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Self-Plagiarism

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SELF-PLAGIARISM

JOSH BLACKMAN*

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“I often quote myself. It adds spice to my conversation.”

- George Bernard Shaw

“Life, liberty and the pursuit of happiness.’

We fought for these ideals; we shouldn’t settle for less;

These are wise words, enterprising men quote ‘em;

Don’t act surprised, you guys, cuz I wrote ‘em.”

- Thomas Jefferson¹

I. INTRODUCTION

Imagine my excitement when I received an invitation, out of the blue, to publish in the *Harvard Law Review’s* prestigious Supreme Court issue. At first, I worried it was a prank, so I googled the senders to make sure they were actually editors. Everything checked out. Here was the pitch: I had exactly twenty-one days to deliver a 15,000-word draft analyzing the Supreme Court’s recent opinion in *Zubik v. Burwell*,² along with the then-pending decision in *United States v. Texas*.³ Fortunately, this task was not nearly as daunting as it may seem. “I’ve already completed my chapters about *Zubik* for my new book,”⁴ I replied to the editors. I added that “[i]t shouldn’t be too difficult to adapt the background I wrote about the case for a piece along the lines you suggested.” As for *Texas*, I had already written three law review articles about the case,⁵ and co-authored three amicus briefs for the litigation.⁶ All of the basics were ready to go. I reviewed the publication con-

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1. Lin-Manuel Miranda, *Cabinet Battle #1*, HAMILTON: AN AMERICAN MUSICAL, <http://genius.com/Lin-manuel-miranda-cabinet-battle-1-lyrics> [<https://perma.cc/5PS9-KHEX>].

2. 136 S. Ct. 1557 (2016).

3. 136 S. Ct. 2271 (2016).

4. See JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER 501-60 (2016).

5. Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213 (2015); Josh Blackman, *Immigration Inside the Law*, 55 WASHBURN L.J. 31 (2015).

6. See Brief for the Cato Institute et al. as Amici Curiae Supporting Respondents at 24-25, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674); Brief of the Cato Insti-

tract. Paragraph five stated, “[y]ou represent and warrant to the best of your knowledge and ability that your manuscript is original with you, provides appropriate credit to sources used by you . . . and does not in any other manner infringe upon the copyrights or other rights of any person.” I returned the signed contract and began to write *Gridlock*, relying heavily on my prior works.⁷

Everything moved smoothly through the first three rounds of review—there would be eight in total—until I received an unexpected email from the Review: “a number of excerpts from *Gridlock* appear to be substantially the same as material from” your book and articles. “We certainly understand that, particularly for some of the factual reporting,” the editor wrote, “there often just are not many ways to say the same thing.” Yet, “[t]he Review has a tradition of publishing unique scholarship, so while it’s perfectly fine to cite to and build from your prior work, we want to make sure the material in *Gridlock* is distinct from that work.” Thus began my crash course with a concept I had never before considered: “self-plagiarism.”

The editors and I were quickly confronted with a series of difficult ethical questions for which there were no clear answers. How much text could be quoted verbatim? How substantially must prior writings be rephrased? Did *all* analysis have to be novel to the Review? During this expedited process, I was struck by how little legal scholarship addressed these quandaries that most authors (myself included) took for granted. Fittingly, several of the specific questions we confronted were of first impression for the century-old institution. In fairly short order—the article was scheduled to go to press only a month later—we arrived at a series of compromises. Through this Essay, I hope to share these lessons and use my publication experience to provide much-needed guidance to writers and editors alike about self-plagiarism.

Part I provides a brief overview of the legal, ethical, and professional implications of plagiarism. Part II introduces the counterintuitive concept of self-plagiarism, which occurs when an author reuses material from something he or she previously wrote. Self-plagiarism can manifest itself in three primary forms. Part III addresses the first aspect—the so called “recycled text”—where an author copies sentences, paragraphs, or even pages, verbatim, from an earlier work. Consistent with guidance from other scholarly disciplines, as well as the fair use doctrine, *small* blocks of text can be quoted verbatim, so long as they are cited and are reproduced only when necessary.

tute & Professor Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellees, Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238); Brief as Friends of the Court Supporting Plaintiffs of the Cato Institute & Law Professors, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254).

7. See Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241 (2016).

Part IV considers a second species of self-plagiarism, where the author substantially rephrases text from an earlier work. This approach is particularly well-suited for background material. For such writings, which the editors dubbed “reporting,” neither the reader nor the publication expects novelty. So long as the author signals to the reader the provenance of the rephrased prefatory text, this approach is permissible.

Part V focuses on a third area where I did not agree with the editors but acquiesced given the Review’s ultimate prerogative to publish. As distinguished from the “reporting,” which could be substantially rephrased, the editors insisted that all “arguments” be novel. Whatever *de minimis* benefit can be derived from offering *entirely* new analysis is substantially outweighed by the policy’s impediment to the iterative scholarly process. Professors who build up a body of work over time should not be expected to completely reinvent every wheel for each new published article—especially for an article solicited based on that body of work. At bottom, there truly is nothing new under the sun.⁸

II. PLAGIARISM

Plagiarism, as defined by the Modern Language Association (MLA), amounts to “presenting another person’s ideas, information, expressions, or entire work as one’s own.”⁹ Plagiarism has ethical, legal, and professional pitfalls. First, the MLA views plagiarism as “a kind of fraud,” because the author attempts to “deceiv[e] others to gain something of value.”¹⁰ Plagiarists are often branded with a “stigma” that “seems never to fade completely,”¹¹ because their future work cannot be implicitly trusted. In addition to suffering reputational harm, copycats may be on the hook for damages. Plagiarism may also violate copyright law, which is designed to protect the author *and* the publisher’s rights to the expression of ideas.¹²

Finally—unlike celebrities and politicians, who routinely employ ghostwriters—academics face a distinct sanction for plagiarism. Because promotion and tenure often turn on “the number and the quality of publications,”¹³ plagiarism allows a professor to deceive review-

8. See *infra* note 98.

9. THE MODERN LANGUAGE ASSOCIATION OF AMERICA, *MLA HANDBOOK* 6-7 (8th ed. 2016).

10. *Id.* at 7.

11. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 37 (2007).

12. *A Brief Introduction and History*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ1a.html> [<https://perma.cc/5K2D-4DUG>].

13. MIGUEL ROIG, *AVOIDING PLAGIARISM, SELF-PLAGIARISM, AND OTHER QUESTIONABLE WRITING PRACTICES: A GUIDE TO ETHICAL WRITING* 17 (2015), <https://ori.hhs.gov/sites/default/files/plagiarism.pdf>.

ers about his or her scholarly agenda. Copying from another “giv[es] the impression that you have written or thought something that you have in fact borrowed.”¹⁴ Excessive copying can also “suggest a certain degree of scholarly laziness.”¹⁵

None of these rationales, however, apply squarely to the counter-intuitive concept of “self-plagiarism.” Generally, this practice, also referred to as “autoplagerism,” refers to an author reproducing content from his or her own previous writings. It does not, as the MLA proscribes, “present[] another person’s . . . work as one’s own.”¹⁶ It presents one’s old work as one’s new work.

III. SELF-PLAGIARISM

Within legal academia, “little consensus” exists about the ethicality of self-plagiarism.¹⁷ Contributing to this uncertainty, perhaps, is the inescapable fact that so much of legal work product is deliberately repetitive. “[O]riginality,” Judge Posner wryly notes, “is not highly prized in law.”¹⁸ And this lack of originality is not necessarily a bad thing. Contracts, deeds, and other legal instruments have contained nearly-identical language since time immemorial,¹⁹ for reasons often lost to the sands of time.²⁰ Beyond preserving precedential value, repetitiveness also has an economical function: attorneys, who bill by the hour, are encouraged to recycle boilerplate provisions to expedite the drafting process and ensure interpretive uniformity.²¹

Even courts engage in blatant self-plagiarism. Judge Gerald Lebovits, who serves on the bench in New York City, recognized that

14. Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J.C. & U.L. 511, 528 n.75 (2013) (citing *Hart v. Univ. of Scranton*, No. 3:11-CV-1576, 2012 U.S. Dist. LEXIS 42629 (M.D. Pa. Mar. 28, 2012)).

15. ROIG, *supra* note 13, at 24.

16. MLA HANDBOOK, *supra* note 9, at 6-7.

17. Lee, *supra* note 14, at 528 n.75.

18. POSNER, *supra* note 11, at 15.

19. DUKEMINIER ET AL., *PROPERTY: CONCISE EDITION* 389 (2d ed. 2017) (“The clause beginning ‘To have and to hold’ is known as the habendum clause (after the Latin *habendum et tenendum*). (Early deeds were written in Latin, the language of clerks (clerics).) The habendum clause had the function in feudal times of declaring of which lord the land was held and by what services. Modern deeds usually contain a habendum clause, which is unnecessary but may function to limit the estate granted in some way.”).

20. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”).

21. Jeremiah T. Reynolds, *Defending Boilerplate in Contracts*, L.A. LAWYER, Dec. 2008, at 10 (“Boilerplate language dramatically reduces transaction costs by allowing parties to rely upon standard contractual language that they know will be interpreted uniformly regardless of the jurisdiction.”).

for a judge, “[b]oilerplate saves time” and is “convenient.”²² He wrote that “[f]aced with ever-increasing caseloads, judges are tempted to rely on the same cases or language to resolve issues encountered repeatedly.”²³ Through a practice known as “copy-paste precedent,” courts often repeat, verbatim, text from unpublished opinions that are not supposed to be precedential, but invariably are cited.²⁴ Often judicial plagiarism is not limited to selfies. Judge Posner observes that most *other* judges “insert into their opinions, without attribution, verbatim passages from lawyers’ briefs.”²⁵

For these reasons, it is perhaps unsurprising that self-plagiarism has received so little attention within legal scholarship. A search for the term “self-plagiarism” on the Westlaw *Law Reviews and Journals* database yields roughly three-dozen results. Virtually all of the articles acknowledge the problem, but offer, at most, a few cursory sentences of analysis.²⁶ None provide a full-length treatment of the topic. I had never even considered the concept until receiving that unexpected email from the *Harvard Law Review*. I suspect I am not alone.

Scholars in other disciplines, however, have analyzed the issue in far more depth. Uniformly, their critiques center on the expectations of readers. Professor Miguel Roig, who teaches psychology at St. John’s University in New York, authored one of the most authoritative treatments on the subject.²⁷ He stresses that the problems from self-plagiarism arise when “authors who reuse their own previously disseminated content” attempt to “pass it off as a ‘new’ product without letting the reader know that this material has appeared previously.”²⁸ Patrick Scanlon, a professor of communications at Rochester Institute of Technology, explains that with self-plagiarized material, readers “are presented with material they believe is original, when it is not; they are denied a link to the true source of the information, which they assume they have before them; and they are duped into accepting the author’s credibility, which is undeserved.”²⁹ Professor Irving Hexham, who teaches religious studies at the University of

22. Gerald Lebovits, *Ethical Judicial Writing—Part III*, 79 N.Y. ST. B. ASSOC. J., Feb. 2007, at 64.

23. *Id.*

24. See Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153 (2012).

25. POSNER, *supra* note 11, at 21.

26. See, e.g., Michael G. Bennett, *The Edge of Ethics in Iparadigms*, 2009 B.C. INTEL. PROP. & TECH. F. 100601; Ralph D. Mawdsley, *The Tangled Web of Plagiarism Litigation: Sorting out the Legal Issues*, 2009 B.Y.U. EDUC. & L.J. 245.

27. ROIG, *supra* note 13.

28. *Id.* at 16.

29. Patrick M. Scanlon, *Song from Myself: An Anatomy of Self-Plagiarism*, PLAGIARY, 2007, at 62, <http://quod.lib.umich.edu/p/plag/5240451.0002.007/--song-from-myself-an-anatomy-of-self-plagiarism?rgn=main;view=fulltext> [<https://perma.cc/D5BU-3NVC>].

Calgary, states the issue succinctly: “the essence of self-plagiarism is the author attempts to deceive the reader.”³⁰

The few legal scholars who have addressed this topic have likewise viewed self-plagiarism through the lens of the familiar doctrine of fraud. Professor Stuart P. Green writes that readers of self-plagiarism “are *deceived* into believing that [the author’s] work is original.”³¹ Laurie Stearns contends that self-plagiarism is particularly “troublesome” because it “primarily harms the audience rather than the author.”³² It is “objectionable,” she writes, “only when it results from . . . the *desire to mislead*.”³³ Stearns adds, “readers are left feeling that they have received less than they had bargained for” because they “invest[ed] time or money in a work with the expectation that its contents are different from, or at least differently expressed than, the contents of the author’s other works.”³⁴

Judge Posner takes a more narrow view. Plagiarism, he writes, consists of more than “deceitful” copying, which “mislead[s] the intended reader[. . .].”³⁵ The act also must “induce *reliance*.”³⁶ That is, the reader takes some action because “he thinks the plagiarizing work [is] original that he would not have done had he known the truth.”³⁷ In the parlance, this effect is known as “‘detrimental’ reliance.”³⁸ Alas, reliance will usually be minimal. For most cases, the reliance interest—at best—is the time needed to read the plagiarized material under the supposition that it is novel.

Posner tempers this estoppel-esque argument, because he deems self-plagiarism to be “very widespread.”³⁹ He acknowledges that “readers should realize that authors repeat themselves” and resist “[t]he temptation to lump distinct practices in with plagiarism,” such a self-plagiarism, which is “rarely . . . objectionable.”⁴⁰ Present company included. Stearns observes that sections of two articles Posner

30. Irving Hexham, *The Plague of Plagiarism: Academic Plagiarism Defined* (2005), http://www.understandingworldreligions.com/research_methods/plague-of-plagiarism.html [<https://perma.cc/K3JM-22SG>].

31. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 191 (2002) (emphasis added).

32. Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 543 (1992).

33. *Id.* at 544 (emphasis added).

34. *Id.*

35. POSNER, *supra* note 11, at 19.

36. *Id.*

37. *Id.*

38. *Id.* at 19-20.

39. *Id.* at 41.

40. *Id.* at 43, 108.

authored in 1988⁴¹ and 1989,⁴² respectively, about (of all topics!) the economics of copyright law “echo[]” each other, nearly verbatim.⁴³ “Neither source,” she writes, “cites the other.”⁴⁴

As with most ethical questions, context matters. The remainder of this Essay considers three species of autoplaiarism: so-called *recycled text*, substantially rephrased text, and the need to reinvent ideas anew.

IV. TEXT RECYCLING

The most blatant form of self-plagiarism occurs when an author copies-and-pastes text, verbatim, from a prior work. Such “text recycling,” Professor Scanlon observes, “presents the most problematic instance of self-plagiarism.”⁴⁵ If self-plagiarism is viewed as fraud on the reader, the ethical problems rise to their apex when the reader cannot tell whether the content is new or old. Text recycling can occur along a gradient. On the extreme end of the scale, a scholar may attempt to republish an article, *in its entirety*, in a second journal. The second edition of the *MLA Style Manual and Guide to Scholarly Publishing* provides that “professionals *generally* disapprove if previously published work is reissued, whether verbatim or slightly revised, under another title or in some other manner that gives the impression it is a new work.”⁴⁶ The eighth and most recent edition of the *MLA Handbook*, does not address this topic.

Judge Posner, who takes a largely ambivalent approach to self-plagiarism, admits that “it is only wholesale and literal repetition that should disappoint” readers.⁴⁷ Although, in certain academic contexts, wholesale reproduction may be acceptable, and indeed desirable. For example, “a long-standing tradition” among academics, Professor Roig notes, is to convert an informal “conference paper” into a later-in-time published paper in a journal.⁴⁸ This practice, he writes, “has generally been always acceptable.”⁴⁹

A far more common practice involves copying sentences, paragraphs, or perhaps even pages, without any alterations. The easiest

41. See RICHARD A. POSNER, LAW AND LITERATURE 350-51 (1988).

42. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 359-60 (1989).

43. Stearns, *supra* note 32, at 543.

44. *Id.* at 543-44 n.159.

45. Scanlon, *supra* note 29, at 59-60.

46. *Id.* at 58 (quoting THE MODERN LANGUAGE ASSOCIATION OF AMERICA, *MLA STYLE MANUAL AND GUIDE TO SCHOLARLY PUBLISHING* 152 (2nd ed. 1998)).

47. POSNER, *supra* note 11, at 43.

48. ROIG, *supra* note 13, at 26.

49. *Id.*

solution to such small-scale text-recycling is to simply bracket the content with quotation marks and cite the earlier work. Roig stresses that “one should be free to reuse with proper attribution and quotation one’s earlier work.”⁵⁰ This workaround, however, runs headlong into copyright law. Though the same author wrote both texts, in most cases, the copyright is held in whole or in part by the earlier journal. Copying too much text verbatim—even with quotation marks—without permission, could give rise to an infringement suit.⁵¹

As a practical matter, the likelihood that the earlier journal would sue and prevail over the repeating author is slim. Professor Pamela Samuelson identified only a single case in U.S. copyright history where “the owner of a copyright won an infringement lawsuit against a self-plagiarist,” which involved a photograph rather than literary text.⁵² Professor Jeffrey Malkan concurred: “Even though the self-plagiarist had access to his own prior work,” he wrote, “and presumably repeated (i.e., copied) himself (consciously or unconsciously), he is usually excused from liability for copyright infringement.”⁵³ Indeed, recall our earlier discussion of courts’ affinity for using boilerplate language. Professor Samuelson noted that “one can detect in the judicial opinions written about [self-plagiarism] some sympathy with the plight of an author who returns to a familiar theme.”⁵⁴ The term “self-plagiarism” is mentioned in six reported decisions (curiously, five of which are from Ohio); none concluded that the behavior constituted academic misconduct.⁵⁵

50. *Id.*

51. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 540-65 (2004).

52. Pamela Samuelson, *Self-Plagiarism or Fair Use?*, Vol. 37 COMMS. OF THE ACM, No. 8, 1994, at 22 (citing *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914)).

53. Jeffrey Malkan, *What Is A Copy?*, 23 CARDOZO ARTS & ENT. L.J. 419, 446 n.97 (2005).

54. Samuelson, *supra* note 52, at 23.

55. *Szeinbach v. Ohio State Univ.*, 987 F. Supp. 2d 732, 740 n.6 (S.D. Ohio 2013) (“The Preliminary Report rebuked, although it did not find misconduct on the part of, Szeinbach for self-plagiarism.”); *Ashraf v. Boat*, No. 1:13-CV-533, 2013 WL 4017642, at *1 (S.D. Ohio Aug. 6, 2013) (“In August 2012, the University decided to conduct an investigation into whether Dr. Ashraf had committed self-plagiarism or other research misconduct.”); *Agrawal v. Univ. of Cincinnati*, 977 F. Supp. 2d 800, 812 (S.D. Ohio 2013) (“Xie’s accusation of self-plagiarism against Dr. Agrawal was separately investigated . . . [and the investigators] concluded that Dr. Agrawal had improperly replicated some of his own previously published work in a subsequent professional publication, but that the issue was not worth further pursuit by UC based on the type of publication that was involved.”); *Szeinbach v. Ohio State Univ.*, No. 2:08-CV-822, 2014 WL 2453021, at *3 (S.D. Ohio June 2, 2014) (“Witness denies knowledge of receiving ORI self-plagiarism policies.”); *Nuovo v. Whitacre*, No. 2:10-CV-240, 2010 WL 2294271, at *2 (S.D. Ohio June 3, 2010) (“This committee, not part of the earlier investigation into [the] [p]laintiff, essentially found that Barsky had either engaged in self-plagiarism (not within the institutional definition of misconduct) or that he had committed unintentional errors. The committee concluded that there was insufficient evidence of research misconduct by Barsky.”); *Murphy v. Expert Bldg.*

Law reviews, which are overly risk averse, however, would not leave such a decision to chance. (And is there any other way to describe student-run publications that haze 2Ls over how many angels can dance on the head of an italicized period?). If permission cannot be obtained, the doctrine of *fair use* will constrain the extent of permissible copying. The American Psychological Association's (APA) publication manual does not prohibit self-plagiarism outright, but instead establishes that "[w]hen duplication of one's own words is more extensive, citation of the duplicated words should be the norm."⁵⁶ This norm, bounded by "legal notions of fair use," suggests that "single text extracts" should be "fewer than 400 words."⁵⁷ But this standard is far from a bright-line rule. Professor Pamela Samuelson, based on "informal inquires . . . among friends," identified a "30 [percent] . . . rule of thumb."⁵⁸ That is, "if one reuses no more than 30 [percent] of one's prose in another article, that's OK."⁵⁹ Samuelson, however, acknowledges this is a "grey zone" and would "not recommend any greater reuse than this, and very likely would recommend less than that, unless one has sought permission for the reuse."⁶⁰

If an author is inclined to recycle text, he or she should first seek written permission from the earlier journal (of course, the author does not need to introspectively seek permission from within). Student-organized law reviews are more likely to grant a royalty-free license to reproduce content from a prior work. In contrast, peer-reviewed journals in other disciplines, which are often owned by publishing conglomerates, are less likely to be forthcoming. If permission is not granted, the APA's guidance is a helpful starting point: any verbatim copying should be limited to roughly four-hundred words—under the fair use doctrine—so long as there are quotation marks and citations to the original source.⁶¹ If permission is granted, a longer sample can be reproduced.

For most legal scholarship, however, this approach is simply not practicable. Journals are likely to reject repeated uses of block quotes, which are unsightly. Take it from my experience: the editors of the *Harvard Law Review* deemed the recycle-and-quote approach quite undesirable and urged me to "use this solution sparingly." In certain

Maint. & Repair Co., No. 85 C 05127, 1986 WL 1020, at *1 (N.D. Ill. Jan. 2, 1986) ("This opinion will indulge in some permissible self-plagiarism by drawing on relevant parts of the *Passarella* opinion.").

56. AMERICAN PSYCHOLOGICAL ASSOCIATION, PUBLICATION MANUAL 16, 173 (6th ed. 2010).

57. *Id.*

58. Samuelson, *supra* note 52, at 24.

59. *Id.*

60. *Id.*

61. *See* PUBLICATION MANUAL, *supra* note 56 and accompanying text.

cases, to “preserve the euphony of a given phrase you’ve already turned,” they explained, it was “especially appropriate.” But for virtually all other instances, it is not suitable for publication. In the rare situations where recycling was used, I utilized several signals to flag for the reader that the writing was not novel, including “as I’ve noted elsewhere” and “as I’ve argued elsewhere.”⁶² Unbeknownst to me, Professor Roig suggested a similar prefatory note—“[a]s I described in my doctoral thesis”—as a means to “alert the reader” of the reproduction.⁶³

In most other situations, however, recycling was out of the question. I was asked to substantially paraphrase the old text or to reinvent even the wheel.

V. SUBSTANTIAL REPHRASING

One of the most commonly used methods to avoid charges of plagiarism is to rephrase, rather than reproduce, an earlier writing. But this is hardly a foolproof solution. “[Y]ou need not copy an author’s words to be guilty of plagiarism,” notes the *MLA Handbook*, because “paraphras[ing] someone’s ideas or arguments without giving credit for their origin” is also plagiarism.⁶⁴ Once again, this sort of justification does not fit neatly into the self-plagiarism paradigm.

As a threshold matter, copyright law protects not only the precise wording of an idea, but also the idea itself. Paraphrasing an idea an author previously expressed in a copyrighted work could still give rise to an infringement cause of action. To use an example from the arts, if a musician records a song with one label and then samples that tune in a song for another label, there may be a copyright violation. The inevitable question arises then: “[h]ow loose must a paraphrase be to escape infringing?”⁶⁵

Paraphrasing is most suitable where the ideas expressed are not novel. Writers in other disciplines have addressed this issue in the context of a “literature review” or “methods” section of their scholarship. Professor Scanlon observes that when reproducing “introductory background material” or “literature review text,” “originality

62. See e.g., *Gridlock*, *supra* note 7, at 248 (“As I have argued elsewhere, the IOM’s 250-page report made no reference to ‘religion’”) (emphasis added); *id.* at 253 (“Employing what I’ve referred to elsewhere as government by blog post”) (emphasis added); *id.* at 277 (quoting JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER 533 (2016)) (“As I noted elsewhere, the ‘decision scrounged together three cases to demonstrate that “this Court has taken similar action in other cases in the past.’ ”) (emphasis added) (citation omitted); *id.* at 298-99 (“As I noted elsewhere, only a few hours later, the President explained in impromptu remarks delivered in the Rose Garden that he would take immigration reform into his own hands.”) (emphases added) (citations omitted, no irony intended).

63. ROIG, *supra* note 13, at 27.

64. MLA HANDBOOK, *supra* note 9, at 9.

65. POSNER, *supra* note 11, at 13.

seems much less important.”⁶⁶ He adds that due to their “foundational” nature, “any significant alterations from one publication to the next could actually be a source of confusion for readers.”⁶⁷ Dr. Dov Greenbaum wrote that in scientific research, “reus[ing] . . . an introduction from an older paper in a more recent publication” is seen as a “less serious” form of self-plagiarism, because it does “not damage the authenticity of the research.”⁶⁸ Professor Roig writes that for scientific articles produced by the same author, “identical so-called boilerplate text in sections that describe these same complex processes or procedures” as well as the “less complex” “literature reviews,” where authors “summarize others’ work,” “should be deemed acceptable.”⁶⁹ However, there is “no clear consensus on this matter,” he notes, as some journals “may allow the reuse of text from literature reviews and methods sections,” while others do not.⁷⁰

The Office of Research Integrity, a division within the Department of Health and Human Services, stresses that “identical or nearly-identical phrases which describe a commonly-used methodology or previous research” does not cause ethical concerns because they are not “substantially misleading to the reader or of great significance.”⁷¹ Professor Scanlon recalls an incident where his university found that self-plagiarism through “repetition of text” “did not constitute academic fraud” because the two “topics were so closely related and the analyses were based on data from a common source.”⁷² He stressed that the reuse was “perhaps unavoidable” in light of the fact that the “research context was nearly identical for both papers,” and this practice was “not uncommon in published studies of this kind.”⁷³

In the context of legal scholarship, such repetitive content usually appears in the introductory sections of articles. When reciting background material, such as the procedural posture of a case, the legislative history of a statute, or the evolution of a legal doctrine, novelty is often undesirable.⁷⁴ For such foundational topics, authors are expected to recount a dispassionate chronology. Even if the scholar is challenging a conventional narrative, most such articles begin by ex-

66. Scanlon, *supra* note 29, at 63.

67. *Id.*

68. Dr. Dov Greenbaum, *Research Fraud: Methods for Dealing with an Issue that Negatively Impacts Society’s View of Science*, 10 COLUM. SCI. & TECH. L. REV. 61, 86 (2009).

69. ROIG, *supra* note 13, at 22-23.

70. *Id.* at 23.

71. *Id.* at 24.

72. Scanlon, *supra* note 29, at 57.

73. *Id.*

74. ROIG, *supra* note 13, at 21 (“Authors who engage in programmatic research often end up writing a series of related papers each of which describes individual empirical investigations that use similar or nearly identical methodologies.”).

plaining how a given law or case is presently understood. Generally, when a scholar focuses on a specific area of law or writes several articles on the same topic, it becomes essential to write about the same history over and over and over again. These discourses will invariably be similar. Reinventing this wheel is an unjustifiable waste of time, as readers cannot plausibly expect originality in such prefatory contexts.

Consider my own scholarship: I wrote several articles and briefs discussing President Obama's executive actions on immigration, along with the resulting litigation.⁷⁵ There are only so many ways to describe the defeat of immigration bills in Congress, the resulting executive memoranda, and the subsequent district and circuit court litigation. With respect to these historical materials, the *Harvard Law Review* editors and I agreed that substantial rephrasing was an acceptable alternative to text recycling. To assuage any additional concerns, I added a prefatory comment to the dagger note, which notified the reader that arguments throughout the article were derived from prior writings:

Portions of this comment are derived from various Supreme Court and lower court briefs for which I acted as counsel or to which I was a party, including briefs filed for the Cato Institute and other amici in the cases discussed in this comment. In addition, portions are distilled from my most recent book, *UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER* (2016), and several articles I have published focusing on executive action in the areas of health care and immigration.⁷⁶

Separate from the nuances of text recycling or substantial rephrasing, this dagger note should be considered a best practice. Because tenure and promotion hinges on "the number and the quality of publications," Roig notes that universities can mistakenly credit an author for "duplicate publication and of other forms of redundancy."⁷⁷ Carol M. Bast and Linda B. Samuels write that "in academe, reuse of one's prior written work may arguably conflict with the assumption that each piece is original."⁷⁸ As a result, they argue, "for purposes of hiring, promotion, and tenure," self-plagiarism gives authors "an unfair advantage because she can produce more publications in a shorter period of time."⁷⁹ This dagger note flags, for the relevant committees, the originality of the work. Further, to the extent that an author par-

75. *Supra* notes 5-6.

76. *Gridlock*, *supra* note 7, at 241.

77. ROIG, *supra* note 13, at 17.

78. Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777, 784 (2008).

79. *Id.* at 784-85.

ticipated in the relevant litigation as *amicus curiae*, such a disclosure should alert readers about potential conflicts of interest.

VI. WHEEL REINVENTING

While the editors and I came to a rapprochement with respect to recycling text and substantial paraphrasing, I acquiesced to the most extreme proposed remedy for self-plagiarism: reinventing the wheel. A memorable episode illustrates this dynamic. Under an early version of the Affordable Care Act's so-called "contraceptive mandate," the federal government exempted a house of worship from the requirement to pay for its female employees' birth control only if the organization "(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization . . ."⁸⁰ To illustrate this somewhat tedious four-factor test, I used a simple illustration in my book *UNRAVELED*:

Consider a Catholic Church that manages a soup kitchen. The church hires non-Catholic employees and does not check baptismal certificates of homeless people seeking help. According to *Exemption 1.0*, the Church would not be deemed a "religious employer" because it does not primarily serve and hire people of the same faith.⁸¹

In my first draft for the *Harvard Law Review*, I included a rephrased version of the soup-kitchen hypothetical. The editors were not troubled by my paraphrased "reporting," but objected that I "repurposed" the soup kitchen "argument," which they noted "strikes us as too similar" to the quoted portion in my book.

This revision, which I acceded to with reservations, resulted in a bizarre thought experiment: how can I reinvent a perfectly valid argument that I already made, using similar-but-different terms? This process forced me to rethink what the exemption was trying to accomplish, as well as what sorts of groups would and would not qualify. After some consideration, I arrived at another example: instead of a church-run soup kitchen, I would discuss a church-run hypothermia shelter! Because I could not use the example of baptismal certificates, instead I wrote that the church could not require entrants to celebrate communion! Both institutions were managed by houses of worship, employed people of all faiths, and religious papers were not checked at the door. With that revelation (if you can call it that), I rewrote the paragraph. As the table below illustrates—which lists the original source, my first draft, and the final version—the editors

80. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873-74 (July 2, 2013).

81. *UNRAVELED*, *supra* note 4, at 57.

accepted paraphrasing of “reporting,” but required a reinvention of the “argument” itself.

	Unraveled	HLR Draft	HLR Final
1	Consider a Catholic Church that manages a soup kitchen .	Consider a Catholic church that operates a soup kitchen .	Consider, for example, a church that operates a hypothermia shelter .
2	The church hires non-Catholic employees the church hires non-Catholic employees to work in the kitchen the church employs people outside the faith to work at the shelter .
3	. . . and does not check baptismal certificates of homeless people seeking help.	. . . the church does not check baptismal certificates for homeless people sharing a meal.	. . . the church does not require communion for those trying to get help.
4	. . . the Church would not be deemed a ‘religious employer’ because it does not primarily serve and hire people of the same faith. Thus, it would not qualify for the exemption . ⁸²	. . . the church . . . would not be deemed a ‘religious employer,’ and would not qualify for the exemption .	This church would not be considered a “religious employer” and would not be exempt .

With all due respect to the concerns of the century-old institution, the burdens imposed by this additional cognitive task far outweighed any conceivable benefits.

Several of the authors who addressed this facet of self-plagiarism drew the line at the limits of creative argumentation. “The more we write,” Professor Scanlon notes, “the more likely we will reuse something—imagery, phrasing, a sentence, an anecdote, an entire argument—that has served us well in the past and which has become a part of our writing vocabulary.”⁸³ Stearns adds that “[b]ecause both the memory and the inventive powers of even the most brilliantly creative mind are limited, some degree of repetition within the works of a single author is inevitable.”⁸⁴

Scholars build their agendas through publishing article after article over the course of decades. All ideas are iterative and build upward. As Judge Kozinski pointed out in a dissent concerning copy-

82. *Id.*

83. Scanlon, *supra* note 29, at 58 (emphasis omitted).

84. Stearns, *supra* note 32, at 543-44.

right infringement, “[n]othing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before.”⁸⁵ He added that “[o]verprotection stifles the very creative forces [it is] supposed to nurture.”⁸⁶ If authors are required to develop wholly new arguments in each new piece, the demands of self-plagiarism will unnecessarily impede the creative process, serving as a prophylactic for a de minimis ethical transgression. Readers do not expect all scholarship to be 100 percent novel, nor should editors. Indeed, journals often select an article for publication *precisely because* of the author’s prior body of work. (Indeed, the *Harvard Law Review*, specifically invited me based on my previous work.) Rewarding an author for past writings, but prohibiting the repetition of any of those worthwhile ideas, undercuts the broad arc of a decades-long scholarly agenda.

Professor Scanlon warns about taking the doctrine of self-plagiarism to a “nearly absurd extreme,” where we “condemn writers as wordthieves and frauds for merely repeating themselves.”⁸⁷ So long as the source of the original argument is identified and the text is not copied verbatim, it is an unreasonable demand of a scholar to come up with a new argument solely because he or she developed it elsewhere.

VI. CONCLUSION

I opened this Essay with an epigraph from Lin-Manuel Miranda’s reimagination of Ron Chernow’s recounting of the life of Alexander Hamilton.⁸⁸ In the whimsical lyrics from *Hamilton: An American Musical*, the two-dollar founding-father⁸⁹ admits to a bit of self-plagiarism. Once again, the truth is stranger than fiction. Historian Joseph J. Ellis recounts that Thomas Jefferson indeed copied sections of the Declaration of Independence from “copies of his own previous writings, to include *Summary Views, Causes and Necessities* and his three drafts of the Virginia constitution.”⁹⁰ However, Ellis was not

85. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc).

86. *Id.*

87. Scanlon, *supra* note 29, at 63-64.

88. Jamie Black, *Author Ron Chernow Discusses Hip-Hop Musical ‘Hamilton,’* CORNELL CHRONICLE (Mar. 22, 2016), <http://news.cornell.edu/stories/2016/03/author-ron-chernow-discusses-hip-hop-musical-hamilton> [<https://perma.cc/PT3U-V6GU>].

89. *Cf.* Lin-Manuel Miranda, *Alexander Hamilton*, HAMILTON: AN AMERICAN MUSICAL, <http://genius.com/Lin-manuel-miranda-alexander-hamilton-lyrics> [<https://perma.cc/UMY4-MCDU>] (“The *ten-dollar Founding Father* without a father[;] Got a lot farther by working a lot harder[;] By being a lot smarter[;] By being a self-starter”) (emphasis added).

90. JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 64 (First Vintage ed. 1998).

prepared to “accuse [Jefferson] of plagiarism, unless one wishes to argue that an author can plagiarize himself.”⁹¹ (Join the club.) Rather, “virtually all the ideas found in the Declaration and much of the language, especially the grievances against George III, had already found expression in those earlier writings.”⁹²

Sir Isaac Newton famously proclaimed, “[i]f I have seen farther, it is by standing on the shoulders of giants.”⁹³ Except he was not the first to say it.⁹⁴ Three centuries earlier, French philosopher Bernard of Chartres used a similar phrasing: “we are like dwarfs . . . upon the shoulders of giants, and so able to see more and see farther than the ancients.”⁹⁵ But even then, Bernard derived the principle from the sixth-century Latin grammarian, Priscian: “*The younger . . . the scholars, the more sharp-sighted.*”⁹⁶

We should never lose sight of the fact that “[t]he thing that hath been, it *is that* which shall be; and that which is done *is that* which shall be done: and *there is no new thing* under the sun.”⁹⁷ Or to go back even further, “[w]hat has been is what will be, and what has been done is what will be done, and there is nothing new under the sun.”⁹⁸ But I would not want to repeat myself.⁹⁹

91. *Id.*

92. *Id.*

93. David Brewster, 1 MEMOIRS OF THE LIFE, WRITINGS, AND DISCOVERIES OF SIR ISAAC NEWTON 144 (1855) (emphasis omitted) (Letter from Isaac Newton to Robert Hooke on Feb. 5, 1675-1676).

94. *See Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 77 n.3 (D. Mass. 1990).

95. ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT 178 (1965).

96. *Id.* at 194-95 (emphasis omitted).

97. *Ecclesiastes* 1:9 (King James).

98. *Ecclesiastes* 1:9 (The Torah).

99. *See supra* note 8.