:57 AM), <https://twitter.com/lilabailey/status/1255179400397508611> [<https://perma.cc/3S42-MBML>].

confusing (or worse, misinforming) our students about the ways that plagiarism works in the practice of law.

This is not to say that we must throw away all plagiarism policies in favor of an “anything goes” mentality. But in skills courses in particular, we should develop a plagiarism pedagogy designed to do the thing that we are supposed to be doing—teaching students to practice law. This certainly includes teaching students to “think like lawyers,” solve problems, and advance the interests of their clients. But it also includes teaching students the skills they need to practice, one of which is plagiarism, and to give students a safe space to learn this skill rather than punish them harshly for violating norms that don’t exist in the profession that they will soon enter.