# TEACHING PLAGIARISM: LAW STUDENTS REALLY ARE THAT SPECIAL

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This paper examines the current narrative of plagiarism and citation style in Australia and argues against using citation style guides as both a cure for plagiarism and as a means to determine the act of plagiarism. The paper suggests that legal education should not promote a narrative of citation where citation style and warnings as to the penalties which will be applied in cases of plagiarism take priority over communicating to students an understanding of the processes and benefits of proper and scholarly attribution of sources.

## I. Introduction

The growing body of Australian and New Zealand literature which discusses plagiarism within the discipline of law focuses upon legal practice. That is, discussion generally examines the impact of findings of plagiarism against legal practitioners;[1] the impact of findings against law students — specifically the impact of disclosure of plagiarism upon the ability of a student to be admitted to legal practice;[2] whether students who plagiarise should be admitted to legal practice;[3] the framing of definitions of plagiarism as an objective or a subject test by universities;[4] and the jurisdictional issues of university disciplinary proceedings.[5] Within this literature, more nuanced and wide-ranging issues are also discussed, including: the reluctance of courts to be involved in academic decision-making;[6] identification and recommendations for the challenges faced by tertiary institutions in this area;[7] and differences in plagiarism standards between universities and legal practice.[8]

This focus in legal writing upon legal practice, courts, university disciplinary bodies and standards of plagiarism should not be surprising for — as Robert Cover points out in his well-thumbed article on nomos and narrative — law is 'a world in which we live'.[9] An inescapable truth is, therefore, that much of our focus as legal academics, lawyers and judges is upon 'the rules' and the identification of 'correct' and 'incorrect' behaviour. It follows that, as guardians

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1 See, eg, Gino Dal Pont, 'A Lawyer Who Plagiarises Invites Disciplinary Sanction' (2011) 49(1) *Law Society Journal* 40; Ian Freckelton, 'Plagiarism in Law and Medicine: Challenges for Scholarship, Academia, Publishers and Regulators' (2010) 17 *Journal of Law and Medicine* 645.

2 See, eg, Mary Wyburn, 'Disclosure of Prior Student Academic Misconduct in Admission to Legal Practice: Lessons for Universities and the Courts' (2008) 8(2) *Queensland University of Technology Law Journal* 314; Francesca Bartlett, 'Student Misconduct and Admission to Legal Practice — New Judicial Approaches' 34(2) *Monash University Law Review* 309.

3 Lillian Corbin and Justin Carter, 'Is Plagiarism Indicative of Prospective Legal Practice?' (2008) 17(1–2) *Legal Education Review* 53.

4 Joy Cumming, 'Where Courts and Academe Converge: Findings of Fact or Academic Judgment' (2007) 12(1) *Australian & New Zealand Journal of Law & Education* 97.

5 Sally Varnham, 'Copping Out or Copying? Do Cheats Prosper? An Exploration of the Legal Issues Relating to Students' Challenging Academic Decisions' (2002) 7(1) *Australia & New Zealand Journal of Law & Education* 21; Patty Kamvounias and Sally Varnham, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34(1) *Melbourne University Law Review* 140; Bruce Lindsay, 'University Hearings: Student Discipline Rules and Fair Procedures' (2008) 15 *Australian Journal of Administrative Law* 146.

6 Cumming, above n 4, 97.

7 Freckelton, above n 1, 645.

8 Corbin and Carter, above n 3, 53.

9 Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97(4) *Harvard Law Review* 4.

of the legal tradition, we are inclined to fervently embrace both rules of citation and penalties for plagiarism. Within the narrative of law, such rules and penalties inform and give meaning to notions of integrity, esteem and good character which are essential to the legal profession and arguably form the basis of creating a university qualified-quality law graduate. These prescriptions around legal scholarship become, according to Covers' thesis, part of the normative universe of the world of law which we 'create and maintain'.[10]

While I agree with the aims and standards of rules of citation and the application of penalties to law students who infringe university rules, this paper is more concerned with exploring Cover's warning that 'we ought to stop circumscribing the *nomos*; we ought to invite new worlds'.[11] As this paper explains, within the context of rising student plagiarism; proposed national legal practice admission rules; increasing judicial decisions concerning the fitness of law students who have plagiarised to be admitted to legal practice; and the rise of a national legal citation style guide, I believe it is timely for us as legal educators to invite in new worlds and ways of teaching plagiarism. The old way of doing things does not seem to be working.

Educating students as to how to avoid plagiarism must necessarily involve thinking deeply about what we desire a student to learn about 'plagiarism', attribution and citation. Our current narrative, which seems simply to posit plagiarism as something to avoid, reduces our ability to create a narrative whereby we can impart to students the value of good scholarship and the intrinsic learning that will take place from appreciating and acknowledging sources.

To explore how the current narrative operates and what we can do to change it, this paper is divided into two parts. The first part examines the current narrative context within which rules of legal plagiarism are framed and understood. The second part explores how the legal academic may invite in new worlds to recontextualise the narrative of plagiarism and to teach the topic of plagiarism effectively.

## II. Understanding the Normative Universe of Law School Plagiarism

Due to the nature of the discipline of law, the form and style of legal writing is unique. This is not intended to imply that all is well in legal scholarly writing. As Rodell, in a now famous article on the nature of the law review, states, 'there are two things wrong with legal writing. One is its style. The other is its content'.[12]

That noted, traditional research and scholarly writing in law has been largely limited to doctrinal research;[13] meaning that law academics, and thus their students, traditionally write so as to compare, contrast and analyse existing materials. Much legal writing is thus content-driven and is often rich with attribution to cases, statutes, secondary sources of law and a wide variety of other sources of writing and media which facilitate analysis of relationships between rules. The essence of law and the craft and skill of legal practice is precision and wordcraft, so legal writing must also be accurate. As Alan King states (on an Ed Sullivan retrospective):[14]

10 Ibid.

11 Cover, above n 9. .

12 Fred Rodell, 'Goodbye to Law Reviews' (1999) 73 *Australian Law Journal* 593. Stating, 'I am the last one to suppose that a piece about the law could be made to read like a juicy sex novel or a detective story, but I cannot see why it has to resemble a cross between a nineteenth century sermon and a treatise on higher mathematics': at 595. For further comments on law reviews and legal writing see Justice Michael Kirby, 'Welcome to Law Reviews' (2002) 26 *Melbourne University Law Review* 1; John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?' (2002) 29 *Melbourne University Law Review* 29.

13 Terry Hutchinson, 'Critique and Comment Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 33.

14 James Fuqua, *James Fuqua's Law Jokes Famous Quotes and Sayings about Lawyers* (27 January 2002) <http://www.jamesfuqua.com/lawyers/jokes/famous.shtml>.

> The other day my house caught fire. My lawyer said, 'Shouldn't be a problem. What kind of coverage do you have?' I said, 'Fire and theft.' The lawyer frowned. 'Uh oh. Wrong kind. Should be fire OR theft.'

This joke reveals important aspects of the skills of law: accuracy, analysis and an awareness and understanding of a wider environment against which statements will be judged and agreements weighed. In legal writing, these skills are used extensively. To promote accuracy, an essential component of the doctrinal nature of legal research and writing is correct citation of sources. Accurate reference to legal authority, such as cases and statutes, is critical both for legal scholarship and the practical day-to-day operation of courts and law-making bodies such as Parliament.

The understanding that legal writing is a particular style of expression which is both dense and simultaneously highly accurate provides one lens through which to view the rules of citation. In other words, doctrinal writing and accuracy in using legal authority creates and sustains narratives around legal citation. In line with Cover's expectation that law is a world unto itself law, as a discipline, it has developed its own systems and standards of citation. Law is not alone in this practice: citation is of interest to any academic discipline. Ensuring proper attribution is, after all, the fundamental tenet of avoiding plagiarism and good academic writing.

In law, the most famous exemplar of a guide to correct legal citation is the American *Bluebook*. Now in its 19th edition, the *Bluebook* is the generally-accepted citation guide which applies to the discipline of law across the United States. It is a joint endeavour by the *Columbia Law Review*, the *Harvard Law Review*, the *University of Pennsylvania Law Review* and *The Yale Law Journal*. The fact that it is a joint endeavour of many law schools promotes the *Bluebook* as a singular, highly-esteemed standard across the US.[15] The *Bluebook* symbolises the global legal fixation on citation. This fixation is growing. For example, in Australia, there is an increase in the citation of authority in judgments. In the High Court in 1920, there were six citations per judgment; in 1980, the figure was 10.6; and in 1996, it was 43.9.[16] There are other signs which give rise to the issue of citation as a discourse unto itself, such as a growing number of studies devoted to analysis of in-court citation.[17]

Indicative that this assertion has veracity is the inevitable production of, and now almost near-universal prescription of, an Australian version of the *Bluebook* — the *Australian Guide to Legal Citation* (AGLC), now in its third edition. Professor Hilary Charlesworth states, in the 'Foreword' to the current edition:

> the third edition expands and updates earlier versions of the *Guide*. Now legal scholars have a stern but reliable guide to the vexing issue of the use of ellipses in quotations, or the citation of parties' submissions in court cases. The distinction between em- and en-dashes is helpfully explicated.[18]

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15 Ross Buckley, 'Book Review: Two Legal Citation Guides' (1988) 10(1) *Bond Law Review* 137.

16 Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' [2004] *Federal Law Review* 11 — this article makes interesting observations on the use of the footnote noting that:

> [t]he longstanding use of footnotes is a distinct feature of decisions of the High Court of Australia. They are still not used in the authorised reports of other courts of final jurisdiction in English speaking nations of the Commonwealth … The increased number and greater content of citations is almost certainly influenced by the use of footnotes because they are a device that permits authors to include parenthetic and additional references that might not be included if 'in text' referencing was used.

17 See, eg, ibid; Russell Smyth, 'Judicial Prestige: A Citation Analysis of Federal Court Judges' (2001) 6(1) *Deakin Law Review* 120; Russell Smyth and Dietrich Fausten, 'Coordinate Citations between Australian State Supreme Courts Over the 20th Century' 34(1) *Monash University Law Review* 53.

18 Hilary Charlesworth, 'Foreword to the Third Edition' in *Australian Guide to Legal Citation* (Melbourne University Law Review Association, 3rd ed, 2010) v.

Later, Professor Charlesworth observes that 'citation practices are akin to musical scales — technical exercises that ground scholarly sonatas.'[19]

There is, of course, nothing inherently wrong with the rules and conventions which surround legal citation. Indeed, conventions have a long history; for example, in England there was a convention that no living author could be cited in court judgments.[20] And referencing is a necessary exercise. Indeed, as Rodell somewhat cheekily states, 'every legal writer is presumed to be a liar until he proves himself otherwise with a flock of footnotes'.[21] Citation performs the important function of both avoiding plagiarism and ensuring correct attribution. In the discipline of law, citation has its own normative universe, created and sustained by a narrative which promotes attributes such as accuracy, consistency, uniformity and inflexibility. The 'flock of footnotes', as Rodell refers to them, must be correctly and uniformly presented according to an accepted legal style guide.

At first blush, the application of a style guide as to accurate citation seems harmless enough — especially as many of us may secretly aspire to write 'scholarly sonatas'. Arguably, however, harm may arise when law students are expected to produce such scholarly sonatas — both in terms of citation style as well as referencing quality and content. I, for one, admit to being guilty of this desire and can justify my expectation on the grounds of good scholarship and academic practice. However, if our expectations of accurate citation style are too high, we may put our students in peril. As the Macquarie Law School currently states on its website, 'you can lose marks or even worse, be accused of plagiarism because of sloppy and incorrect citation.'[22]

A brief survey of statements made by universities which offer law reveals the extremely thin 'blue' line between poor application of citation rules by students and subsequent allegations of plagiarism. For example, the Australian Catholic University warns that plagiarism can occur if you 'lack familiarity with the conventions of referencing';[23] at the University of New England, 'poor or sloppy referencing will cost you marks, but this is not the worst thing that can happen';[24] at the University of New South Wales, 'inaccurate references or — worse still — no references at all can be regarded as plagiarism';[25] at the University of Western Sydney, 'strategies that will ensure that you are not inadvertently or accidentally plagiarising include … excellent referencing in footnotes and bibliographies, indicating your control of the research material';[26] and the La Trobe University Law Faculty states that:

> Instances of inadequate referencing will, moreover, usually appear to the reader as no different to plagiarism, and so you run the risk of an allegation of plagiarism even if your inadequate referencing was genuinely unintentional. Even if your marker is satisfied that your inadequate referencing was not intentional, you will still lose significant marks, and possibly fail the assessment in question. So take care to ensure that you are aware of the requirements concerning referencing and check your work for any instances of inadequate referencing …[27]

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19 Ibid.

20 Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9(1) *Griffith Law Review* 25, 32.

21 Rodell, above n 12, 594.

22 < http://www.law.mq.edu.au/html/undergraduate/currentstudents/plagiarism.html>

23 Australian Catholic University, *Plagiarism* (19 October 2010) <http://www.acu.edu.au/student_resources/office_of_student_success/service_areas/academic_skills/referencing/plagiarism/>.

24 University of New England, *Referencing* (24 February 2011) <http://www.une.edu.au/library/eskillsune/keeping/referencing.php>.

25 University of New South Wales, *How Does Plagiarism Happen?* (2010) <http://www.lc.unsw.edu.au/plagiarism/how_7.html>.

26 University of Wollongong, *Avoiding Plagiarism* (13 September 2011) <http://www.library.uow.edu.au/helptraining/tutorials/legal/citwrit/3a_avoidplag.html.>.

27 La Trobe University, *Short Guide to Avoiding Plagiarism and Inadequate Referencing* (2007) <http://www.latrobe.edu.au/lawman/currentstudents/assets/downloads/law/law-guide-avoiding-plagiarism.pdf >

It cannot, however, be claimed that this approach is uniform. There are institutions which offer law that do not adhere to the view that inadequate referencing and poor use of citation styles may lead to allegations of plagiarism. For example, Central Queensland University (CQU) states:[28]

> Plagiarism means intentionally passing off the work of another as your own work, or knowingly providing a copy of your work, or a draft of it, to another student to enable that student to reproduce it in part or in whole as their own work but does not include poor or inadequate referencing.

Of course, the application of this rule, as stated by CQU, to a student's work will be difficult to apply in practice. As le Masurier observes:

> The task of determining deceitful intent is simple when the student has lifted an entire article from *The Korea Times* or *Allure* magazine. But trying to determine whether students have major conceptual difficulties understanding plagiarism and what constitutes 'original' work, whether they simply misunderstand how to attribute sources or the craft of paraphrasing, whether they really did 'intend to deceive' is difficult. Even more so when language becomes a barrier rather than a conduit to communication. The problem is that the differences between negligent and dishonest get lost in translation when there appears to be a basic conceptual gap between the word and its meaning in practice. I found this critical distinction one that was almost impossible to make. [29]

This observation of le Masurier as to the blurred distinction between intentional and unintentional plagiarism is disturbing, particularly given the impact that an allegation/finding of plagiarism may have upon a student's academic and professional career. For example, as the Hon Clifford J stated in the New Zealand High Court in *Bell v Victoria University of Wellington* [2010] NZHC 2200 (8 December 2010) at [159]:

> I think a finding of intentional plagiarism is more serious in terms of culpability, than a finding of objective, but unintentional, plagiarism. The finding of intentional plagiarism involves — in effect — a finding of an intention to deceive.

Given that poor citation skills may lead to an allegation of unintentional *and/or* intentional plagiarism — and thereby mean that a law student may be refused admission to practise law — I hope I may be forgiven for raising the question as to whether citation style guides actually miss the point.[30] Posner, a highly regarded US judge, in his criticism of the *Bluebook*, states that 'my judicial and academic writings received their share of criticism, but no one to my knowledge has criticized them for citation form. The reason is that readers are not interested in citation form. Unless the form is outlandish it is invisible.'[31] In other words, the aim of citation in scholarly work is not merely to avoid plagiarism; rather, it is to improve the value of the writing to the reader and, perhaps just as importantly, to the writer. In this sense, the *form* or the *style* that a citation takes should never override the purpose that the citation is intended to perform — to provide a correct attribution and to add value to the scholarly nature of the work for the reader and the writer, and for the wider discipline of law. It follows that we should not create a narrative of citation where *style* becomes more important than communicating to students an understanding of the processes of proper and scholarly attribution of sources.

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28 Central Queensland University, *What is Plagiarism* (29 April 2010) <http://association.cqu.edu.au/cqusa_faq/php/view-faq.php?id=80>

29 Megan Le Masurier, 'Teaching Our Way through Plagiarism' (2006) 24 *Synergy* <http://www.itl.usyd.edu.au/synergy/article.cfm?articleID=286>.

30 As the author of a legal referencing style guide (*Legal Referencing* (LexisNexis, 4th ed, forthcoming)) I feel entitled to raise this question.

31 Richard Posner, 'The *Bluebook* Blues' (2011) 120 *The Yale Law Journal* 851, 853.

## III. Recontextualising the Narrative of Plagiarism

Reflecting upon how the discipline of law constructs a narrative around attribution of sources is imperative for two reasons.

Firstly, we need to be aware of our own participation in creating a narrative of uniformity, accuracy and inflexibility in legal citation style. While there is nothing wrong with such requirements per se, and they are desirable attributes in legal writing, the danger is that this may mean that citation style is viewed as both the answer to plagiarism and as a means to determine the act of plagiarism. In other words, within such a narrative, correct citation is a goal unto itself. This narrative is pervasive. Two clear examples of this are firstly, as Posner notes, the *Bluebook* has suffered from 'hypertrophy' which he says refers to 'a class of disease in which an organ grows to an abnormal size because of the cells that constitute it'.[32] He points out that the *Bluebook* in its 16th edition was 255 pages long and, now, in its 19th edition is 511 pages long. A similar form of 'hypertrophy' has afflicted our own *Bluebook*. The AGLC in its first edition was 158 pages and, now, in its third edition is 332 pages. The second example is the change over a 10-year period in the forewords to the AGLC. The foreword to the first edition of the AGLC[33] in 1998 refers to Posner's article and states that 'this *Guide* is not, and does not pretend to be a guide to legal style any more than it is a guide to substantive law. The *Guide* is concerned with how sources may be identified.' By the time we reach the third edition, published in 2010, the reference to Posner has been removed and instead reference is made to Lynne Truss[34] with the statement:

> sticklers unite! Like the printers of St Petersburg, the authors of this *Guide* take the conventions of language and research seriously. May this compendium repay their hard work by encouraging precision in prose and clarity in citation.[35]

Secondly, we need to reflect upon our law school practises given that the existing literature (almost unanimously)[36] observes that there is an increase in student plagiarism. This is occurring for a variety of reasons, as the website of Deakin University states:[37]

> The temptations for students to plagiarise and collude have increased in recent years:
>
> - The Internet has made it easy to copy and paste text, images, programming, etc, published on the Web — and also to buy custom-written essays (eg: http://www.oppapers.com/).
> - Many students need to work to support themselves, pay rent and pay fees, leaving less time for sound research.
> - More and more group work assignments are being set, without good management strategies to control unauthorised collusion.

These explanations clearly apply to law. For example, in *Re Humzey-Hancock* [2007] QSC 34, the applicant who had been denied admission to practise law had, as a law student, allegedly plagiarised in International Trade Law, an assignment which

> was submitted on 10 October 2005. By this time, the applicant was working four days a week for a firm of accountants but he was nevertheless undertaking the course of a full-time student. The subject International Trade Law was conducted by the University as a so-called 'intensive' course, over three weekends in October 2005. In addition to his work demands, the applicant also

32 Ibid.

33 Justice Hayne, Foreword, *Australian Guide to Legal Citation* (University of Melbourne, 1998), vii.

34 Lynne Truss, *Eats, Shoots and Leaves: The Zero Tolerance Approach to Punctuation* (Profile Books, 2003).

35 Charlesworth, above n 18.

36 Hon P de Jersey, 'Integrity in Legal Practice' (Paper presented at the Third International Legal Ethics Conference, Gold Coast, 14 July 2008) 2 <http://archive.sclqld.org.au/judgepub/2008/dj140708.pdf>.

37 Deakin University, *Dealing with Plagiarism in Assessment* <http://www.deakin.edu.au/itl/pd/tl-modules/assessment/plagiarism/> 1 June 2011.

> had distractions because of events within his family. He says that in consequence he prepared this assignment 'hurriedly and without the proper care and attention for which was required.' He says that this explains his failures to give proper attribution to his sources.[38]

Of course the list from Deakin University is not exhaustive, there are many explanations given for the increase in plagiarism, such as increased internationalisation and the consequent changing nature of the student body and a more lenient view towards plagiarism and collusion by a younger student cohort.[39]

While there may be many sound explanations for a rise in plagiarism and many good reasons for constructing a narrative around style guides and plagiarism this arguably does not remove our obligation as legal educators to improve and self-reflect for, as le Masurier posits, 'if our students plagiarise, then what is it about our teaching or the context in which we now teach, that allows, perhaps even encourages, this to happen?'[40] Of course, good teaching practice will never prevent those who set out to abuse the system from plagiarising. Nor can we change most of the factors attributed to the rise in plagiarism, such as the prevalence of the internet or students being time poor. However, the point of this paper is to suggest that we do more than communicate to the student body the prescribed citation style our law school adopts while making them aware of the terrifying penalties for plagiarism. Indeed, the cases of plagiarism in Australia where law students have sought admission to practice[41] support the need for deeper consideration of educative practices in this area. In each case, where law students have challenged the refusal of their relevant admission board to admit them to legal practice, correct citation style would not have impacted on the original allegation of plagiarism by the university.[42] Accurate citation would not have prevented the allegation of plagiarism in any one of these three cases. In *Law Society of Tasmania v Richardson* [2003] TASSC 9; *Re OG* [2007] VSC 197 and *Re Humzey-Hancock* [2007] QSC 34, the accusations of plagiarism involved 'collusion' with another student (therefore correct attribution or citation of that student's work would not have saved the integrity of the work submitted). Similarly, in *Re Liveri* [2006] QCA 152, the allegation of plagiarism concerned the extent of the material taken (rather than the failure to cite the material correctly).[43] The fact that correct citation to reference sources would not have saved any of these students from an allegation of plagiarism adds weight to the view that the role of legal education must extend beyond communicating to students prescriptive citation style and harsh penalties.

## IV. How Then to Encourage Students to Reference Well?

A study by Neville of 201 undergraduate and postgraduate students in the United Kingdom found that 75 per cent made 'critical comments about referencing' that ranged from a serious dislike of referencing to time management issues to disliking the detail that referencing requires.[44] One of

38 *Re Humzey-Hancock* [2007] QSC 34, [15].

39 For a thorough listing of reasons, see Mark Freeman, Henriikka Clarkeburn and Lesley Treleaven, 'A Collaborative Approach to Improving Academic Honesty' in Angela Brew and Judyth Sachs (eds), *Transforming a University: The Scholarship of Teaching and Learning in Practice* (Sydney University Press, 2007) 153 <http://ses.library.usyd.edu.au/bitstream/2123/2127/1/TransUniFreeman14.pdf>.

40 Ibid.

41 In some cases, there is no specific detail given, such as in *Kunhi v University of New England* [2008] NSWADT 333 — where we know little more than that there was a finding of unintentional plagiarism on a thesis.

42 See *Re Humzey-Hancock* [2007] QSC 34; *Re Liveri* [2006] QCA 152; *Law Society of Tasmania v Richardson* [2003] TASSC 9; *Re OG* [2007] VSC 197.

43 In the judicial decision, the general conduct and honesty of the student was also a factor. This paper does not attempt to deal with the important issue as to whether we can teach law students to be generally honest — my thanks to an anonymous reviewer for this point.

44 Colin Neville, *The Complete Guide to Referencing and Avoiding Plagiarism* (McGraw Hill, 2nd ed, 2010) 5.

the 75 per cent stated that 'in all honesty I seriously dislike referencing. It is far too troublesome for simply putting forth a point'.[45] The study by Neville is alarming as it reflects not only a widespread serious dislike of an essential academic practice but also an inability of students to appreciate why they are referencing. This indicates failure by universities to impart to students any respect for the practice or a sense of the delight and confidence that attribution may bring. While applying words like 'delight' and 'confidence' to referencing may seem inappropriate, these descriptors are precisely those used by individuals who show appreciation of the process. For example, one of the 25 per cent of students who was positive about referencing stated that 'referencing is essential and learning to do it boosts confidence, not just in writing but also and primarily in arguing ideas. It is a way of putting my point forward'[46] and, as stated in the preface to the third edition of the AGLC:[47]

> Until I worked on the *Melbourne University Law Review* as a student in the 1970s, I was oblivious to the delights, agonies and obsessions of editorial style and citation methods. That experience imparted enduring respect for well-tempered punctuation as well as accurate and judicious footnoting.

These comments support the benefits in the teaching of referencing as part of a wider message about good scholarship. In a study of business students by Ellis, Freeman and Bell,[48] four categories in which students understood referencing were identified — 'two being related to higher level conceptions of learning such as reflection and reasoning; and two which were comparatively poorer in conceptualisation'.[49] The study found an important indicator of students belonging to the higher learning approach to be their engaging with referencing in a scholarly way. Indeed Ellis, Freeman and Bell state that 'the results indicate that cohesive conceptions of referencing seem to be related to deep approaches to referencing.'[50] Students must be motivated to see past referencing as an annoyance and then, ultimately (and at the risk of sounding like a preaching plagiarism Pollyanna) students must gain inspiration for their discipline and their own scholarship through referencing.

Legal educators must recognise the critical role they perform in teaching good referencing. As Wade states, 'excellent teachers are characterized by sophisticated knowledge of their areas of specialty (coupled with humility on the limits of knowledge), a love of people, enthusiasm for their subject, organized thought and speech, and a self-deprecating sense of humour.'[51] Whether one agrees with Wade's characteristics of a good teacher, the point made is important — for, if we, as educators, do not find referencing an area of interest how can we expect to pass good practice on to our students? Enthusiasm for, and knowledge of, referencing must begin with the legal educator, who may employ a range of methods to engage students and thereby encourage them to reference well.

This article does not cover all the techniques which may be employed to encourage good writing. While critical, the skills students use to write are just one aspect of good referencing. Rather, this article suggests motivation for good referencing may come not only through the acquisition of citation skills but also through students being encouraged to see law as 'their'

45 Ibid.
46 Ibid.
47 Charlesworth, above n 18.
48 Robert Ellis, Mark Freeman and Amani Bell, 'Referencing as Evidence of Student Scholarliness and Academic Readiness' (2008) 13(1) *Australia & New Zealand Journal of Law & Education* 83.
49 Ibid 89.
50 Ibid 96.
51 John Wade, 'Legal Education in Australia — Anomie, Angst, and Excellence' (1989) 39 *Journal of Legal Education* 189, 202. See also texts such as M Le Brun and R Johnstone, *The Quiet Revolution: Improving Student Learning in Law in Australia* (Law Book Company, 1994).

discipline.[52] This point is often assumed by those already within the field of legal study. The term 'within' is used here deliberately, as students entering law must go through a transition or, perhaps, transformation. A law student moves from seeing the discipline of law as a point of external engagement to experiencing themselves as a student of law within a field of study which they individually may both contribute to and draw from. In this context, the greatest opportunity that the study of law offers is, as White observes, 'not that one can learn to manipulate forms, but that one can find a voice of one's own, as a lawyer and as a mind; not a bureaucratic voice, but a real voice'.[53] If students are able to accept that they have a 'real' voice within a 'real' discipline, it may follow that their individual maintenance of the referencing rules of the discipline will improve.

In this sense, being part of the discipline of law invigorates student empowerment. Once a student views themselves as part of a community of legal writers, exchanging ideas about a topic,[54] the importance of recognising the ideas of others who have helped them to develop their own ideas becomes more apparent. Through good referencing, students will view their legal writing as contributing to the range and depth of Australian legal scholarship. In this sense, the 'obligation' to reference as an external imposition forced on them by a lecturer will transform into an internal desire. Our aim as legal educators should be to change students' view of referencing as merely a mechanistic chore, or as one student commented: '*a damn nuisance*'.

> Within this panaromic (and, perhaps) utopian vision of what referencing will come to mean for law students — that students will enjoy referencing, have discipline loyalty, be motivated and love citation style — it must not be forgotten that a fixation with footnotes and references may also operate as 'a potential barrier to engagement, enjoyment and progression and to the development of an authentic authorial voice'.[55] For this reason, the legal educator must be wary of excessive emphasis on citation style with the subsequent danger of seeming to create a 'secret language'[56] of legal citation which may be exclusionary and alienating to the law student.[57]

The looming difficulty for the future of Australian legal education will therefore be to manage the overwhelming prevalence of uniform citation style guide 'rules' with the promotion of good referencing. The two are not the same; neither are they exclusionary. However, finding the balance between the two is a task that law teachers must — for the sake of the law student — engage in actively. We cannot unquestioningly accept that the existence of a widely-applied Australian citation style guide necessarily means that its rules should be enforced to the extent that they render law students subject to significant and possibly life long career punishment.

## V. Conclusion

Robert Cover wrote of nomos and narrative — of inhabiting a nomos, or normative universe, where prescriptions exist because of the narratives that locate them and give them meaning.[58] Within this context, the title to this paper — 'Teaching Plagiarism' — is intentional. While confronting, 'Teaching Plagiarism' reflects what I believe is the current dominant narrative of correct citation style and plagiarism avoidance: we teach students firstly, how to steal information from other sources in order secondly, to give them a style guide which needs to be

52 Note that evidence to support this thesis is not widespread or conclusive: see John Sanders, 'Hooray for Harvard? The Fetish of Footnotes Revisited' (2010) 12 *Widening Participation and Lifelong Learning* 48, 49.

53 James White, *From Expectation to Experience: Essays on Law and Legal Education* (University of Michigan Press, 1999) 25–6, cited in Terrill Pollman, 'Building a Tower of Babel or Building a Discipline? Talking about Legal Writing' (2002) 85(4) *Marquette Law Review* 887, 892.

54 I am grateful to an anonymous referee for this point.

55 Sanders, above n 52.

56 Ibid.

57 Colin Neville, *The Challenge of Referencing*, <www.learnhigher.ac.uk>

58 Cover, above n 9.

applied correctly so that thirdly, they do not do so. Put simply, we teach students that 'it is not plagiarism to copy, but rather it is plagiarism to copy and not to attribute.'[59]

This paper argues that this approach is necessary but that it may never be sufficient. Le Clerq writes that:

> The problem of plagiarism in American law schools is reaching a crisis point as two national trends race toward a collision: while the law schools refuse to admit that their old methods for dealing with plagiarism are outdated and ineffective, the courts show increasing willingness to review academic disciplinary hearings and reverse their findings on due process grounds. [60]

This statement clearly applies in the Australian context. There are an increasing number of Australian legal cases dealing with law student plagiarism and admission to practice. While Australian law schools have not refused to admit that their 'old methods for dealing with plagiarism are outdated and ineffective' there is nonetheless a general lack of debate and discussion around fresh ways of educating students in the joys of legal referencing.

It is suggested that we empower the law student to engage with referencing. We impart to them the knowledge that plagiarism is not simply a crime worthy of punishment but rather is part of a wider narrative of good legal community scholarship. In short, the narrative of plagiarism and the prescription of style guides must be reframed around a discourse of plagiarism which is both positive and meaningful. As McCabe states, 'if we have the courage to set our sights higher, and strive to achieve the goals of a liberal education, the challenge is much greater than simply a focus on reducing cheating'.[61] Law students are special[62] — a proposed national profession will require a national approach to the construction of plagiarism and citation[63] — and we, as legal educators, can enhance the referencing experience of law students. At the very minimum, we can encourage students to think about how referencing may help them be a confident participant in developing the future of the discipline of law.

59 *Bell v Victoria University of Wellington* [2010] NZHC 2200 (8 December 2010), [150] (Clifford J).

60 Terri LeClercq, 'Failure to Teach: Due Process and Law School Plagiarism' (1999) *Journal of Legal Education* 236.

61 Ibid.

62 The creation of a national profession includes the suggestion that a national legal profession take into account academic misconduct in the decision as to whether an applicant may practise law: Legal Profession National Rules (r 1.2.2) and Legal Profession National Law (consultation drafts available at Attorney-General's Department, *National Legal Profession Reform* (9 September 2011) <http://www.ag.gov.au/legalprofession>).

63 A national study has shown this to be largely uniform: Teaching and Learning Centre, Murdoch University, *Audit of Academic Integrity and Plagiarism Issues in Australia and New Zealand* (2005) <http://www.tlc.murdoch.edu.au/project/acode/> found that: 'the findings were largely uniform — almost every institution recognized that there was a need to educate students better about academic integrity, but they also recognized a need to make detection and disciplinary procedures more efficient and transparent.'