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I. Introduction

In her book, *A Nation Under Lawyers*,[1] Professor Mary Ann Glendon quotes Professor Owen Fiss as having proclaimed that "law professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover."[2] Whether intentional or not, however, law professors do "train lawyers." At least we train students who assume that we are training them to be lawyers. Perhaps more importantly, we train students who become lawyers. Professor Glendon expresses concern about the effect that law school faculty disagreements have on the legal profession. She notes, however, that despite their areas of difference, many faculty members share a disdain for the practice of law.[3] This scorn is described by Professor Glendon as indicative of a gulf between attorney faculty members and members of the practicing bar, as well as between the professorate and students.[4]

Professor Glendon joins the chorus of those expressing dismay that many law school professors have abandoned the practical for the esoteric, widening the gulf between the two groups of attorneys.[5] Other academic lawyers and I despair that in an effort to more closely mimic the profession, we have often abandoned the ideal for the expedient. Tragically, this abandonment often occurs without conscious recognition of our differences or their conse-

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1. MARY ANN GLENDON, A NATION UNDER LAWYERS (1994).
2. *Id.* at 217.
3. *Id.*
4. *Id.*
5. *Id.* at 221.

quences. This essay examines the mixed messages law professors and other members of the legal community unwittingly convey to students regarding plagiarism. The issue of plagiarism serves as one example of the growing, and often unexplained, chasm between the values of law professors and those of the legal profession. Perhaps by exploring this one issue, other areas of possible discord within the profession may be recognized. Ultimately, such recognition may cause members of the profession, whether academic or practicing lawyers, to exercise greater care in their training of law students so as to minimize the confusion of values that currently exists.

This essay does not focus on specific incidents of plagiarism, but on commonly accepted practices among lawyers. My original fascination with the subject, however, was motivated by my involvement in three incidents of student plagiarism that caused me to question my previous conviction that the issue was a simple one involving integrity and competence. Reflecting on two of the incidents, each involving students whose understanding of plagiarism differed greatly from what I considered conventional wisdom, I was compelled to ask several questions. First, in the face of sincere claims of innocence, the contrary messages that students receive from legal education, the conflicting practices in the profession, and perhaps even custom from other parts of the students' lives, how do academics convey to students our peculiar expectations? Second, how do we justify insisting on these expectations when our students are studying to enter a profession that does not adhere to our standards and when these standards are not in fact our own practices? Finally, how do we justify such actions when we know that the impact of our duplicity is likely to fall disproportionately on those who, because of their "outsider" status, are more likely to feel that their ideas do not matter?

II. The Widening Gulf

Many regard plagiarism as an obvious ethical breach and decry its existence in this moral profession. Yet it is conceded that the circulation and reuse of documents and the use of forms is an acknowledged and accepted practice within the legal community. An argument also exists that it would be unethical and overly costly to spend time and money reinventing the wheel with every new client and every new situation. We have no procedure for citing to the original authors of forms, and indeed, have never

made it a practice to cite our colleagues when we lift paragraphs from their briefs, opinion letters, and memoranda.

In legal education, we are guilty of the same type of borrowing. We 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. How many attorneys similarly use the work of their associates, or judges that of their clerks?

I was directly involved in two of the three incidents of student plagiarism mentioned above, and heard of the other only after the fact. In an effort to help me focus my examination of the subject, the colleague involved in the third incident sent me a book review of the 1992 publication entitled *Voice of Deliverance: The Language of Martin Luther King, Jr., and Its Sources*.[6] In the book review, the author, Professor William Cain, writes of the cultural differences that separate what Martin Luther King did in most areas of his life from that of the journalists and the academics who criticized what they discovered to be plagiarism in his doctoral dissertation. It made me think anew about the subject. The book review notes:

> How could the noble King have stooped so low? Why did he maintain that material he had copied from other sources was his own work? Many said they felt betrayed, as though they had naively placed their trust in a leader who did not merit it and whose commitment to ethics and morality was tainted from the beginning.
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> One of the striking facts about King's dissertation, however, is that he dutifully cited the very books from which he mined phrases, sentences, entire paragraphs. He wasn't concealing them from view. It's clear, of course, that King failed to meet his academic responsibility: A dissertation is supposed to be original, a new contribution to knowledge. But as Keith D. Miller points out in his important, powerfully argued book, *Voice of Deliverance*, perhaps King's act of plagiarism simply suggests that he found the job of analyzing the abstruse theology of Tillich and Wieman to be dull and tedious. He was not passionately invested in the recondite

6. KEITH D. MILLER, VOICE OF DELIVERANCE: THE LANGUAGE OF MARTIN LUTHER KING, JR., AND ITS SOURCES (1992).

> topic, and, moreover, he did not share the norms of scholarly originality to which his advisers and academic authorities subscribed.[7]

The review further points out that "what King did in his dissertation, he did throughout his career."[8] Cain argues that King's famous "Drum Major Instinct" sermon, in which he described how he wished to be remembered, the tape of which was played at King's funeral, was taken almost entirely from a sermon given in 1949 by another minister.[9] Cain goes on to say:

> This sure looks like plagiarism, but Miller convincingly argues that it isn't. He claims that "plagiarism" is in fact a misleading charge to hurl against King, for it implies assumptions about language he never embraced. Miller emphasizes that King was not stealing. He was adeptly, unashamedly "borrowing," locating himself within a "system of knowledge and persuasion created by generations of black folk preachers," among them his own father and grandfather.
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> . . . .
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> King did what folk preachers had always done: He freely appropriated sermons that others had used, reshaping and modifying them where needed . . . .
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> As Miller indicates, the members of the congregations who heard sermons expected to find in them familiar kinds of bracing allusions, scriptural passages, metaphors, images, verbal structures, lessons. They counted on the preacher to deliver the Word, reiterating and repeating truth, not tendering new, original truths of his own. This was an essential and highly conventionalized part of the ritual that all good preachers understood and practiced.[10]

Law professors tell students, in essence, "I don't care what you think. What does the opinion say? Or what does the judge say?" We revere precedence. We too are counting on the student to "deliver the Word, reiterating and repeating truth, not tendering new, original truths of his own."[11] We send an inconsistent

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7. William E. Cain, *Martin Luther King's "Borrowed" Language*, IN THESE TIMES, July 8-12, 1992, at 20.
8. *Id.*
9. *Id.*
10. *Id.* at 7.
11. *Id.*

message when we then tell students that their ideas should be original ones, or, if they are not, we at least want to know whose they are. When the need for originality is mentioned only sporadically and the desire to "deliver the Word" is hammered home day after day, should it surprise us that students seem a bit confused?

The colleague who shared the book review also sent a copy of the memorandum she wrote to her student plagiarizer, a memorandum that she now gives to all students who plan to write papers in her classes.[12] In her memorandum, my colleague attempts to explain why academic institutions treat the question of plagiarism as they do, as a serious breach of ethical standards. She talks about plagiarism as theft, theft from the person who is not given payment in the form of recognition, and theft from other students who, if they are being graded on the curve, are not compared fairly to their peers.[13] She also speaks to the peculiar nature of words for lawyers, indicating that "a surgeon might care deeply about the handwashing habits of members of her surgical team, while an airline pilot may not care at all about handwashing."[14] She contrasts law professors and other lawyers, noting that "for academic people, protecting the integrity of the intellectual record, the stream of scholarly output over the years, is a Big Deal, as professionally important as protecting the integrity of the blood supply is to the Red Cross."[15] She goes on to talk about our desire to "trust the transparency of what we read."[16] She indicates that we want to know whether the ideas and words are from "a thinker we respect or a charlatan who was exposed last month as a fraud,"[17] and how we want to know who we are "hanging out with" intellectually.[18] She recognizes that there is something of a cultural gap between students and professors in this regard, but nonetheless, comes down clearly on the side of academic values as we impose our ethics with regard to plagiarism on our students.[19]

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12. Memorandum from Professor Frances Ansley, University of Tennessee School of Law [hereinafter Memorandum] (on file with the author).

13. *Id.* at 4.

14. *Id.*

15. *Id.* at 5.

16. *Id.*

17. Memorandum, *supra* note 12, at 6.

18. *Id.*

19. *Id.* at 7.

Throughout most of their academic training, students are encouraged to freely appropriate new ideas and concepts, reshaping and modifying as necessary, with little or no requirement that they attribute their ideas or words to others. Moreover, legal academics, as well as practicing attorneys and judges, openly adopt what we term "work for hire." We seldom discuss the inconsistencies in what we do and what we say. Our hypocrisy, however, does not go unnoticed by our students.

Legal academics must serve as models of professional behavior for law students. It is understandable, therefore, that we do not acknowledge to our students that in our teaching and in our practice, and sometimes even in our scholarship, we freely appropriate the work of others without attribution. Even the Association of American Law Schools' *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*[20] seems ambiguous on the point. In the section on "Responsibilities as Scholars," it states: "When another's scholarship is used — whether that of another professor or that of a student — it should be . . . candidly acknowledged."[21] It goes on to explain that, "Publication permits at least three ways of doing this: shared authorship, attribution by footnote or endnote, and discussion of another's contribution within the main text."[22]

Does this mean that I can ask my research assistant to draft a portion of an article or borrow freely from the thoughts of colleagues gleaned from a faculty forum and fulfill my ethical responsibility by acknowledging their assistance in the first footnote? What if the publication is in the form of a speech? As I speak about plagiarism, should I first thank my friend who sent the memo and the article on King? Should I acknowledge the former students I discussed this with over beer? The concerns voiced by these individuals were very much the same concerns that I read about in the recent issue of *The Second Draft* devoted to

20. ASSOCIATION OF AM. LAW SCH. EXECUTIVE COMM., STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES (1989), *reprinted in* ASSOCIATION OF AM. LAW SCH. PROCEEDINGS 327-32 (1993).

21. *Id.* at 330.

22. *Id.*

plagiarism.[23] Should I take the time to acknowledge the part that all of these influences played in the speech?

While custom and comon sense answer many of these questions, more explicit guidelines need to be developed. In examining the conflicting messages that result from the customs and practices of the legal community, I was reminded of what the Cain book review called the "pious discontent and lamentation"[24] that accompanied the news that Dr. King had plagiarized much of his dissertation. I remembered joining this "pious discontent and lamentation" when I confronted my student plagiarizers. Now, however, in light of my examination, I feel that regardless of how we define it, and regardless of what we require of students, we need to clean up our own house.

If 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. If students are to be penalized for misappropriation of ideas or words, we need to make sure that they understand what they are doing and why we care. If we are unwittingly fostering the system of misappropriation through our own sloppiness or messages, we need to acknowledge our complicity and accept responsibility for it.

III. Conclusion

In sum, legal professionals need to engage in serious thought and dialogue about plagiarism in legal writing. Legal educators, who may unwittingly be sending mixed messages to students, need to forge alliances with Academic Affairs Deans, Honor Committees, and faculty who supervise research assistants or teach seminars that require formal writing. Members of the profession who supervise and mentor students and young attorneys should likewise clarify the appropriate and inappropriate standards of conduct in specific contexts. While plagiarism has been the focus of this essay, it is only one of many areas in which our unexamined and unexplained behavior as lawyers may send precisely the wrong message to those for whose training we are responsible. These

23. LEGAL WRITING INST., THE SECOND DRAFT: PLAGIARISM PILFERED PARAGRAPHS (1993).

24. Cain, *supra* note 7, at 20.

mixed signals create a dilemma for the entire legal profession and deserve our full attention.