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## The Calculus of Plagiarism: Toward a Contrastive Approach to Teaching Chinese Lawyers

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# THE CALCULUS OF PLAGIARISM: TOWARD A CONTRASTIVE APPROACH TO TEACHING CHINESE LAWYERS

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## INTRODUCTION

Recent writings in the fields of English as a Second Language, English for Academic Purposes, and English for Specific Purposes have underscored to those teaching graduate legal writing to foreign lawyers the indispensability of conducting a needs assessment in course design.<sup>2</sup> The community of writing professionals teaching

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<sup>2</sup>For background on needs assessment theory, *See generally* Joy Reid, *Advanced EAP Writing and Curriculum Design: What Do We Need to Know?*, reprinted in *ON SECOND LANGUAGE WRITING* 143

foreign lawyers is still relatively small,<sup>3</sup> but as we evaluate our students' needs ever more carefully, our methodologies grow more sophisticated. Although there will undoubtedly be commonalities among the processes we use to determine the needs of our students, faculty, and institutions, these processes must be fine-tuned to serve the particular requirements of each constituency.<sup>4</sup> The dialogue that will emerge from the growing emphasis on needs analyses promises to enrich the current literature in the field.<sup>5</sup>

Despite thoughtful and useful efforts to create contrastive curricula to meet the various needs of our

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(Tony Silva & Paul Kei Matsuda eds., 2001); Sarah Benesch, *Needs Analysis and Curriculum Development in EAP: an Example of a Critical Approach*, 30 TESOL Q. 723 (1996); V. K. Bhatia, *Applied Genre Analysis and ESP*, in FUNCTIONAL APPROACHES TO WRITTEN TEXT: CLASSROOM APPLICATIONS (134-149) (T. Miller ed., 1997).

<sup>3</sup>Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039, 1048 (2002).

<sup>4</sup>Reid, *supra* note 2, at 144 "stating that comparable needs assessments processes will produce different results . . . although the processes of needs analysis are similar from institution to institution, the *products*—the interpretation of the results and the resulting curriculum design—are not necessarily transportable."

<sup>5</sup>Although ESP professionals may be called upon to formulate and administer well-designed needs assessment, I predict that legal writing professionals will become increasingly adept at formulating assessment tools to determine the needs of their students as well as meet their own and their institutions expectations. This can only result in richer scholarship. For example, after reviewing the considerations that would make up an objective needs analysis, Mark Wójcik concludes: "These academic questions about the purposes and scope of academic evaluation certainly are neither new nor unique to graduate legal education for foreign lawyers. Evaluation is "a regular part of a teacher's professional work." *Evaluating International Students: Are We Testing What We Teach, or What Our Students Already Know?*, in NEWSLETTER OF THE AALS SECTION ON GRADUATE PROGRAMS FOR FOREIGN LAWYERS (American Assn. Law Schools), Summer 2005, at 6.

students as well as accelerate the cultural assimilation of foreign lawyers,<sup>6</sup> relatively little attention has been paid to the thorniest problem in teaching writing to legal graduate students, especially those from Asia: intentional and unintentional plagiarism.<sup>7</sup>

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<sup>6</sup>Contrastive rhetoric is a sociolinguistic concept first articulated by ROBERT KAPLAN in *CULTURAL THOUGHT PATTERNS IN INTER-CULTURAL COMMUNICATION* (1966) *reprinted in* LANDMARK ESSAYS IN ESL WRITING 11 (Tony Silva and Paul Kei Matsuda, eds., 2001). *See generally* ULLA CONNOR, *CONTRASTIVE RHETORIC: CROSS-CULTURAL ASPECTS OF SECOND-LANGUAGE WRITING* (1996). Increasingly contrastive rhetoric is regularly considered in incorporating contrastive techniques in designing courses for foreign lawyers studying in the U.S. *See generally* Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEG. EDUC. 157 (1997) (providing a comprehensive discussion of using contrastive methods in the law classroom); *see also* Mark E. Wojcik & Diane Penneys Edelman, *Overcoming Challenges in the Global Classroom: Teaching Legal Research & Writing to International Law Students and Law Graduates*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 127 (1997); NADIA NEDZEL, *LEGAL REASONING, RESEARCH AND WRITING FOR INTERNATIONAL GRADUATE STUDENTS* (2004).

<sup>7</sup>Most legal writing and research texts now address the special needs of foreign students, *see, e.g.*, Nedzel, *supra* note 6. A good variety of insightful work concerning plagiarism that can be adapted for foreign lawyers is drawn from the ESL, ESP, and Composition scholarship; *see generally* Alastair Pennycook, *Borrowing Others' Words: Text Ownership, Memory, and Plagiarism*, 30 TESOL Q. 2011 (1996) (arguing that plagiarism by Chinese students should be addressed as a complex relationship among text, memory & learning); Sharon Myers, *Questioning Author(ity): ESL/EFL, Science, and teaching about plagiarism*, TESL-EJ (1998) (reminding that students must be instructed about academic prohibition on plagiarism if they are to take their places in the discourses of the sciences); Lise Buranen, *But I Wasn't Cheating: Plagiarism and Cross-Cultural Mythology*, in *PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD* 63, 73-74 (Lise Buranen & Alice M. Roy eds., 1999), (noting the importance of exposing students to the entire writing process to increase communication).

The problem does not exist in a vacuum. Despite clear-cut guidelines set out by the Legal Writing Institute and virtually all law schools, plagiarism among U.S. law students is increasing.<sup>8</sup> Today, few legal educators would contend that U.S.-style attribution is ethically superior to other rhetorical styles,<sup>9</sup> but the alternative and less punitive explanation for the prohibition—that individual cultures have rhetorical preferences and that it is the responsibility of the foreign lawyers to follow those of the U.S. while here—is only marginally better. This explanation is considerably more valid than the implicit, accompanying suggestion that law students who want to compete in the global scholarly arena will need to employ English and U.S.-style scholarly writing conventions if they are to succeed. There is a direct connection between U.S. legal attribution form and our legal system, but the fact remains that it is a rhetorical preference. Accordingly, we send our students the implicit message that American style attribution is synonymous with the rule of law.

Unfortunately, explaining the ethical aspects of U.S. legal attribution, and counseling students to follow the “when in Rome, do as the Romans do,” customs do little to impart the skills they need to meet the expectations of an

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<sup>8</sup>See Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. LEGAL EDUC. 236 (1999) (noting alarming trend identified through survey mailed to 177 law schools within two year period). Robert D. Bills, *Plagiarism in Law School Close Resemblance of the Worst Kind*, 31 SANTA CLARA L.REV. 103, 105 (1991). Kevin J. Worthen, *Discipline: An Academic Dean's Perspective On Dealing With Plagiarism*, BYU EDUC. & L.J. 441, 447 (2004); M.C. Mirow, *Confronting Inadvertent Plagiarism*, 6 No. 2 PERSP. TEACHING LEGAL RES. & WRITING 61 (1998); Steven K. Berenson, *What Should Law School Student Conduct Codes Do?*, 38 AKRON L. REV. 803 (2005).

<sup>9</sup>Anyone who has read a particularly turgid law review article recognizes that it is by no means superior in all respects.

American legal audience. Through all these efforts, we all too frequently show our hand: we reveal the frustration that inevitably arises when trying to justify a convention without taking the time systematically to break down and teach the skills that comprise the convention. Too often, we also fail to engage our students in a contrastive discussion of the purpose of the practice and its equivalent in the students' home countries.<sup>10</sup>

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<sup>10</sup>See Nedzel, *supra* note 6, at 90 (for a disheartening conclusion to an otherwise excellent discussion of plagiarism and honor code violations in a textbook designed for International LL.M. students):

The student who had copied readily admitted guilt, but the student whose paper was copied was at first furious that he should be sanctioned as well. He even accused the instructor of deliberately ruining his studies and wasting his (parents') money, thus exhibiting bad taste as well as bad judgment. He decided to appeal the case to the law school honor board, as was his right. In the written appeal, he twice admitted that he had willingly shared his work with another student, though this was specifically prohibited under the law school's honor code. Luckily his honor-board appointed counsel advised him to drop the appeal before the hearing, because by fighting the limited sanction given by the instructor, he was opening himself up potentially to a much stricter sanction imposed by the honor board, up to and including expulsion from the LL.M. program. *Eventually he apologized to the instructor, acknowledging that he should have obeyed whatever culture he was in. Still, he may never fully understand why the copier and the one copied are sanctioned in U.S. law schools.* (emphasis added). *Id.*

Somewhere between the student's stubborn protestation of innocence and the counsel's successful intervention, the author as

Writing professionals have devised effective methods to teach the importance of attribution to foreign lawyers (some of which I will discuss later in this article), and texts are beginning to reflect this notion of rhetorical preference.<sup>11</sup> But in purely practical terms, rhetorical preferences reflect a lifetime of academic training.<sup>12</sup> It would be ill-advised to ask students to reform their practices in a semester or a year, because the majority (if not all) cannot. Further, we should not ask our students to approximate the attribution skills of native English speakers and writers unless we are prepared to devote adequate time to breaking down and teaching these skills—time that might take away from the writing and research assignments required in our courses.<sup>13</sup>

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instructor reveals an adherence to moral principles that suggests that the lesson has *not* (emphasis added) been learned, that there is more at stake here than breaking the rules. Implicitly, the message may be that what is at stake is more a question of ethics than a question of rhetorical preferences. What is lost is the teaching moment, and, as I will later argue, the recognition that the resistance that the student displays should have been used much earlier in the process, long before this unfortunate hypothetical had a chance to occur.

<sup>11</sup>*Id.* at 173-4; See also ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER* 311-325 (2d ed. 2003).

<sup>12</sup> Alison Craig, *Beyond the Horizon: Legal Writing Approaches for International Law Students: Helping International Students Avoid Plagiarism*, Presentation at the 11<sup>th</sup> Biennial Conference of the Legal Writing Institute (July 24, 2004), (handout available at

<http://www.lwionline.org/publications/documents2004/Craig.Presentation.doc>) (reminding that for U.S. law students and professors, many years of schooling went into avoiding plagiarism).

<sup>13</sup>Those skills include basic print and electronic research skills, and the disciplinary specific writing skills of case briefing, memos, clients' letters, persuasive letters, and a current trend towards transactional documents.

My contribution to this dialogue is a description of the strategies that I have devised and employed to come to terms with the habitual, institutionalized plagiarism (in the Western sense of the term) in the unusually accomplished constituency that I teach every summer for 9 weeks: lawyers and judges from Temple's LL.M. Program in Beijing, China.<sup>14</sup> I will argue that any contrastive approach I design is only as good as my willingness to look at the broader implications of teaching about plagiarism, coupled with my willingness to interrogate the deeply embedded prejudice that one of the goals of training foreign lawyers is to convert students to the rules of attribution as practiced in the U.S.

This is not to say that we cannot teach American-style attribution, or that our students should leave for their home countries unprepared to think about the connection between writing, the rule of law, or intellectual property in new ways.<sup>15</sup> Rather, my goal is to create a method of

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<sup>14</sup>The students from Temple Law School's Beijing Program receive an introduction to Legal English at the beginning of their 15-month program. One priority for this entry level instruction in Legal English is to provide them with enough legal terminology to conduct future reading and research in the more specific doctrinal areas of interest, and to develop legal skills such as briefing cases, but as I will discuss, the development of these deceptively complex skills cannot be guaranteed in a pre-program. *See infra* pp. 33-37.

<sup>15</sup>My task is at once more straightforward and more complicated than teaching legal writing to students enrolled in LL.M. Programs for Foreign Lawyers like the one I teach at Temple every Fall Semester. My task is to create the best curriculum for students who have already been studying in our Program in Beijing—in English—and who are studying in Philadelphia for a limited period. Without exception they will be returning to China and jobs as teachers, lawyers, and judges, positions where they will probably be communicating with U.S. lawyers in English. Although my constituency may be quite different from the majority of LL.M. Programs, the reality is that this semester of writing instruction has relevance for anyone teaching



teaching students how to avoid plagiarism that will encourage thoughtful, contrastive thinking during their professional careers. Equipped with this understanding of the English that U.S. lawyers favor, they may find a new voice to add to the debates surrounding the rule of law in China.<sup>16</sup>

This article is organized as follows: In Part I, I will review the particular non-Western perspectives that contribute to culturally relative attribution practices, and

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International LL.M. students, as well as Legal Writing Programs that might include multilingual J.D. students, and first generation law students.

<sup>16</sup>This is an especially pressing responsibility, given Temple's programmatic goals and current history of success in meeting those goals. As of the Class of 2004, 161 Chinese Lawyers and Judges have graduated from Temple's LL.M. Programs (including a total of 25 students who matriculated in Temple's year-long LL.M. Program). See generally JAMES E. BEASLEY SCHOOL OF LAW, TEMPLE UNIV., TEMPLE LAW IN ASIA (2005). In Temple's own words: In keeping with the program's goals of educating judges, prosecutors, and key government officials who will be well-positioned to influence the rapidly-developing Chinese legal system, we continue to draw heavily from the public sector. *Id.*

Sixty four percent of the Beijing class of 2004 and 72% of the entering class are judges, prosecutors, legislative drafters for the National People's Congress, government officials, and law professors. *Id.* The Chinese government grants these employees a paid leave of absence to attend the program, after which they are expected to return to their posts. Our graduates are recognized as having special knowledge by their superiors, and 47% of our graduates are promoted within one year of education. This trend demonstrates strong evidence that our graduates will have an opportunity to use their education creatively to make substantial contributions to the development of a fair and credible Chinese legal system—from within the system. *Id.*

connect these perspectives to additional general observations about the cultural underpinnings of intellectual property. In Part II, I will link that discussion to two compelling strains of an on-going, postmodern view of intellectual property as a metaphor. I draw on Teemu Ruskola's adaptation of Gadamer's "hermeneutic circle," and Laurie Stearns' model of Contract, and conclude with my own trope: a calculus of plagiarism—that is, a method by which plagiarism may be systemically analyzed and addressed. In Part III, I offer the concept of the student as a "subject" articulated by innovative composition theorists—notably the New London group—to detail a more practical application of my metaphor of plagiarism as a calculus. Finally, in Part IV, I offer a fluid intellectual property problem designed to put the calculus in place. I anticipate where interventions—or, engagements, as I call them—may be needed. I will describe a number of exercises and suggestions I have adapted from the work of creative colleagues in the field to support the students while they complete the assignments.

Finally, I will conclude that any model like the one I outline will require assistance from fellow faculty members, teaching assistants, and, ideally, interested lawyers and judges. My hope is that in outlining my model, I might offer useful suggestions to all who teach Chinese lawyers, as well as promote a discussion among scholars. In the end, we must design curricula to meet the needs of our institutions and our constituencies, and with this project-based curriculum in place, definitions of plagiarism might emerge that will prove useful to Chinese lawyers returning home.

#### I. "UNLEARNING" PLAGIARISM THROUGH CONTRASTIVE PEDAGOGY

American students and students from China have significantly different learning styles. Students come to the U.S. classroom equipped with a range of skills, and very limited experience with the disciplinary-specific form of writing that we expect of them.<sup>17</sup> In my experience, a few students will always make the effort to see that their fellow students do well, going so far as to create “uber-texts,” i.e., models for writing assignments that can be shared and fairly easily customized by each student.<sup>18</sup> With this background in place, the question arises of whether an explanation of U.S. rhetorical preferences is sufficient to alert students to the fundamental assumption of all legal rhetoric: proper attribution.

The answer is, almost certainly, no. To fail to confront comparative notions about plagiarism head-on is to guarantee failure, especially when faced with an extremely limited time frame. Chinese students lack a sense of ownership of their words and ideas, but this lack is interwoven into an extremely complex cultural view. It reflects far more than the collectivist mentality that Westerners assume. Rather, it expresses a particular aspect of Confucian thinking, “jen” or “human-heartedness.”<sup>19</sup> To

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<sup>17</sup>Craig, *supra* note 12.

<sup>18</sup>For this reason I have students submit all written work directly to Turnitin software, a program that detects plagiarism from a bank composed of any work that has been submitted to the system, as well as a variety of law reviews and journals. Turnitin software (or any other plagiarism detection software) is not a focus of this essay. However, in general, I find it far more useful as a tool of prevention than a tool of detection.

<sup>19</sup>Myers, *supra* note 7 (“To the Chinese, self-cultivation is more meaningful than individualism. In this way it is not a question of subsuming one’s entire identity for the greater good of the group but cultivating oneself in order [that] . . . state, society, family, and *self* are well served.” (quoting R. Dellios, “*How may the world be at peace?*”: *Idealism as realism in Chinese strategic culture*, in *CULTURE & FOREIGN POLICY* 203, 208 (Valerie M. Hudson, ed., 1997))). *See also*

address this difference, it is necessary to find a method that allows us, as Alistair Pennycook says:

[T]o avoid simplistic arguments such as ‘it’s OK to plagiarize in Chinese’... [and] to understand the notion of cross-cultural communication not as some idealized cultural exchange, but rather as a place of struggle and contestation, because alongside the tradition of emphasizing the creativity of the West, there has also been a tradition of deriding other cultures for their supposedly stagnant or imitative cultural practices.<sup>20</sup>

Chinese students will readily sign a plagiarism contract that requires them to foreswear a practice that is second nature. They may well understand what they are signing, and do so in good faith, but the overwhelming number of students will not have the requisite skills to avoid plagiarism. Ideally, there would be a stage that precedes signing. That stage is the site of contention and resistance that might yield a truly contrastive pedagogy. Before outlining that site, I must set out a parallel to the debate that closely tracks these pedagogical issues.

## II. CREATING AN ETHICAL CONTRACT: PLAGIARISM AND THE CONTRASTIVE CLASSROOM

The term “intellectual property” has both legal and cultural connotations. Although our general understanding of intellectual property concerns *legal* rights with respect to

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Brent Yonehara, *Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects For Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART & ENT. L. & POL’Y 63, 75-6 (for further distinction between Chinese preference for order established through “li” and dislike of penal concept of “fa” (rule of law)).

<sup>20</sup>Pennycook, *supra* note 7, at 218.

inventions or creative expressions (i.e. patents, trademarks, copyrights, etc.), there is also a general sense of *ownership* in our unique ideas and creation. That is, however, a cultural phenomenon unique to Western thinking whereby ideas and work can be possessed. Generally, Eastern thinking tends to be more collective. These contrastive, conceptual frameworks result in vastly different conventions regarding attribution.

In *Technology Licensing to China: The Influence of Culture*, Anna M. Han addresses these conceptual differences and concludes:

The enforcement of intellectual property in China remains a dilemma. On the one hand, the Chinese government desires to import technology to modernize the country. It recognizes that to do so effectively, it must provide intellectual property protection for the foreign licensor of technology. On the other hand, it is battling traditions that are ingrained in the society. The lack of recognition of scientific and technological achievements, combined with the notion that art, literature, and music should be shared with the public, lead to the potential disregard of intellectual property rights by the licensees. *Until some of these fundamental cultural attitudes regarding intellectual property change*, (emphasis added) foreign licensors must carefully evaluate the benefits versus the risks when

licensing their intellectual property in China.<sup>21</sup>

Han's conclusion dramatizes the overlap in attitude with conventional notions of plagiarism detection: i.e., to rid ourselves of this problem, cultural attitudes will have to change. There is a considerable body of thought suggesting that cultural change in China is a condition for harmonious economic relations with the U.S.<sup>22</sup> Too easy a connection among the rich cultural history of copying in China, academic plagiarism in the U.S., and the contemporary debate about intellectual property would be specious. Conversely, to ignore the growing body of literature from this intellectual property debate—traditional and postmodern—that reflects attitudes toward plagiarism in non-Western cultures would be to neglect one of the richest areas of inquiry in this pedagogical field.<sup>23</sup>

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<sup>21</sup>Anna M. Han, *Technology Licensing to China: The Influence of Culture*, 19 HASTINGS INT'L & COMP. L. REV. 629, 642-3 (1996).

<sup>22</sup>See, e.g., Angela Mia Beam, *Piracy of American Intellectual Property in China*, 4 D.C. L. J. INT'L L. & PRAC. 335 (1995).

<sup>23</sup>WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 19-29* (1995) (arguing for the futility of imposing western notions of intellectual property based on the related Confucian traditions of literary copying, family based dispute resolution, and traditional Chinese resentment of foreigners. Alford further notes that there is a strong comparability between copyright and Confucianism, just as there is between Western human rights and Confucianism); See also Patrick H. Hu, *Mickey Mouse in China: Legal and Cultural Implication in Protecting U.S. Copyrights*, 14 B.U. INT'L L.J. 81 (1996); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 361 (2003) (discussing intellectual property in China especially with regard to the role "the socialist economic system [played in] mak[ing] it difficult for the Chinese to see the benefit of intellectual property ownership"); See also Geremie R. Barme', *To Screw Foreigners is Patriotic*, 34 CHINA J.

Legal writing professors who teach foreign lawyers whose first language is not English must grapple with differing notions of attribution and intellectual property. But to make assumptions about non-U.S. legal systems and cultures without properly interrogating one's own presuppositions—as well as the presuppositions of one's students—may be worse than simply superimposing the U.S. style. The solution is to expose our assumptions about our students' knowledge and ways of learning, as well as their assumptions as to what we know and teach, question it, and replace it with something more constructive and contrastive. Postmodern thinkers in comparative law scholarship are leading the way in this effort and provide models useful for thinking about legal writing pedagogy.<sup>24</sup>

A more expansive way of thinking about the contrastive classroom may be framed by the “ethics of orientalism.” Elaborated by Teemu Ruskola with regard to comparative law, this theory also relates to the contrastive classroom as a site of considerable frustration but increased communication.<sup>25</sup> Ruskola relies on German Philosopher

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209 (1995) (arguing Chinese see intellectual property rights not as tools designed to promote China's economy, but as Western weapons).

<sup>24</sup>See, e.g., Janet E. Ainsworth, *Categories and Culture: On the 'Rectification of Names' in Comparative Law*, 82 CORNELL L. REV. 19, 29 (1996) (arguing “[O]ne cannot fully appreciate the overall Chinese cultural context without developing a sense of the Chinese legal sensibility, the legal practices and discourses which it informs, and the place of that legal order in a larger social world.”).

<sup>25</sup>“In an important sense, the process of comparison creates the objects of comparison. Therefore, how we compare ourselves to others produces both enabling conditions as well as obstacles to further communication. An ethical legal Orientalism attends to the conditions of legal subject formation: rather than positing the Chinese as simply lacking legal subjectivity, it allows for the possibility of *differently* constituted legal subjects. Indeed, a more open-ended approach to comparison may change our views not only of others as

Hans-Georg Gadamer to describe a version of the “hermeneutic circle” that I believe offers a vision for the contrastive writing class and, perhaps even more radical, a potential dialogue among students, doctrinal professors, and legal writing faculty. Hermeneutics, as defined in Black’s Law Dictionary, is “[t]he art of interpreting texts, esp[ecially] as a technique used in critical legal studies.”<sup>26</sup> This philosophical approach allows us to understand both the creator and audience of a text within the context of their own culture and historical perspectives. As Ruskola envisions it:

The term “hermeneutic circle” in fact sounds more static than it need be. It is not just a kind of infinite loop that makes up permanent hostages of our current prejudices. On the contrary, ‘the circle possesses an ontologically positive significance.’ It always entails the possibility of a ‘fusion of horizons,’ a genuine encounter between different hermeneutic systems. We have no choice but to bring our own legal categories, our own mental apparatuses to the encounter, but as we approach the Chinese legal system, we can question our categories.”<sup>27</sup>

Ruskola is not alone in envisioning the future of comparative law as a site where postmodern thinking helps us question our own socially constructed cultural

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legal subjects, but also of ourselves.” Teemu Ruskola, *Legal Orientalism*, 101 Mich. L. Rev. 179, 188 (2002).

<sup>26</sup> BLACK’S LAW DICTIONARY (8<sup>th</sup> ed. 2004).

<sup>27</sup> Ruskola, *supra* note 25, at 232.



assumptions. Uncomfortable as the process may be, it may also play a role in the cultural classroom for the future.<sup>28</sup>

The final piece in the theoretical framework of my calculus of plagiarism is offered by Laurie Stearns in her discussion of the future of intellectual property law.<sup>29</sup> Stearns addresses the question of plagiarism's legal significance:

People commonly think of plagiarism as being 'against the law.' But with respect to plagiarism, the law and literary ethics intersect only imperfectly. Plagiarism is not a legal term, and though an instance of plagiarism might seem to be the quintessential act of wrongful copying, it

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<sup>28</sup> A number of postmodern theorists from disciplines other than law and composition have contributed insights to the discussion of this discomfort. See, e.g., CLAIRE CONCEISON, SIGNIFICANT OTHER: STAGING THE AMERICAN IN CHINA 5 (2002) (using postcolonialism, postmodernism, and performance studies to analyze appearances of Americans on Chinese stage). Conceison notes "the American or European living in Beijing or Shanghai, aware of his or her own nation's imperialist history in relation to other nations (including China), must internalize 'righteous anger' as an unavailable, indefensible option. Resentment at being treated as Other is accompanied by feelings of guilt due to recognition of this privileged status." *Id.* at 4.

<sup>29</sup> Compare Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 514 (1992), reprinted in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POST-MODERN WORLD 5-17 (Lise Burnanen & Alice M. Roy eds., 1999), with Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 823 CORNELL L. REV. 19, 39-41 (1996) (explaining the importance of understanding the Chinese concept of the "relational self" in the study of comparative law).

does not necessarily constitute a violation of copyright law.<sup>30</sup>

Though a potentially powerful pedagogical tool, the intellectual property metaphor must be handled deftly. Not properly employed, it runs the risk of functioning as a purely punitive, preventative device, and by no means a successful one.

It may be more useful to draw inspiration from Stearns' vision of the intellectual property metaphor as enhanced by the notion of contract.<sup>31</sup>

“As the social contract is a metaphor for political life, perhaps another kind of contract is a metaphor for efforts at creativity and communication: the ‘creative contract’. By virtue of living among other people, everyone is a party to the creative contract as both a creator and a member of the audience.

Thinking of creativity in terms of this larger social relationship and viewing infractions against literary ethics, such as plagiarism, as breaches of the creative contract as well as infringements of property rights can open new avenues of legal analysis. *Intellectual property is an inadequate metaphor not because the structure of property law is inadequate but because the term itself makes people think too simplistically of words as property to be owned.* The contract metaphor can serve as

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<sup>30</sup>Stearns, *supra* note 29, at 5-6.

<sup>31</sup>*Id.* at 14.

a reminder that property can be shared, exchanged, bargained over, and used, as well as owned.”<sup>32</sup> (emphasis added)

The definitions that will emerge from the successful implementation of this metaphor of contract—whatever one’s constituency—will reflect the exchange of societies and cultures who sign the contract. As creative and worthwhile as this prospect may be, we must remember that although plagiarism is not strictly a legal concept, this may amount to a distinction without a difference from the U.S. cultural perspective.<sup>33</sup> Legal writing instructors turn to the plagiarism contract today to ensure that students understand the rules, but I hold that the students also need to understand the meaning (and weight) of the contract before they are asked to sign, and that frequently takes an entire semester.<sup>34</sup>

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<sup>32</sup>*Id.*

<sup>33</sup>For a foundational view of plagiarism as a metaphor that acknowledges the role of intellectual property in expanding on the metaphor, See David Leight, *Plagiarism as Metaphor*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POST-MODERN WORLD 221-229 (Lise Burnanen & Alice M. Roy eds., 1999). Leight notes that “definitions can be socially constructed yet still carry the weight of ‘law.’” *Id.* at 229. He defines plagiarism “by four dominant metaphors: plagiarism constitutes stealing and is therefore morally wrong; plagiarism is an ethical problem in which the plagiarist violates an unwritten code of conduct for students; plagiarism is a ‘borrowing’ in which ‘credit’ is left undelivered; and plagiarism is a failure to intellectualize like a member of the academy.” *Id.* at 221.

<sup>34</sup>See LEGAL WRITING INSTITUTE, LAW SCHOOL PLAGIARISM V. PROPER ATTRIBUTION (2003) *available at*, <http://www.lwionline.org/publications/plagiarism> for a “Law school Plagiarism and Proper Citation Brochure” that asks students to sign off on having read the literature concerning plagiarism. It is the teacher’s job, I argue, to spend the class term ensuring that the material is understood.

In the following section, I employ these concepts of the hermeneutic circle and plagiarism metaphor to systemically expose student and teacher concepts of ideas as “private.” Thus, I seek to describe a classroom that embodies a creative, ethical contract—a classroom where students gain an ability to anticipate the needs of their American academic audience, including their professors. And finally, I seek to teach the foreign students the skills needed to negotiate the needs of their co-nationals in anticipation of returning not only to their home countries, but to a global, economic, and legal community.

### III. THE CONCEPT OF STUDENT AS SUBJECT: A (SELF) CRITICAL PEDAGOGICAL APPROACH

Legal educators recognize the need for incorporating cultural context consistently and recurrently into every stage of the curriculum for international lawyers studying in the U.S.<sup>35</sup> Although the scholarship that will offer strategies for teaching these students is now growing, it cannot grow fast enough to meet the demand.<sup>36</sup> My

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<sup>35</sup>See, e.g., Margaret Y. K. Woo, *Reflections on International Legal Education and Exchanges*, 51 J. LEGAL EDUC. 449, 454 (2001) (stating “we need to have a way of infusing cultural literacy into the curriculum and of placing the substantive information into the appropriate social, historical, and political context and background. Additionally, the best way may be for us to be aware of our own assumptions and raise questions about their continued validity. In time, this same method and questioning may be transferred to the student’s own assumptions.”).

<sup>36</sup>The slow growth of scholarship is not surprising given the teaching demands that often preclude any significant time for exploring new methods of reaching our students. This, of course, is a problem shared by legal writing professionals teaching native or non-native students. Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor’s Paradox*, 80 OR. L. REV. 1007, 1021 (explaining

contribution, then, is a calculus to help foreign students studying in the U.S.—in this case Chinese students—translate into their own cultural vocabulary the U.S. perception that an original conclusion, even a very modest conclusion, is painstakingly built on sources, and that this reliance on sources, is, in turn, a metaphor for our legal system.

This is fairly easy to explain, even to understand, but teaching students how to use such information to communicate with an audience requires a different commitment from them, and from us. The aim of my proposal is to offer something I believe other approaches have not offered as yet. Using the series of exercises I prescribe in the way I prescribe them, I hope to demonstrate how building blocks might scaffold a way of understanding other systems in relation to one's own in ways both recursive and highly self-critical.

This self-critical quality is the key to the enterprise: with a process of (self) critical reading in place, what might emerge *for ourselves and our students* is a record of (self) conscious encounters with sources (including our students' and our own teachers and mentors) leading to a level of communication where a student begins to see ideas as private. By invoking this notion of ideas as private, I begin to interrogate my own place in the calculus.

Beyond an awareness of our own and our students' cultural sensitivities, any pedagogy designed to create a contrastive classroom must take into account the full range of one's intellectual and cultural influences. Fortunately, with reflection, these influences can be unearthed and interrogated as a part of an always-evolving pedagogy. As

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the difficulty of producing scholarship when faced with little financial support and heavy teaching responsibilities.)

such, before envisioning a method by which students see ideas as private, I must situate my own definition of private within the context of the postmodern composition studies debate over the role that a teacher will ask a student to play in the classroom: that is, the role of the student's "subjectivity"—a particularly potent and often confusing debate in the 1980's.<sup>37</sup>

This article is not intended to address the state of composition studies since the 1960s and the central role that the question of the subject played, and continues to play, in postmodern composition theory.<sup>38</sup> Still, my own preference for the voice of the individual (particularly the voice of resistance, over the voice of the community) is deeply embedded in my pedagogy. As such, it must be interrogated. Postmodern thinking provides a method, articulated by Lester Faigley, for framing the theoretical basis for the calculus of plagiarism as a potentially *ethical* enterprise, and situates that calculus in the postmodern debate.<sup>39</sup> I quote in full:

I argue that the rejection of the individual-versus community dichotomy for conceiving the subject and the recognition of heterogeneity and unassimilated otherness establish ethics as the central concern for postmodern subjectivity. While postmodern theory does not supply an agenda for social

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<sup>37</sup> LESTER FAIGLEY, FRAGMENTS OF RATIONALITY: POSTMODERNITY AND THE SUBJECT OF COMPOSITION 15-17 (University of Pittsburg Press, Pittsburg Series in Composition, Literacy, and Culture) (1992) (explaining the role the "communitarian" view of the subject played in challenging both the belief in the writer as an autonomous self (a high modernist notion), and the more postmodern notion of individual as capitalist consumer).

<sup>38</sup>*Id.* at 22.

<sup>39</sup>*Id.*

agency, it does uncover networks of relations of power, how these relations are constituted, and how we do and do not think about them. If theory does not point to the direction that change should take beyond resistance to domination, it does locate spaces where change occurs and refocuses attention on the politics of knowledge and practice.<sup>40</sup>

Locating such spaces requires that we identify the fault lines of our own curriculum, and navigate those fault lines as much as possible.

The conspicuous fault line that emerges when we teach Chinese lawyers in the U.S. is that although we are preparing our students to use English to negotiate legal boundaries and global economic boundaries, we do not necessarily design our programs to that end. We accept—even encourage—our students to measure their system against ours, but the process is often hampered by conventional, text-bound pedagogy. It stands to reason that the pedagogy that we create for these students should accommodate not only the conventional, textual interpretation of U.S. law, but also the multitude of contrastive perspectives that will emerge in their studies. The method that I have used to facilitate a contrastive perspective is informed by the theory of “multiliteracies” with which the New London Group suggests we may construct an English for a global economy.<sup>41</sup>

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<sup>40</sup>*Id.* at 24.

<sup>41</sup>The New London Group is an international collective devoted to literacy studies. Bill Cope and Mary Kalantzis, *INTRODUCTION, Multiliteracies: the beginnings of an idea*, in

The New London Group's conceptual framework is applicable to a pedagogy designed for foreign lawyers because of its focus on "broaden[ing] [this] understanding of literacy and literacy teaching and learning to include negotiating a multiplicity of discourses...."<sup>42</sup> In addition, the pedagogy seeks "to develop an epistemology of pluralism that provides access without people having to erase or leave behind different subjectivities."<sup>43</sup> The preservation of student and teacher subjectivity is integral to my own pedagogy. For these reasons and others I will explore, the framework of The New London Group provides a highly practical model for teaching Chinese lawyers.

The New London Group's schema for this 'pedagogy of Multiliteracies' requires incorporating four interrelated and integrated elements into one's conventional teaching methods: "Situated Practice, Overt Instruction, Critical Framing, and Transformed Practice."<sup>44</sup> For the

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MULTILITERACIES: LITERACY LEARNING AND THE DESIGN OF SOCIAL FUTURES 3-8 (Bill Cope & Mary Kalantzis eds., 2000).

<sup>42</sup>The New London Group, *A Pedagogy of Multiliteracies: Designing Social Futures*, in MULTILITERACIES: LITERACY LEARNING AND THE DESIGN OF SOCIAL FUTURES 9 (Bill Cope and Mary Kalantzis eds., 2000) (stating "[w]e seek to highlight two principal aspects of this multiplicity. First, we want to extend the idea and scope of literacy pedagogy to account for the context of our culturally and linguistically diverse and increasingly globalized societies; to account for the multifarious cultures that interrelate and the plurality of texts that circulate. Second, we argue that literacy pedagogy now must account for the burgeoning variety of text forms associated with information and multimedia technologies.").

<sup>43</sup>*Id.* at 18.

<sup>44</sup>Mary Kalantzis & Bill Cope, *A Multiliteracies Pedagogy: A pedagogical supplement*, in MULTILITERACIES: LITERACY LEARNING AND THE DESIGN OF SOCIAL FUTURES 240-2 (Bill Cope & Mary Kalantzis eds., 2000) (clarifying that the schema operates in any number of complementary, non-linear ways.)



remainder of this article, I will describe my original assignments, and those I have adopted from others, in the context of The New London Group's elements, noting problems that the teacher might anticipate and need to address. The ways in which the elements interrelate is more difficult to signal: there is no method for predicting how the learning progression will proceed, nor should there be.<sup>45</sup> The expectation is that assignments designed according to this innovative pedagogy may create private moments for the students—moments that might, if they do not reverberate, than at least recur, to influence their own writing, research, and analysis when they return to their own system and culture.

#### IV. APPLYING THE CALCULUS: ASSIGNMENTS AND "ENGAGEMENTS"

My interconnected assignments are designed to draw on a fairly open-ended software piracy problem that involves several steps but begins as follows:

John Smith, an American citizen residing in Philadelphia, was trained as a software engineer. In 2001, he quit his job at Micro-Comp, the dominant software manufacturer in the world, headquartered in Philadelphia. After unsuccessfully trying to go into business for himself, he decided he would use his contacts at Micro-Comp to get rich.

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<sup>45</sup>*Id.* at 242 (stating "[t]hese kinds of cultural journeys, or ways of seeing meaning, are never neatly linear. Often they happen simultaneously, or with one aspect in greater focus in the foreground but with the others still in the background. And the shift in focus can happen in all kinds of order, shifting focus frequently or slowly or irregularly from one aspect to another.").

Starting in 2003, Smith paid his friend Jones (a Micro-Comp employee) to give Smith a “Gold” pre-release CD version of the not yet released Micro-Comp “Doorways” Operating System—the most-sought after software in the world. Smith then flew to Beijing, where he sold the software for half a million in U.S. dollars to a software piracy group, which, in a matter of days, had distributed it throughout Asia. Smith paid \$250,000 to an individual in Beijing to obtain DVD versions of four “blockbuster” films that had not yet been released in American movie theaters.

Smith returned to the U.S. with the remaining \$250,000 and the DVDs hidden in his luggage. He gave the cash to the same friend at Micro-Comp, who used the money in a series of transactions, and returned \$200,000 to bank accounts in Philadelphia. The banks are unaware of the origin of those funds, which are now fully available to Smith to spend as he wishes.

Smith sold the 4 DVDs for \$500,000 in cash to Jones who quickly copied and distributed the films throughout the U.S. Once again, Smith, through Jones, was able to “transform” that cash into \$400,000 of seemingly legitimate funds.

Micro-Comp executives are outraged that someone has apparently stolen the last two versions of their most prized software.

They believe those two thefts have cost the company over \$100 million in sales.

The executives at United Pictures—the Philadelphia-based producer of the four films Smith brought back from Beijing, are also outraged. They estimated that the widespread distribution of “bootleg” copies of the four films has cost United over \$150 million in box office receipts and at least another \$50 million in DVD rental fees.

The FBI has begun to investigate Smith. The media has learned of the investigation and broadcast and written numerous stories and articles describing Smith’s exploits. When Jones heard about the investigation, he fled to Costa Rica, where he is now residing. The individuals with whom Smith dealt in Beijing are all citizens of China, residing in Beijing.

The first assignment takes advantage of the fact that the students are still in Beijing. Using their own research resources, they are asked to write their findings in a form that they feel appropriate for the audience, a fictitious senior partner in a fictitious law firm.

#### Assignment #1

You are an associate at Rose & Rose, a large commercial firm in Beijing that represents Smith. Aware that he is under criminal investigation in America, Smith fears that he may have potential criminal liability in China under Chinese law. Please prepare a memo to the senior partner in your law firm

analyzing whether Smith has committed any crimes under Chinese law and the range of potential penalties. The memo should be 750 to 1000 words long.

This is a standard, comparative, diagnostic assignment informed by Ramsfield's seminal article.<sup>46</sup> My variation on this assignment gives the students an opportunity to engage with their future audience in the U.S., and to write in the style with which they are comfortable, applying the statute-based law that they know well. The innovation is that this assignment, like all the assignments that grow out of the hypothetical, invite the students to engage in what The New London Group calls "situated practice."

This is the part of pedagogy that is constituted by immersion in meaningful practices within a community of learners who are capable of playing multiple and different roles based on their backgrounds and experiences.<sup>47</sup>

At this stage, meaning is constituted from the students' own "lifeworld experience,"<sup>48</sup> but the students are aware that their final audience for this assignment will be a professional trained in U.S. law, and so may have misgivings about what is expected of them. Part of the process that I employ provides the guidance learners at this early stage need.

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<sup>46</sup>See Ramsfield, *supra* note 6, at 195-96 (suggesting a comparison and contrast of a written assignment, e.g., a client letter, to the way the student would write it at home—followed by a comparison and contrast of the form in each system).

<sup>47</sup>The New London Group, *supra* note 42, at 33.

<sup>48</sup>Kalantzis & Cope, *supra* note 44, at 244.

Although they are expected to complete the problem using their own research sources while in Beijing, the students have access to a discussion board that allows them to follow the communications between Beijing and the U.S. during the month that they prepare their responses. Students may use their own names, but are not required to do so. Some of the dialogue will inevitably relate to the requirements of the assignment, but the teacher can anticipate that questions and opinions about the highly controversial issue of software piracy here and in China will begin while the students are on their own "turf," and have a degree of anonymity.

Any method used to create a dialogue with our students is an advantage, but when the technology is available, I would argue that "hypertext"<sup>49</sup> may provide the class with a forum for simultaneous "talk." In a version of a practice-based project that would be particularly authentic, lawyers, judges, and professors in the law school community are brought into the networked discussion, which might continue after the students arrive in the U.S. Although some participants might, in actuality, speak with greater authority than others, in the anonymous world of the discussion board, all voices will seem equal.<sup>50</sup>

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<sup>49</sup>See FAIGLEY, *supra* note 37, at 165 (raising the question of whether rational autonomous subject will be disrupted by introduction of "the use of electronic written discussions on networked computers and the use of nonsequential writing known as hypertext."). Hypertext poses potentially revolutionary implications in our definitions of plagiarism, but that issue is not in the scope of this essay. Hypertext in this context refers to interactive technology that encourages communication. *Id.*

<sup>50</sup>While at first glance, this form of communication may seem the ideal method for releasing the "voices" of those unaccustomed to airing opinions, it is not without dangers. "While this technology greatly increases the participation of those most likely to be silenced in a traditional classroom, it also allows students to use discourses

Additionally, the subject of the assignment is Chinese law, so the students in Beijing have the opportunity to take on the role of student or expert, depending on whether they are asking the question or answering it.

This hypertext discussion offers exciting possibilities for teaching foreign lawyers studying in the U.S. Once the students are in the U.S., a networked classroom will provide a partial alternative to a classroom of non-participants. Electronic communication technology that permits all participants to talk in real-time is one way to encourage our students' and our own "private" voices to emerge.<sup>51</sup>

Whether or not students engage in dialogue with one another and their professor before they submit their diagnostics, I anticipate the teacher will receive memos that vary widely in format, style, and quality. They will likely include a statement of facts and a discussion section. In most instances, the statement of facts will be nearly a word-for-word transcription of the original. The discussion section—with a few exceptions—will vary greatly from U.S.-memo style organization. The rules may be separated from the discussion, but they will most often be enumerated and literally translated: i.e., they will not contain a macro and micro-organization of a rule section and a rule explanation. Obviously, because the students are accustomed to statute-based law, there will be no explanation of the rule through case law. Although there may be some version of a discussion, and although their

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forbidden in many classrooms such as the discourses of racism, sexism, and homophobia. The issue of the students' 'empowerment' thus becomes problematic in the networked classroom and exhibits many of the contradictions inherent in Lyotard's description of the postmodern condition". See *id.* at 24.

<sup>51</sup>*Id.*

legal conclusions—with a few exceptions—will be correct, they will see no need for elaboration, so there will be none. In short, by U.S. standards, the memos will be poorly organized, conclusory, and not legally sound.

The memos will not provide a particularly useful contrast with the U.S.-style memos they will next be assigned, but it is not necessary to focus on writing style at this point in the semester. Rather, it is important that the students have been immersed in a real problem using law they understand, and have had ample time to entertain their own pre-suppositions about U.S. attitudes toward software piracy. In addition, they will have had opportunities to discuss their ideas with their legal writing professor and with one another on the discussion board (or in hypertext). When they begin the complicated process of analyzing and synthesizing U.S. law, they will have a foundation—a context within which to make a comparison by virtue of immersion in “situated practice.”

Once in the U.S., the students will assume the roles of deputized civil and criminal lawyers working with their American counterparts. They will research American law, using American research techniques, and write their findings in the forms accepted by the American legal community. There will be no suggestion whatsoever that U.S.-style legal scholarship or education is superior to Chinese legal scholarship or education. The students will be asked, however, to compose documents and analyze issues in the U.S.-style because their audiences will be U.S. lawyers and government representatives. The second assignment will ask the students to identify as prosecutors or civil litigators and choose the relevant assignment as follows:

## Assignment #2

A.

You are a prosecutor in the Office of the United States Attorney's Office in Philadelphia. The United States Attorney would like to know what crimes Smith may have committed under American law. In addition, the United States Attorney would like to know if there is sufficient evidence available to obtain a conviction of Smith for any of these crimes. Please write a 750-1000 word memo answering these questions.

B.

You are an associate at Brown & Brown, a Philadelphia law firm that represents Micro-Comp and United Pictures. These companies have asked your firm to determine whether they can successfully sue Smith for his actions respecting the software and the DVDs. A partner at the firm has asked you to answer that question in a 750-1000 word memo.

Once again, the students are immersed in situated practice. Now, however, they are taking on roles for which they will almost certainly feel culturally unprepared.

Teachers and members of the legal community taking part in this project must guide students to the full range of available resources, keeping in mind that the students may hesitate to take chances and make mistakes.<sup>52</sup>

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<sup>52</sup>The New London Group, *supra* note 42, at 33 (arguing that Situated Practice "that constitutes the immersion aspect of pedagogy must crucially consider the affective and sociocultural needs and identities of all learners. It must also constitute an arena in which all



The students are now committed to an on-going, discursive set of assignments with multiple sources of information coming from the classroom, library, internet, and the “real world.” Their assignments are linked to a contrastive theme, but what makes the theme significant—this problem’s distinctive feature—is that it necessarily draws them into a skill-based practice of the law.

Once immersed in their roles, the students will require considerable “Overt Instruction” from professors and members of the legal community. A complete explanation of The New London Group’s first element of critical pedagogy is required:

Overt Instruction does not imply direct transmission, drills, and rote memorization, although unfortunately it often has these connotations. Rather, it includes all those active interventions on the part of the teacher and other experts that scaffold learning activities; that focus learners on the important features of their experiences and activities within the community of learners; and that allow the learner to gain explicit information at times when it can most usefully organize and guide practice, building on and recruiting what the learner already knows and has accomplished. *It includes centrally the sort of collaborative efforts between teacher and student wherein the student is both allowed to accomplish a task more complex than they can accomplish on their own, and where they come to conscious awareness of the teacher’s*

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learners are secure in taking risks and trusting the guidance of others - both peers and teachers.”).

*representation and interpretation of that task and its relations to other aspects of what is being learned. (emphasis added).* The goal here is conscious awareness and control over what is being learned - over the intra-systematic relations of the domain being practiced.<sup>53</sup>

Students will need Overt Instruction throughout their study, but it is likely that the professor will initially use it to teach case reading and briefing. In my first engagement, I will illustrate how a distinctive feature of Overt Instruction—the use of metalanguages—might equip the Chinese student with a valuable tool with which to acquire a new skill and a new and highly reflective method of learning.<sup>54</sup> To set out this process fully, we must first return to the fundamentals we expect of foreign students by the time they arrive in the U.S.

#### Engagement #1 - Teaching Case Reading as a Self-Conscious Metalanguage:

#### Interrogating One's Own Skills To Complicate The Case Reading Process

In the first month of their Program, our students in Beijing are given general readings in sources that clearly outline “how to” read and brief a case.<sup>55</sup> The question remains why, if students are acquainted with briefing, they should have difficulty with the skill. The answer is that

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<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at 34 (defining metalanguage as “languages of reflective generalization that describe the form, content, and function of the discourses of practice.”).

<sup>55</sup>In Beijing the students are taught the conventional methods for briefing cases, including color-coding for facts, procedural history, etc.

legal analysis, research, and writing should be seen as related skills that must be practiced repeatedly to take.<sup>56</sup> In this pedagogy, the metalanguage that “describe[s] and interpret[s] the Design elements of different modes of meaning” takes a highly self-conscious form.<sup>57</sup>

My contribution to the method of teaching case briefing as a metalanguage is to suggest that a stage comes before practicing the form. Students must first explain to themselves (or to one another) what they do and do not understand as they read the case. This is something they may have never done. By reading a case in a “talk-aloud” protocol, the student will determine whether he can analyze.<sup>58</sup> As a basic composition skill, the “talk-aloud” protocol is invaluable for working through any difficult text. For Chinese students it has a “value-added” component. Once a case is understood and briefed, the student is much less likely to plagiarize it in his memo.

Mary Lundenberg studied the reading strategies of native-speaking and writing lawyers and law professors, and devised a method of teaching comprehension strategies that might be applied to non-native speakers and writers.<sup>59</sup>

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<sup>56</sup>English for Specific Purposes course design developed for initial, one month program recognizes essential, grammatical features and their relationship to discourse function and the lexical features and their relationships to each other and the complete text; See Kristin Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning Through Learner-Centered Assessment*, 94 LAW LIBR. J. 59, 63-69 (2001) (stressing the importance of repeated activities as a key to experiential learning).

<sup>57</sup>The New London Group, *supra* note 42, at 35.

<sup>58</sup>See J.R. Hayes & L.S. Flower, *Uncovering Cognitive Processes in Writing: An Introduction to Protocol Analysis*, in RESEARCH ON WRITING: PRINCIPLES AND METHODS, at 207-220 (P. Mosenthal, L. Tamon & S. A. Walmsley, eds., 1983).

<sup>59</sup>Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*,

In Lundeberg's study, students "talk aloud" as they read the text; they do not simply read the text and then talk about it in the question-answering discussion.<sup>60</sup> She concluded:

Both the experts and the novices regulated their cognition, but the experts did so in ways that demonstrated knowledge of the text type. Familiarity with text type brings knowledge of and reliance on structure. Specifically, knowledge of case structure enables the reader, for example, to distinguish between language that signals the germane point of the rationale and language that signals dicta (judicial ramblings). Other strategies not used by novices, such as recognizing judges' names, courts, dates, prior court proceedings, and dicta, reflect discrepancies in domain knowledge—the novices' lack of familiarity with law.<sup>61</sup>

Although my students are by no means novices, they have not yet come to terms with their own failure fully to understand text type. Much of the reason they plagiarize from the cases, I argue, is that they do not fully understand that the case can be broken down and paraphrased without losing any of the content. By reading aloud the full text of a case with the professor, or possibly a teaching assistant, the student will be able to stop at any place, comment on what he does or does not understand, and open up a space

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READING RESEARCH Q., Fall 1987, at 407-432. See also Simon Harris, *Reaching Out in Legal Education: Will EALP Be There?*, ENGLISH FOR SPECIFIC PURPOSES, Vol 11, No. 1, 1992, at 19, 22 (criticizing the focus on texts as a model of legal writing and reading).

<sup>60</sup>See Lundeberg, *supra* note 59, at 410.

<sup>61</sup>*Id.* at 417.

for a private exchange.<sup>62</sup> Teaching assistants may help here because they have very recently learned to brief and analyze cases. In either event, the student has the opportunity to learn a skill that depends on one's willingness to reveal one's private ideas to another.<sup>63</sup>

Once the composition process begins, students need considerable Overt Instruction. Although my goal is for students to create the definition for plagiarism that reflects their private ideas about U.S. standards, the standards must be taught. Multiple, recursive exercises are the necessary foundation for acquiring these skills, and the incentive for learning them should be that they are the foundation of any U.S. lawyer's writing practice. Indeed, the skill of paraphrase may well be the most difficult skill for any writer to master.<sup>64</sup>

Systematically teaching summary, paraphrase, and quotation skills is time-intensive and requires working with resistance and frustration from our students.<sup>65</sup> The trade-off of incorporating multiple exercises in a curriculum is interference with students' expectations—which I refer to as the "silver bullet" theory. Chinese learners need explicit, detailed instructions on how to incorporate information

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<sup>62</sup>Teaching assistants have told me that students from China frequently approach them with opinions complaining that they cannot understand why the writing is long-winded and confusing when they are being asked to be clear and concise. A read-aloud protocol gives students a chance to confront and address these complaints in a risk-free environment.

<sup>63</sup>Guidelines for reading cases like those provided by Lundeborg in her study can be quite helpful but will be of little use until students have command of their reading skills.

<sup>64</sup>Myers, *supra* note 7.

<sup>65</sup>ALISON CRAIG, FAILING MY ESL STUDENTS: MY PLAGIARISM EPIPHANY, PERSPECTIVES (2004) (describing her experiences teaching our two-tiered attribution system).

from other sources into their writing, opportunities to practice without consequences, and instruction in how to incorporate their own ideas into their writing. What follows is another engagement that requires Overt Instruction.

### Engagement #2 - "Proper" Attribution Form

One of the more attractive features of the legal writing field is the inspiration and excellent suggestions one receives from creative colleagues. One effective assignment to help students understand how to avoid plagiarism was created by Alison Craig.<sup>66</sup> What is particularly useful is that she anchors the assignment in a realistic scenario in which a senior partner asks a junior partner to draft a memo on the subject of "trespassing" on the Internet. The scenario is this: the junior partner reads the law review article "Getting Cited for Trespass in Cyberspace," by Ritesh Patel. The junior attorney has enough time to read the complete note only. He does not have enough time to look up the cases it contains, and the deadline looms. He must write a memo based on what he has read. The assignment is posed as the following problem: "Based on current law on trespass, will a company with a web site recover in a lawsuit against persons who use 'web crawlers' to access information on the company's site?"<sup>67</sup>

Craig's method for framing a real-life situation and deadline around detailed instruction is to limit the draft to four paragraphs and give the students only the first page of

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<sup>66</sup>Craig, *supra* note 12.

<sup>67</sup>P. M. HOWE, THE PROBLEM QUESTION IN ENGLISH, ENGLISH FOR SPECIFIC PURPOSES 214, 219 Elsevier (1990) (describing the advantages of using the problem-question form).

the memo. Each skill that the student is asked to practice is drawn from a paragraph in the first page of the memo. Thus, the student must make a recommendation and practice the skills of summarizing, directly quoting, and paraphrasing.<sup>68</sup>

To limit the assignment and, I would argue, make clear the metalanguage at work, Craig offers three possible solutions for each paragraph that the students may consult after they attempt the exercise. I use the exercise for group work and allow groups of three or four to negotiate not only which answer is the most correct by U.S. standards, but why.<sup>69</sup> The additional advantage of this assignment is that it is posed as a real world problem, in real-time, with real-time limits. The entire exercise takes place in the span of a two-hour class.

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<sup>68</sup> Items 1-4 that follow outline explicit instructions needed to complete the required tasks?

1) Using Patel's opening paragraph, summarize his ideas in an interesting introduction for your discussion section ... [writer must] Cite to Patel at the end of the first sentence where you use material from the article and at the end of your summary.

2) In order for the senior partner to understand how the tort of trespass applies....correctly introduce and quote from Patel ... [writer must] Cite to Patel ...

3) From paragraph 3 in the note, paraphrase Patel's explanations of what the plaintiff's alleged and what the defendant's claimed ... [writer must] Cite to Patel...

4) Finally, conclude your office memo with a prediction ... Decide if you would recommend that client's with such a problem should sue or not. Explain why you came to that decision.

<sup>69</sup>Choosing from among examples is a less pressured way for students to gain conscious control over the "why" of U.S. attribution standards.

I make several changes to the assignment to accommodate my constituency. I introduce a software piracy problem, more closely related to my theme, and a different law review article. The method is the same. By breaking attribution exercises into small, repetitive chunks, the teacher enforces the level of frustration in the hope of yielding discussion and work product. The assignment, is, in essence, a complete memo, albeit one in four paragraphs. The students are forced to look at the skills on a minute scale. (They might even register their answers on an overhead screen or on a white board.) By forcing the discussion of proper attribution into this very limited text, the calculus may yield something far more important than pristine, American style product. It may yield class discussion and compromise.

There are features of assignment #2 that draw on Jill Ramsfield's notion of contrastive "logic," and a contrastive method that might reveal the cultural basis of logic.<sup>70</sup> Ramsfield suggests contextualizing assignments

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<sup>70</sup>See Ramsfield, *supra* note 6, at 195 (stating "[b]ecause logic is rooted in culture, contrasting analytical paradigms may uncover better solutions to legal problems. Once we define and illustrate <sup>some</sup> typical U.S. paradigms, we can introduce other paradigms, using examples from other disciplines and cultures. We can include in our course materials rules of statutory interpretation that are themselves part of a country's code. We can then contrast those rules with the unwritten rules here. Students can discuss and write responses to the question 'Which result is more "logical" and why?' We can use U.S. cases as examples of analogical reasoning, then show how a judge in a code-based country reaches a conclusion using not by analogy, but plain meaning. Or we can introduce a family of cases construing a U.S. federal statute, then a group of cases construing a code provision elsewhere. We can illustrate the analogical reasoning in each U.S. case and the *stare decisis* development of a rule as the U.S. cases are read together; we can then show how the cases construing a code provision do not necessarily refer to each other, but to a fresh interpretation of the code provision. Then we can assign a short writing assignment



with a discussion of cultural rhetorical approaches in the context of problem-solving.<sup>71</sup> The theory is innovative and sound. My variation calculates that if a student works on a connected set of assignments that force him out of the classroom and into the larger world of practice, he will be motivated to understand not only the disciplinary-specific skills needed to write documents in the U.S. style, but also gain a greater understanding of the social contexts in which the problem is situated. It is the social context in combination with efforts to develop private ideas that help the student to understand the relationship between attribution form and the larger legal system. If he can approximate this task, he is on his way to understanding the U.S. attitudes toward plagiarism. This, in turn, can only enhance his understanding of U.S. intellectual property views on piracy. The goal, of course, is to equip the student with new ways of thinking that might influence his own practice at home.

Students will be asked to garner information from a variety of sources to help them understand their deputized roles, and to be prepared to discuss contrasting Chinese and U.S. views on intellectual property and software piracy. However, the attribution exercise, or any other exercise employing online sources (including Westlaw and Lexis), is useless if they do not understand the value given to those sources in the U.S. academic legal society. It is here that

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requiring students to 'reason' using each paradigm. Use of contrasting paradigms can illustrate stare decisis principles in a first-year course or advance trade practice trends in an advanced international trade course. Students can then apply contrasting paradigm by, first, reading foreign statutes that cover the same material covered in the class text and, second, writing out how they think a foreign court will construe the statute. Then we can offer an actual case construing that foreign statute, which can start a discussion of 'logic' and its cultural bases.").

<sup>71</sup> *Id.*

the third element of The New London Group's practice "Critical Framing" comes into clear focus.<sup>72</sup>

The goal of Critical Framing is to help learners frame their growing mastery in practice (from Situated Practice) and conscious control and understanding (from Overt Instruction) in relation to the historical, social, cultural, political, ideological, and value-centered relations of particular systems of knowledge and social practice. Here, crucially, the teacher must help learners to denaturalize and make strange again what they have learned and mastered.<sup>73</sup>

I use the exercise that follows to help students understand the intellectual property debate and the wide range of discourse used in that debate. As I adapt it, however, it is possible to frame legal scholarship in the manner described above. Students distance themselves from U.S. legal sources then critique them in the context of the U.S. legal culture they have come to understand. The goal of such an exercise is that when they come to draw on sources of their own choosing, they do so with complete understanding of the weight the sources have in our culture and their own.

### Engagement #3: Identifying The Weight Of Legal Scholarship

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<sup>72</sup>To reiterate, these elements are recursive and developmental, not linear. Critical Framing may occur as early as the diagnostic assignment as the students begin to view their assignment in the context of their own system. Later, of course, the teacher provides the opportunities for students to interpret the social and cultural context of a particular form of legal meaning.

<sup>73</sup>The New London Group, *supra* note 42 at 34.

In his influential article, *Teaching Foreign LL.M. Students about Legal Scholarship*,<sup>74</sup> Matthew Edwards navigates tricky distinctions that are often lost on Chinese students. For example, he explains that although Professors often want papers to be original and prescriptive, the originality required is modest and quite possible for a student to achieve.<sup>75</sup> He makes the important point that our foreign students need to know how much disagreement exists in the legal community about trends in scholarship, what legal scholars should do, and what should count as scholarship for hiring and tenure decisions.<sup>76</sup>

Edwards's demonstration is intended to make students aware that all scholars will take a stand on the debates in legal scholarship by the forms they choose.<sup>77</sup> By selecting a given approach, a scholar makes a statement about what is useful, and what is acceptable. In addition, the choices they make influence their success in the academy.<sup>78</sup> Our students may not be writing scholarly articles here or in China, but our system of attribution and our reliance on mandatory and persuasive sources is directly tied to this debate. Accordingly, the debate can be modified to underscore U.S. reliance on sources—something students must know to understand U.S. attitudes toward plagiarism. If there were no other reason to use this demonstration, it would be useful in that it exposes students to the extent to which U.S. scholarly legal debate cannot exist without attribution and citation.

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<sup>74</sup>Matthew Edwards, *Teaching Foreign LL.M. Students About U.S. Legal Scholarship*, 51 J. LEGAL EDUC. 520 (2000).

<sup>75</sup>*Id.* at 523-524.

<sup>76</sup>*Id.* at 524.

<sup>77</sup>*Id.* at 526.

<sup>78</sup>*Id.* at 526, 531.

Any number of topics could be used in this demonstration. Edwards has students read two articles about the racial impact of crack cocaine sentencing. Next, he opens up the question of what impact a variety of sources—from non-academic writing like op-ed pieces, to books and law review articles—would have on the public, the legal community, and legislators. Although Matthew Edwards points to Ramsfield's work on contrastive rhetoric as a source for the discussion of international students' understanding of "dominant forms of discourse," he does not use this exercise to contrast U.S. forms of legal scholarship with those of other countries.<sup>79</sup>

I take the exercise in a complementary but slightly different direction by introducing the contrastive element. This requires adjusting one's expectations and taking into account the idea that different cultures express opinion and dissent in different fashions. I introduce an *amicus curiae* brief, op-ed pieces, books, law review articles, and other materials that express a range of opinions on the issues of software piracy in the U.S. and China.<sup>80</sup> Students may thus debate the issues at the same time they come to understand what significance a particular form of discourse might have on legal and non-legal audiences.

The contrastive element of the assignment requires using a range of sources expressing a range of opinions, but all related to the theme of software piracy.<sup>81</sup>

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<sup>79</sup>*Id.* at 520.

<sup>80</sup>See Edwards, *supra* note 74 at 528 ("Amicus curiae briefs and judicial biographies would be two other possibilities, and it might also be useful to include a work of jurisprudence or legal philosophy.").

<sup>81</sup>A good cross-section might include: Ronald V. Bettig, *The (Political) Economics of Intellectual Property*, in *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY*, 73-103 (1996); Anthony L. Clapps, *The Augury of the Dismal Scientists*

Edwards's purpose is to help foreign students discover "what type of scholarship they wish to produce."<sup>82</sup> My purpose is related, but intended even more to give students a full definition and illustration of the rules of the game before they are asked to play. "Critical Framing" requires, most importantly, that "students show that they know what the Design is for: what it does, why it does it and whose interests it serves."<sup>83</sup>

With the help of engagements like the three described above, students may be prepared for what the New London Group describes as "Transformed Tractice" – in essence, taking new skills and applying them to a new context: "transfer in meaning-making practice which puts the transformed meaning (the Redesigned) to work in other contexts or cultural sites."<sup>84</sup>

This "Transformed Practice" may be demonstrated in the students' final assignment: a persuasive letter:

### Assignment #3

#### A.

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*An Introduction to the Economics of Intellectual Property Theft*, in *SOFTWARES: THE LEGAL BATTLES FOR CONTROL OF THE CLOGAL SOFTWARE INDUSTRY*; Curtis W. Cook, *Why Nations Condone Intellectual Property Theft and the Economics of Intellectual Property Theft*, in *HOW INTELLECTUAL PROPERTY RULES THE GLOBAL ECONOMY*, 116-18 (2002); John Gantz & Jack B. Rochester, *Hidden Costs of Software Piracy*, in *PIRATES OF THE DIGITAL MILLENIUM: HOW THE INTELLECTUAL PROPERTY WARS DAMAGES OUR PERSONAL FREEDOMS, OUR JOBS, AND THE WORLD ECONOMY*, 152-56 (2005); Meheroo Jussawalla, *The Legal Framework as it Exists in Various Countries: The United States*, in *THE ECONOMICS OF INTELLECTUAL PROPERTY IN A WORLD WITHOUT FRONTIERS*, 61-73 1992.

<sup>82</sup>Edwards, *supra* note 74, at 532.

<sup>83</sup>Kalantzis & Cope, *supra* note 44, at 247.

<sup>84</sup>The New London Group, *supra* note 42 at 35.

You are the United States Attorney in Philadelphia. One of your assistants has authored a memorandum explaining that insufficient evidence is available to prosecute Smith under federal law. Accordingly, you have decided not to charge Smith criminally. Representative Green, who chairs a Congressional Committee investigating white collar crime, has sent you a letter asking why your Office has decided not to prosecute Smith. Your office normally does not publicly explain decisions not to prosecute. Because of the heavy publicity respecting Smith, however, you have decided to respond in writing to Green. Prepare a letter of 750-1000 words to Green explaining your decision not to prosecute.

B.

You are an associate at Grey & Grey, a Philadelphia law firm that represents Smith. Micro-Comp and United Pictures have publicly announced that they intend to sue for the harm he has done to them. Smith is concerned about that potential lawsuit, and wants to know just how serious it might be. A partner has asked you to prepare a letter to Smith, explaining his potential civil liability, including potential damages. Please prepare this letter. It should be 750-1000 words.

The students will take the position they have occupied throughout the semester: prosecutor or civil

lawyer. Now, however, they must communicate using the skills they have gained to write for a particular cultural context in a form far more demanding than what they have been asked to do before.

At this point, the students will have written a memorandum and will be comfortable with the law. The focus will now shift to audience. It is in the very recursiveness of the exercises that the students will have developed the language with which they can express their individualized thoughts. "Transformed Practice" implies that the students have learned new legal meanings that they are now ready to try to apply in new contexts, but they must approach those new contexts for their own "real purposes."<sup>85</sup> There is no question that this final element will continue to relate to the other three: a student may need to return to Overt Instruction repeatedly for increasingly explicit information about, for example, bringing one's voice into a U.S. style letter. In the words of The New London Group, Transformed Practice allows students to "demonstrate how they can design and carry out, in a reflective manner, new practices embedded in their own goals and values."<sup>86</sup> It is because their goals and values have not simply been preserved, but drawn into the creative process, that we can hold out hope that the tools we have shared with our students will be tools they use after they return home.

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<sup>85</sup>The New London Group, *supra* note 42, at 36 (Using the following fascinating example of "Transformed Practice": "[H]ow can a person be a 'real' lawyer and, at the same time, have his or her performance influenced by being an African-American? In his arguments before the U.S. Supreme Court for desegregating schools, Thurgood Marshall did this in a classic way. And in mixing the discourse of politics with the discourse of African-American religion, Jesse Jackson has transformed the former. The key here is juxtaposition, integration, and living with tension.").

<sup>86</sup>*Id.* at 35.

The method I describe in this article will not prevent a good deal of intentional and unintentional plagiarism. To explain why I welcome future encounters with Chinese students who plagiarize, I turn to Pennycook and his call for reflexivity:

although of course we still need to leave a space open to criticize unacceptable borrowing practices, unilateral accusations of plagiarism are inadequate and arrogant... behind this clumsy term [plagiarism] may lurk any number of different concerns, and so, despite the demands on our time that such reflexivity may make, I believe it is incumbent on us as teachers to develop an understanding of the complexity of issues involved in language learning and textual borrowing.<sup>87</sup>

The reflexivity Pennycook writes about is one that I have attempted to demonstrate through the calculus that I have described. True self-reflexivity can take place, however, only when one understands the complex needs of oneself, one's institution, and one's constituency. Flexibility and a willingness to look beyond our received practices are elements that will be required if we hope to communicate the rationale of our textual practices to Chinese students.

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<sup>87</sup>Pennycook, *supra* note 7, at 226. *But cf.* REBECCA MOORE HOWARD, *STANDING IN THE SHADOW OF GIANTS: PLAGIARISTS, AUTHORS, COLLABORATORS* 117-120 (1999) (arguing that patchworking should be seen as a legitimate part of the learning process – irrespective of proper citation).



