THE LONG SHADOW OF *VINUYA* IN THE TIME OF ARTIFICIAL INTELLIGENCE: REFLECTIONS ON ETHICAL ISSUES IN LEGAL RESEARCH*

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ABSTRACT

Artificial intelligence ("AI") has permeated all industries, the legal profession being no exception. Amid apprehensions concerning the use of generative AI, this Essay revisits the *Vinuya* saga to demonstrate how the Court's decision to redefine plagiarism by requiring intent and its contemporaneous actions that undermined the legal academy has affected legal research ethics well into the age of AI. The Essay then argues for efficiency-based reasons to prohibit plagiarism as originally and widely understood, with the end goal of seeing generative AI as a tool that can be used for justice instead of a threat to academic integrity.

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This is an expansion of a reaction to Tanya Lat's *Ethical Issues in Legal Research* and Cristina Bonoan's *Digital Tools: Challenges and Opportunities for Legal Research and Ethics*, which they delivered during the Colloquium on Legal Research in the Digital Age held on September 4, 2023 in the Malcolm Theater, UP College of Law. I am grateful to the Information and Publication Division (IPD) of the UP Law Center, led by Michael Tiu, for the invitation to react to those lectures.

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I. INTRODUCTION

There is no topic in Philippine law schools today that is as overstated and polarizing as artificial intelligence ("AI"), much of it centered on its use by law students in their academic output.

Since the COVID-19 pandemic, the great majority of Philippine law schools have migrated to online instruction,[1] which meant that teaching and assessments were done on internet-based platforms where generative AI had become easily accessible. The tenor of conversations in faculty workrooms and symposia is one of great anxiety that students may be smuggling AI-generated content into their exams and papers.[2]

Amid this panic, there is optimism from other key voices. The Chief Justice has preached AI's potential to improve legal research,[3] court operations, and case management,[4] and continuing legal education courses offered by the University of the Philippines (UP) in 2023 have explored AI's effects on legal practice as well as its ethical facets.[5] Nevertheless, and for the most part, when Philippine law faculties consider the intersection of AI and legal education, they refer to a more immediate concern with students using

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[1] This required the intervention of the Philippine Legal Education Board, which mandated law schools under its jurisdiction to resume full onsite learning after the midterm of the first semester of the 2023-2024 academic year. Legal Educ. Bd. Mem. Order No. 30 (2023). Transitional Return to the In-Person Learning Modality.

[2] This worry partly betrays the enduring hierarchies in Philippine legal education that are built on distrust between teachers and students, yet it is also the necessary consequence of how most assessments in Philippine schools continue to prioritize bar-oriented rote memorization, which cannot be credibly and efficiently tested in asynchronous or offsite exams.

[3] *Chief Justice Gesmundo: SC to Use AI-Powered Tools to Improve Court Legal Research*, SUPREME COURT OF THE PHIL. WEBSITE (Feb. 17, 2023), *at* https://sc.judiciary.gov.ph/chief-justice-gesmundo-sc-to-use-ai-powered-tools-to-improve-court-legal-research/; *Chief Justice Gesmundo: Judiciary E-Library to Use AI Technology to Improve Legal Research*, SUPREME COURT OF THE PHIL. WEBSITE (Aug. 27, 2023), *at* https://sc.judiciary.gov.ph/chief-justice-gesmundo-judiciary-e-library-to-use-ai-technology-to-improve-legal-research/.

[4] The Chief Justice has spoken about the potential of AI to clear the country's infamously clogged court dockets via the preparation of stenographic notes and digitalization of court judgments. *SC to Use Artificial Intelligence to Improve Court Operations*, SUPREME COURT OF THE PHIL. WEBSITE (Mar. 4, 2022), *at* https://sc.judiciary.gov.ph/sc-to-use-artificial-intelligence-to-improve-court-operations/.

[5] Univ. of the Phil. Law Ctr., Inst. for the Admin. of Just., *Artificial Intelligence and the Law,* Mandatory Continuing Legal Education Seminar (July 3, 17, 25 & 31, 2023).

AI to generate their course requirements, as reflected in the consultations within the larger teaching staff of the country's top two universities.[6]

Contrast this with the conversations across the Pacific, which seem to transcend short-term pedagogical concerns about students cutting corners. Instead, they acknowledge AI's rise as a complex phenomenon with wide-ranging effects on the legal job market, as well as ethics in legal practice and policymaking. Hence, when the development of generative AI took a "huge leap" with the release of GPT-3 amid global COVID-19 lockdowns,[7] U.S. law schools were quick to recognize its disruptive potential in the career prospects of their graduates. Early estimates showed that 23% of legal jobs in the United States were automatable, making it difficult for schools to justify the exorbitant costs of legal education without any adjustments for the impending structural changes in the legal profession.[8]

At the same time, U.S. law schools were mindful of generative AI's impact on the skills and ethics of their students. Although the ability of ChatGPT to pass the bar examinations was well reported,[9] the bar skepticism in the top law schools of the United States perhaps resulted in their academies being worried less about generative AI's ability to pass a long-criticized qualifying exam for lawyers[10] and more with the unanswered ethical

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[6] Memorandum from the Ateneo de Manila Off. of the President to the Univ. Cmty. re: GenAI Task Force, Memo No. U2324-034 (Aug. 24, 2023); Email from the Univ. of the Phil. Off. of the Vice-President for Dev't re: Draft Policy on Artificial Intelligence (July 19, 2023). *See also* Krixia Subingsubing, *UP Drafting Guidelines on 'Responsible' AI Use*, INQUIRER.NET, July 21, 2023, *at* https://newsinfo.inquirer.net/1804839/up-drafting-guidelines-on-responsible-ai-use.

[7] Bernard Marr, *A Short History Of ChatGPT: How We Got To Where We Are Today*, FORBES, May 19, 2023, *at* https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/.

[8] Abigail Johnson Hess, *Experts Say 23% of Lawyers' Work Can Be Automated—Law Schools Are Trying to Stay Ahead of the Curve*, CNBC, Feb. 18 2020, *at* https://www.cnbc.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html.

[9] Debra Cassens Weiss, *Latest Version of ChatGPT Aces Bar Exam with Score Nearing 90th Percentile*, ABA J., Mar. 16, 2023, *at* https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile. This news clip cites an unpublished paper by Daniel Martin Katz, et al. *See* Daniel Martin Katz et al., GPT-4 Passes the Bar Exam (Mar. 15, 2023), *at* https://ssrn.com/abstract=4389233 or http://dx.doi.org/10.2139/ssrn.4389233.

[10] The criticism against bar exams in the United States was summarized in a 1994 student note, which comprehensively responded to the conventional justifications for a licensure exam for lawyers. Daniel R. Hansen, *Do We Need the Bar Examination—A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L.

questions "at the intersection of law and AI" in fields like warfare, racial justice, intellectual property, and torts.[11]

The almost deafening persistence of law and AI in academic conversations aside, it is evidently a highly pertinent issue with far-reaching implications. This landscape of dialogues on legal education and AI was the backdrop of Tanya Lat's *Ethical Issues in Legal Research* and Cristina Bonoan's *Digital Tools: Challenges and Opportunities for Legal Research and Ethics*.[12] In the context of legal research ethics in the digital age, both Lat and Bonoan discussed ethical concerns in students' academic output—again, the present preoccupation of Philippine legal academia in relation to AI. Yet the overlap of Lat's and Bonoan's lectures confirms that for legal education in the Philippines, the main ethical challenges do not actually spring from generative AI but older problems predating its rise.

Most prominently, the Philippine Supreme Court's definition of plagiarism in the cases beginning with *Vinuya v. Romulo*[13] and plagiarism's

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REV. 1191 (1994). The top law schools in the United States today notably do not make even implicit references to bar passing rates in their admission materials, acknowledging that the broader, interdisciplinary and theoretical legal education offered by these schools may come at the cost of bar performance. *Compare Ivy Schools May Examine Bar Failures*, HARV. CRIMSON, Mar. 12, 1964, *at* https://www.thecrimson.com/article/1964/3/12/ivy-schools-may-examine-bar-failures/.

[11] Brendan Johnson & Francis Shen, *Teaching Law and Artificial Intelligence*, 22 MINN. J.L. SCI. & TECH. 23, 26 (2021). For them, they include "[w]hen is it ethical to employ Al in warfare? Are we unknowingly ingraining racial biases into our algorithms? Who holds the copyright to art created by AI? Who bears liability for torts committed by AI-controlled robots?" *Id.* (Citations omitted.)

[12] Lectures delivered during the *Colloquium on Legal Research in the Digital Age*, UP Law Ctr. Info. & Publ'n Div. (IPD), Malcolm Hall, Diliman, Quezon City (Sept. 4, 2023).

[13] [Hereinafter "*Vinuya I*"], G.R. No. 162230, 619 SCRA 533, Apr. 28, 2010.

References to "*Vinuya*" without a reporter citation are collectively to: *Id.*; Vinuya v. Romulo [hereinafter "*Vinuya II*"], G.R. No. 162230, 732 SCRA 595, Aug. 12, 2014; *In re* Del Castillo [hereinafter "*In re Del Castillo I*", A.M. No. 10-7-17-SC, 632 SCRA 607, Oct. 12, 2010; In re Del Castillo [hereinafter "*In re Del Castillo II*"], A.M. No. 10-7-17-SC, 642 SCRA 11, Feb. 8, 2011; *In re* UP Law Faculty [hereinafter "*In re UP Law Faculty I*"], A.M. No. 10-10-4-SC, 633 SCRA 418, Oct. 19, 2010; *In re* UP Law Faculty [hereinafter "*In re UP Law Faculty II*"] A.M. No. 10-10-4-SC, 644 SCRA 543, Mar. 8, 2011; *In re* UP Law Faculty [hereinafter "*In re UP Law Faculty III*"] A.M. No. 10-10-4-SC, 651 SCRA 1, June 7, 2011.

To recall, in *Vinuya*, the Supreme Court dismissed the petition of an organization of former comfort women by misattributing, mis-contextualizing, or misusing the works of top international scholars and turning their theses on their heads. *See* 37 Members of the UP College of Law Faculty [hereinafter, the "UP Law 37"], *Restoring Integrity: A Statement by the Faculty of the University of the Philippines College of Law on the Allegations of Plagiarism and Misrepresentation in the Supreme Court* (July 27, 2010) [hereinafter "*Restoring Integrity*"]. The text of this statement is reproduced in *In re* UP Law Faculty, 644 SCRA at 579–83.

misplaced entanglement with fraud have complicated legal research ethics for at least a decade. Generative AI merely opens a phase of even greater uncertainty.

Appreciating the full impact of AI on Philippine legal research ethics therefore requires a reexamination of *Vinuya*, its dilution of plagiarism, and the reasons for still prohibiting the practice as originally and widely understood. I have thus organized this Essay as follows: In Part II, I provide a summary of Lat's and Bonoan's lectures and give initial comments. In Part III, I present the *Vinuya* saga and its enduring legacy, particularly in research ethics. I then argue in Part IV for a paradigm shift on plagiarism in legal education, from a personal moral failure as advocated by Lat to an activity with economic inefficiencies and negative externalities that should be regulated regardless of the individual's moral state. I conclude in Part V by returning to the emergence of generative AI, reflecting on its potential and arguing that denialism is contrary to our own ethical obligations to prepare our students for the legal profession.

Despite *Vinuya*'s age and notoriety, this Essay is a rare academic effort to present the original plagiarism in *Vinuya* and the Court's contortive response to it as a single, indivisible event rather than a series of poor decisions. Although other works have commented on *Vinuya*, this Essay benefits from more than a decade of hindsight in tracing current and emerging ethical issues in research to that episode in Philippine legal history. I aim to show that correcting the seemingly analog concern with plagiarism as redefined in *Vinuya* is necessary to prime the legal community for deeper, better-informed discussions on law and AI, including seeing generative AI as a tool that can be used for justice instead of principally a threat to academic integrity.

II. DIGITAL TOOLS AND ETHICAL ISSUES

Lat and Bonoan delivered their lectures at the end of a colloquium on legal research in the digital age—one that could have well been "in the age of AI," given the prominence of the subject in the gathering. It would however be amiss to characterize the lectures as primarily centered on AI tools. Lat's lecture viewed ethical issues in legal research, particularly

plagiarism, through the lens of psychology and systems.[14] Meanwhile, AI was mainly an illustrative example in Bonoan's broader discussion of digital tools and the ethical issues (of varying degrees) that attend their use.[15]

Lat begins by defining plagiarism as:

> [T]he appropriation and misrepresentation of another person's work as one's own. […] It constitutes a taking of someone else's ideas and expressions, including all the effort and creativity that went into committing such ideas and expressions into writing, and then making it appear that such ideas and expressions were originally created by the taker.[16]

Lat lists plagiarism as the first among a number of acts constituting intellectual dishonesty, which she in turn defines as "any fraudulent act performed by a student to achieve academic advantage or gain for oneself or others."[17] Lat borrows both definitions from academic institutions and characterizes plagiarism as both a long-standing and a moral issue. For her, the internet and digital resources are not the cause of plagiarism, but easy access to them serve only as their "catalyst."[18] Further, Lat treats plagiarism as a form of "theft and fraud"—"parallel to stealing other people's offspring"[19]—and contrary to the Judeo-Christian, Islamic, and secular versions of morality.[20]

Vinuya makes its first appearance in Lat's lecture when she uses it to illustrate how plagiarism in legal research may be intentional and unintentional,[21] contradicting the strained effort of the Court to distinguish "judicial plagiarism" (which must be intentional)[22] from "academic

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[14] Tanya Lat, *Ethical Issues in Legal Research*, Lecture delivered at the Colloquium on Legal Research in the Digital Age (Sept. 4, 2023) (presentation slides on file with the author; recording available with the IPD).

[15] Cristina Bonoan, *Digital Tools: Challenges and Opportunities for Legal Research and Ethics*, Lecture delivered at the Colloquium on Legal Research in the Digital Age (Sept. 4, 2023) (presentation slides on file with the author; recording available with the IPD).

[16] Lat, *supra* note 14, at 5. (Citation omitted.) As I discuss later, Tanya's choice of this definition is revealing as it is arguably the catalyst for the Supreme Court's twisted view of what constitutes plagiarism in a "judicial" context.

[17] *Id.* at 3–4, *citing* UNIV. OF THE PHIL. DILIMAN, 2012 CODE OF STUDENT CONDUCT OF UP DILIMAN [hereinafter "CODE OF STUDENT CONDUCT"] (2012).

[18] *Id.* at 7.

[19] *Id.* at 9, 11. (Citation omitted.)

[20] *Id.* at 11–12.

[21] *Id.* at 16.

[22] *In re Del Castillo I*, 632 SCRA 607, 630.

plagiarism" (which is intent-neutral, being "governed by standards different from judicial decision writing").[23] However, Lat does not expound on how plagiarism that is unintentional can be immoral.

This is interesting because in enumerating both the circumstances and risk factors of plagiarism, Lat appears sympathetic to how students labor under a culture that emphasizes "competition and success rather than development and cooperation,"[24] or simply do not know what plagiarism is or misappreciate its rules.[25] Further, in suggesting that motivated cognition or reasoning is why people commit the particular plagiarism in *Vinuya*—that is, not simply failing to attribute, but twisting a source to support a contrary conclusion, as I recount later—Lat seems to undercut the intentionality that is implicit in a moral (or immoral) choice. As motivated cognition recognizes the "*unconscious* tendency of individuals to fit their processing of information to conclusions that suit some end or goal,"[26] it seems difficult to reconcile unintentional behavior with intentional fraud.

In any event, Lat ends by suggesting several ways to address plagiarism. She describes these interventions as "ultimately a matter of character formation," emphasizing the responsibility of teachers to "provide adequate guidance and supervision" towards better awareness of the rules, including giving students chances to correct their mistakes but backstopped by fair and consistent enforcement.[27]

The tenor of Bonoan's lecture is one less concerned with the immorality of plagiarism, as in Lat's lecture, and more with professional ethics. She points out that the Code of Professional Responsibility and Accountability ("CPRA"), the newly amended ethical code for Philippine lawyers, now prohibits them from "pass[ing] off as one's own the ideas or words of another."[28] That, in turn, has been categorically described by the CPRA as a form of unethically misleading a "court, tribunal, or other

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[23] *In re Del Castillo II*, 642 SCRA 11, 42.

[24] Lat, *supra* note 14, at 17, *citing* Simon Moss, Barbara White, & Jim Lee, *A Systematic Review Into the Psychological Causes and Correlates of Plagiarism*, 28 ETHICS & BEHAV. 261, 261–83 (2018).

[25] Lat, *supra* note 14, at 21.

[26] *Id.* at 24, *citing* Dan Kahan. (Emphasis supplied.) *See* Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 413 (2013) that describes this as the "unconscious pressure to fit their assessments of the evidence at hand to the conclusion that fits their expressive interests."

[27] Lat, *supra* note 14, at 31.

[28] CODE OF PROF'L RESPONSIBILITY & ACCOUNTABILITY [hereinafter "CPRA"], canon II, § 8.

government agency."[29] It does not take long for Bonoan to reference the *Vinuya* saga[30] once she delves into issues of plagiarism, remarking briefly on the technology issues that were discussed in the administrative investigation of *Vinuya*'s author and his staff.[31] But while software programs could already detect similarities between works-in-progress and published materials during the time of *Vinuya*,[32] current AI-detection tools may not be as effective when it comes to AI-generated content. Bonoan then asks whether the use of AI-generated content can be considered as plagiarism because of the lack of attribution in its output or since, as some authors have claimed,[33] OpenAI used their copyrighted material in training ChatGPT.[34]

Bonoan goes further than plagiarism and shifts to misinformation risks in AI, such as the false or inaccurate information generated by AI hallucinations[35] and the use of chatbots in relation to the authorized practice of law.[36] Despite these risks, Bonoan does not advocate for rooting out AI, acknowledging that the technology has arrived and is here to stay. Instead, she argues for regulating the use of AI in the legal profession and teaching the responsible use of AI and other digital tools in legal research.[37]

Lat's and Bonoan's lectures were not meant to be extended disquisitions on ethical issues arising from the use of AI, but they are nevertheless a source of an important insight on that topic: while generative AI does increase the risk of plagiarism, the core problem is how it has come to be defined in the Philippine legal system.

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[29] Bonoan, *supra* note 15, at 3, *citing* CPRA, canon II, § 8.

[30] More specifically, *In re Del Castillo I*, 632 SCRA 607.

[31] *See id.* at 626. "The Court adopts the Committee's finding that the researcher's explanation regarding the accidental removal of proper attributions to the three authors is credible. Given the operational properties of the Microsoft program in use by the Court, the accidental decapitation of attributions to sources of research materials is not remote."

[32] *See id.* at 668 (Sereno, *J.*, *dissenting*). "[A]vailable on the market are software programs that can detect some, but not all, similarities in the phraseology of a work-in-progress with those in selected published materials."

[33] *See, e.g.*, Mack DeGuerin, *Content Farms Are Using AI Chatbots to Plagiarize News Outlets*, GIZMODO, Aug. 24, 2023, *at* https://gizmodo.com/content-farms-ai-chatbots-plagiarize-news-nyt-1850770474.

[34] Bonoan, *supra* note 15, at 4.

[35] *Id.* at 5–6. AI hallucinations occur when an AI large language model (LLM) "perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate." *What are AI hallucinations?*, IBM, *at* https://www.ibm.com/topics/ai-hallucinations (last checked Oct. 2, 2023).

[36] Bonoan, *supra* note 15, at 11, *citing* CPRA, canon II, §§ 41, 43.

[37] Bonoan, *supra* note 15, at 13.

III. THE LONG SHADOW OF *VINUYA*

In defining and contextualizing plagiarism in Philippine legal research, Lat's and Bonoan's common citation to the *Vinuya* saga is revealing. More than a decade after its various component cases were decided, and notwithstanding technological leaps since, *Vinuya* clearly remains the starting point of any analysis of ethics in legal research, particularly as to plagiarism.

A. The *Vinuya* Cases

The *Vinuya* decisions cannot be properly understood simply by assessing the plagiarism committed in *Vinuya v. Romulo* ("*Vinuya I*").[38] To appreciate the Court's definition of plagiarism and its effects, it is necessary to read that first set of opinions with its companion cases: *In re Del Castillo*,[39] which is the administrative investigation of the author of the opinion in *Vinuya I* for allegations of plagiarism, and *In re UP Law Faculty*,[40] which is the disciplinary investigation of the academics who publicly called out the plagiarism in *Vinuya I* and demanded the resignation of its author.

The saga begins with *Vinuya I*, which was a petition filed by the Malaya Lolas, an organization of former comfort women. It sought to compel the Executive Department[41] to assist them in filing a case against Japanese officials who established "comfort women" stations in the Philippines. The Executive Department refused such assistance, as the Philippine Government had taken the position that any individual claims have been extinguished by Japan's compliance with the 1951 Peace Treaty between the two countries.[42] In resolving the petition, the Court chose to treat the Philippine Government's refusal as a political question.[43] However, instead of narrowly dismissing the case on this prudential consideration, the Court enumerated the Japanese Government's various acts of contrition[44] and effectively ruled upon the merits of the Malaya Lolas' claim against the Philippine Government's reticence. According to the Court, such refusal of

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[38] *Vinuya I*, 619 SCRA 533.

[39] *In re Del Castillo I*, 632 SCRA 607; *In re Del Castillo II*, 642 SCRA 11.

[40] *In re UP Law Faculty I*, 633 SCRA 418; *In re UP Law Faculty II*, 644 SCRA 543; *In re UP Law Faculty III*, 651 SCRA 1.

[41] Through the Department of Justice, the Department of Foreign Affairs, and the Office of the Solicitor General.

[42] *Vinuya I*, 619 SCRA at 540.

[43] *Id.* at 558–61.

[44] *Id.* at 544–58.

assistance was not arbitrary nor in grave abuse of discretion because it was well-supported in international law, insofar as the Philippines "is not under any international obligation to espouse [the] petitioners' claims."[45]

In the course of this unnecessary extended discussion, *Vinuya I* lifted passages from scholarly literature without proper attribution. It also mined the primary sources from those scholarly works, effectively appropriating the research work of finding and organizing them. Worst, *Vinuya I* used the lifted passages and mined references to arrive at the conclusion diametrically opposite to that of the plagiarized sources. As succinctly summarized by members of the UP College of Law Faculty ("UP Law 37"):

> But a far more serious matter is the objection of the original writers, Professors Evan Criddle and Evan Fox-Descent, that the High Court actually misrepresents the conclusions of their work entitled "A Fiduciary Theory of *Jus Cogens*," the main source of the plagiarized text. In this article they argue that the classification of the crimes of rape, torture, and sexual slavery as crimes against humanity have attained the status of *jus cogens*, making it obligatory upon the State to seek remedies on behalf of its aggrieved citizens. Yet, the *Vinuya* decision uses parts of the same article to arrive at the contrary conclusion. This exacerbates the intellectual dishonesty of copying works without attribution by transforming it into an act of intellectual fraud by copying works in order to mislead and deceive.[46]

Made aware of the reliance of *Vinuya I* on "polluted sources,"[47] the Malaya Lolas requested an ethical investigation of the opinion's author, Justice Mariano del Castillo, alleging plagiarism. In this second set of cases, *In re Del Castillo*,[48] the Court would excuse what the average educator would call plagiarism by finding that it was not intentional, instead blaming the incident on software issues. The Court held in its 2010 decision ("*In re Del Castillo I*") that because, "[a]t its most basic, plagiarism means the theft of another person's language, thoughts, or ideas,"[49] it "presupposes intent and a deliberate, conscious effort to steal another's work and pass it off as one's

[45] *Id.* at 566 *et seq*.

[46] *Restoring Integrity*, *supra* note 13, *in In re UP Law Faculty II*, 644 SCRA 543, 580–81. For the article most prominently plagiarized in *Vinuya I*, *see* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009).

[47] *Restoring Integrity*, *supra* note 13, *in In re UP Law Faculty II*, 644 SCRA at 581.

[48] *In re Del Castillo I*, 632 SCRA 607; *In re Del Castillo II*, 642 SCRA 11.

[49] *In re Del Castillo I*, 632 SCRA at 619.

own."[50] Though it found that the passages lifted by *Vinuya I* from the works of Criddle and Fox-Decent and Mark Ellis[51] were "self-evident[ly]" non-original and that there was still reference to the sources cited by these authors, the Court still held that Justice del Castillo did not pass off these lifted portions as his.[52] Yet it is precisely bypassing the secondary literature without the appropriate annotation that resulted in *Vinuya I* passing off or appropriating their research as that of the opinion's writer.

Moreover, *In re Del Castillo I* found that the omission of the references was "accidental," and blamed it on a combination of word processing errors and multiple draft revisions.[53] The Court thus required its staff to "acquire the necessary software for use by the Court that can prevent future lapses in citations and attributions"[54]—a bizarre order given that no such software had existed. As the dissent points out:

> Nor can a software program generate the necessary citations without input from the human researcher. Neither is there a built-in software alarm that sounds every time attribution marks or citations are deleted. The best guarantee for works of high intellectual integrity is consistent, ethical practice in the writing habits of court researchers and judges.[55]

The Court would then deny reconsideration in its 2011 resolution ("*In re Del Castillo II*") and instead double-down on the excuses it had made. The Court insisted on the supposed lack of plagiarism and reasoned that the sources of the secondary literature cut out from *Vinuya I* were ultimately attributed.[56]

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[50] *Id.* at 630.

[51] Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225 (2006).

[52] *In re Del Castillo I*, 632 SCRA at 630–31.

[53] *Id.* at 626–28.

[54] *Id.* at 637.

[55] *Id.* at 667 (Sereno, *J.*, *dissenting*).

[56] *In re Del Castillo II*, 642 SCRA 11, 26. The Court held: "Notably, those foreign authors expressly attributed the controversial passages found in their works to earlier writings by others. The authors concerned were not themselves the originators. As it happened, although the *ponencia* of Justice Del Castillo accidentally deleted the attribution to them, there remained in the final draft of the decision attributions of the same passages to the earlier writings from which those authors borrowed their ideas in the first place. In short, with the remaining attributions after the erroneous clean-up, the passages as it finally appeared in the *Vinuya* decision still showed on their face that the lifted ideas did not belong to Justice Del Castillo but to others. He did not pass them off as his own."

Turning its gaze to the academics who called out the plagiarism in *Vinuya I*, the Court launched its own ethical investigation into *Restoring Integrity*, the strong open letter published by the UP Law Faculty, and which Lat cites in her lecture.[57] In this third set of cases, *In re UP Law Faculty*,[58] the Court ordered the UP Law 37—including five of its then and former deans—to show cause why they should not be disciplined as members of the Bar. The Court noted possible violations of professional duties to "promote respect for law and for legal processes," "observe and maintain the respect due to the Courts and to judicial officers," "refrain from any impropriety which tends to influence, or gives the appearance of influencing the Court," desist from "activities aimed at defiance of the law or at lessening confidence in the legal system," and "submit grievances against a judge to the proper authorities only."[59]

The aftermath of the Court's 2010 resolution ("*In re UP Law Faculty I*") possibly explains why the *Vinuya* cases have attained longevity in any Philippine discussion on research ethics. Given the Court's already precarious political legitimacy at that time,[60] the promulgation of *In re UP Law Faculty I* immediately generated outrage in higher education institutions and legal circles. At the time, maroon and green ribbons, the school colors of UP, hugged the trees lining the main avenue of UP's flagship campus, which also saw weekly marches by law and non-law students, faculty, alumni, and civil society. The show-cause order inspired solidarity statements and mass actions from universities,[61] bar associations, and academic

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[57] *See supra* note 16 and accompanying text.

[58] *In re UP Law Faculty I*, 633 SCRA 418; *In re UP Law Faculty II*, 644 SCRA 543; *In re UP Law Faculty III*, 651 SCRA 1.

[59] *In re UP Law Faculty I*, 633 SCRA at 426 & nn.7–8, 427, *citing* CODE OF PROF'L RESPONSIBILITY [HEREINAFTER "CPR"], canons 10, 11, 13 & r. 1.02, 11.05.

[60] Then Chief Justice Corona had just been appointed, in an apparent breach of a ban on last-minute appointments before a presidential election. *See* CONST. art. VII, § 15. Given the clear text of the Constitution, the Court had to issue an opinion allowing such last-minute appointments to the judiciary, reversing precedent which categorically held otherwise. *See* De Castro v. Jud. & B. Council, G.R. No. 191002, 615 SCRA 666, Mar. 17, 2010.

The public perception was that the Court, dominated by appointees of outgoing President Macapagal-Arroyo, allowed such last-minute appointment of the Chief Justice so that he can be burrowed in the Court and shield the outgoing President from upcoming court cases. *See* MARITES DAÑGUILAN VITUG, HOUR BEFORE DAWN: THE FALL AND UNCERTAIN RISE OF THE PHILIPPINE SUPREME COURT 33–41 (2012).

[61] Sophia Dedace & GMANEWS.TV, *More Schools Reject Supreme Court Denial of Plagiarism*, GMA NEWS ONLINE, Nov. 9, 2010, *at* https://www.gmanetwork.com/news/top stories/nation/205543/more-schools-reject-supreme-court-denial-of-plagiarism/story/.

publications,[62] who were disturbed by both the Court's strained efforts to disclaim the plagiarism in *Vinuya I* as anything but and its targeting of colleagues who expressed a brusque yet well-founded academic opinion.

As the suspension or disbarment of the UP Law 37 would compromise the continued operation of the country's most politically outspoken law school, *In re UP Law Faculty* was widely perceived to be an attack on the institution itself, compelling the top law firms of the country to step in and offer legal representation pro bono.[63] Considering that most of them take great pains to avoid politically charged cases and that defending the UP Law 37 would be taking a stand against the Court itself, this was an exceptional display of professional solidarity that has been unseen since. All told, not only did *Vinuya* and *In re Del Castillo* achieve a level of notoriety that was sustained over an extended period, but the intended censorship of the UP Law 37 in *In re UP Law Faculty* also had a Streisand effect, galvanizing informed opinion around the egregiousness of the plagiarism in *Vinuya I*.[64]

Perhaps owing to this outcry from its key stakeholders, on whom it owed much of its legitimacy, the Court in its March 2011 decision ("*In re UP Law Faculty II*") gave 35 (of the 37) faculty members only a slap on the wrist, withholding serious sanctions but reminding them of their "lawyerly duty […] to give due respect to the Court and to refrain from intemperate and offensive language tending to influence the Court on pending matters […]."[65] The Court more strongly "admonished" the Dean,[66] but this was still much lighter than the suspension or disbarment that it could have imposed

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[62] *See, e.g.*, The Editorial Board, *Defend Legal Scholarship: A Statement by the Philippine Law Journal on the Allegations of Plagiarism in the Supreme Court* [hereinafter "Defend Legal Scholarship"], 85 PHIL. L.J. i (2010).

[63] *See In re UP Law Faculty II*, 644 SCRA at 567–68.

[64] For a firsthand account of this episode, *see* Dante Gatmaytan, *Irreverence*, *in* IN THE GRAND MANNER: LOOKING BACK, THINKING FORWARD: 100 YEARS OF UP LAW 141–47 (Danilo Concepcion et al., eds., 2013).

[65] *In re UP Law Faculty II*, 644 SCRA at 643. Two of the 37 were not disciplined by the Court. Prof. Raul Vasquez was lauded by the Court since "in contrast to his colleagues, Prof. Vasquez was willing to concede that he 'might have been remiss in correctly assessing the effects of such language [in the Statement] and could have been more careful.'" *Id.* at 601. Prof. Owen Lynch, the foremost legal scholar on Philippine indigenous law, was a citizen of the United States and not a member of the Philippine bar and was thus beyond the disciplinary jurisdiction of the Supreme Court. The Court nevertheless reminded him that "while he is engaged as a professor in a Philippine law school he should strive to be a model of responsible and professional conduct to his students even without the threat of sanction from this Court." *Id.* at 632.

[66] *Id.* at 643.

on any of the UP Law 37 who were members of the Philippine bar. The Court refused to reconsider its ruling in a June 2011 resolution.[67]

B. The *Vinuya* Fallout

When it was originally filed, the *Vinuya* petition had all of the makings of a landmark decision, if only because domestic courts rarely have an opportunity to pass upon state liability for wartime personal injury and damage and any remedies therefor.[68] This may explain in part why the Court bothered with a protracted opinion in *Vinuya I* when, if it were truly premised on a political question, it should have been a terse dismissal. Instead, the decision became an international judicial embarrassment and a clear example of the "ordinary understanding of plagiarism."[69]

More than *Vinuya I*, which some were willing to accept as simply "bad bluebooking,"[70] what was truly delegitimizing for the Supreme Court was its full-throated defense of its brethren in *In re Del Castillo* and its proactive attempt to silence academic voices in *In re UP Law Faculty*. Notably, these were labeled by a dissenter as "an abrasive flexing of the judicial muscle that could hardly be characterized as judicious."[71] The criticism from international law scholars was particularly scathing, calling the show cause order in *In re UP Law Faculty I* an "abuse of judicial power." Criddle and Fox-Decent themselves write:

> [I]t is not the place of a court to sanction individuals or institutions that have been critical of it. This principle is especially important in the case of a law school, where discussion of cases is an integral part of legal pedagogy. The idea that a law school or its members cannot express an opinion on a case is contrary to the best practices of law schools everywhere, and an affront to free expression. That a court would assert jurisdiction to sanction its detractors is, in our opinion, an abuse of judicial power. To the best of our knowledge, no court in a democracy has ever attempted to assert the kind of jurisdiction the [Philippine

[67] *In re UP Law Faculty III*, 651 SCRA 1.

[68] *Restoring Integrity*, *supra* note 13, in *In re UP Law Faculty II*, 644 SCRA at 581.

[69] Simon Stern, *Copyright Originality and Judicial Originality*, 63 U. TORONTO L.J. 385, 414 (2013).

[70] *International Law Plagiarism Charge Bedevils Philippines Supreme Court Justice*, OPINIO JURIS, Jul. 19, 2010, *at* https://opiniojuris.org/2010/07/19/international-law-plagiarism-charge-bedevils-philippines-supreme-court-justice/.

[71] *In re UP Law Faculty I*, 633 SCRA 418, 428 (Carpio-Morales, *J.*, *dissenting*).

> Supreme Court] is asserting now against the [UP] College of Law.[72]

Although the Court took pains to defend *Vinuya I* throughout the other cases of the saga, its 2014 resolution ("*Vinuya II*") years later would betray the Court's awareness of the opinion's notoriety. Rather than buttress or rehabilitate the extensive discussion of international law in *Vinuya I*, the Court would affirm the dismissal of the petition only on the narrow technical grounds of wrong remedy, timeliness, and the political question.[73] Notably, it could have relied upon these very arguments in its original 2010 decision, avoiding the fallout and the rest of the saga. The Court also seemingly ignored the reputational havoc wreaked by *Vinuya I*, with its silence so conspicuous that it was as if the first opinion had not even been written.

But the fallout of *Vinuya* reaches far beyond the tarnished reputation or even the illegitimacy of the "Arroyo Court,"[74] and well into how we currently understand plagiarism in legal research.

First, *Vinuya* recognized a defense of lack of intent for "judicial" plagiarism. In *In re Del Castillo II*, the Court claims:

> Plagiarism, a term not defined by statute, has a popular or common definition. To plagiarize, says Webster, is "to steal and pass off as one's own" the ideas or words of another. Stealing implies malicious taking. Black's Law Dictionary, the world's leading English law dictionary quoted by the Court in its decision, defines plagiarism as the "deliberate and knowing presentation of another person's original ideas or creative expressions as one's own." The presentation of another person's ideas as one's own must be deliberate or premeditated—a taking with ill intent.[75]

In justifying the element of "intent," the Court cites its practice of *stare decisis*, which "encourages courts to cite historical legal data, precedents,

[72] *Holding the UP Law Faculty in Contempt Would Be a Grave Mistake*, OPINIO JURIS, Oct. 26, 2010, *at* https://opiniojuris.org/2010/10/26/holding-the-up-law-faculty-in-contempt-would-be-a-grave-mistake/.

[73] *Vinuya II*, 732 SCRA 595, 604, 608–10.

[74] *See* Oscar Franklin Tan, *Guarding the Guardians: Addressing the Post-1987 Imbalance of Presidential Power and Judicial Review*, 86 PHIL. L.J. 524, 527–32 (2012) (detailing controversial cases of the beginning of Chief Justice Renato Corona's term, including *Vinuya*); Eleanor Balaquiao, *Rings and Towers: A Study of Judicial and Legal Ethics in the Philippines*, 88 PHIL. L.J. 150, 171–73 (2014) (listing disciplinary investigations involving members of the Supreme Court from the same era).

[75] *In re Del Castillo II*, 642 SCRA 11, 19. (Citation omitted.)

and related studies in their decisions."[76] Without further engaging the fallacy in the Court's logic—i.e., citation of these does not preclude proper attribution to scholarly work—the tenor is similar to arguments made by Simon Stern that seek to distinguish "judicial copying" from plagiarism.[77] Yet while Stern anchors his mitigated concern with non-attribution to the fact that "the authorship function [in judicial writing] is oriented not around credit so much as responsibility,"[78] he still leaves the door open for personal sanctions when the copying does amount to a "bid for unearned credit."[79]

The *Vinuya* saga slams that door shut: not only does it require intent to establish plagiarism in judicial decisions, but it also effectively casts the burden of proof on those who accuse judges of plagiarism. Given the secrecy of the decision-making and decision-writing process,[80] which may be the key to uncovering intent or lack of it, this is a practically impossible hurdle.

Cognizant of the academic criticism that lack of intent may become a defense against plagiarism in research, scholarship, and school requirements, the Court tried to set judicial writing apart from academic writing by ostensibly limiting the defense to copying by judges. The Court laid down the reason for this distinction, saying:

> Original scholarship is highly valued in the academe and rightly so. A college thesis, for instance, should contain dissertations (sic) embodying results of original research, substantiating a specific view. This must be so since the writing is intended to earn for the student an academic degree, honor, or distinction. He earns no credit nor deserves it who takes the research of others, copies their

[76] *Id.* at 19–20. (Citations omitted).

[77] Stern, *supra* note 70. "Closer scrutiny, however, shows that, in the context of judicial writing, the concern generally does not involve unmerited credit but rather a failure on the judge's part to examine the parties' arguments independently—and in that case, the concern arises to the same extent whether the copied material is attributed or not." *Id.* at 416.

[78] *Id.* at 390.

[79] *Id.* at 416.

[80] "Court records which are 'predecisional' and 'deliberative' in nature are thus protected and cannot be the subject of a subpoena if judicial privilege is to be preserved. The privilege in general insulates the Judiciary from an improper intrusion into the functions of the judicial branch and shields justices, judges, and court officials and employees from public scrutiny or the pressure of public opinion that would impair a judge's ability to render impartial decisions. The deliberative process can be impaired by undue exposure of the decision-making process to public scrutiny before or even after the decision is made […]." *In re* Production of Court Records and Documents (Feb. 14, 2012).

> dissertations, and proclaims these as his own. There should be no question that a cheat deserves neither reward nor sympathy.[81]

This would have allowed "judicial plagiarism" to fall squarely within Stern's more lenient "judicial copying." But inexplicably, the Court said more and suggested an excuse even for those accused of plagiarism in an academic setting:

> But the policy adopted by schools of disregarding the element of malicious intent found in dictionaries is evidently more in the nature of establishing what evidence is sufficient to prove the commission of such dishonest conduct than in rewriting the meaning of plagiarism. Since it would be easy enough for a student to plead ignorance or lack of malice even as he has copied the work of others, certain schools have adopted the policy of treating the mere presence of such copied work in his paper sufficient objective evidence of plagiarism. Surely, however, *if on its face the student's work shows as a whole that he has but committed an obvious mistake or a clerical error in one of hundreds of citations in his thesis, the school will not be so unreasonable as to cancel his diploma*.[82]

The Court's obiter signaled that intent-neutrality in academic plagiarism was more a matter of practicability of proof and less a guarantor of academic integrity. Ultimately, when it comes to the unavailability of lack of intent as a defense, what the Court giveth, the Court taketh away.

It is not hard to see how *In re Del Castillo* poses a serious threat to integrity in law schools, both in the scholarly work of faculty and researchers and the course requirements of students. The opinion has the force and effect of law, and it is reasonable to expect that law students familiar with this case will have it in their back pockets for administrative disciplinary proceedings, which are often appealed to the courts themselves. Court review may take years to complete: the administrative disciplinary proceedings for plagiarism in *University of the Philippines Board of Regents v. Court of Appeals*[83] were initiated in 1993, and the Supreme Court promulgated its final ruling only in 1999, or six years after.[84]

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[81] *In re Del Castillo II*, 642 SCRA at 20. (Citation omitted.)

[82] *Id.* (Emphasis supplied.)

[83] G.R. No. 134625, 313 SCRA 404, Aug. 31, 1999. This entailed the review of lower court decisions which, in turn, reviewed the withdrawal by UP of a doctoral degree due to plagiarism in a dissertation.

[84] *Id.*

In the meantime, a plagiarizer would have plenty of opportunities to anticipatorily rehabilitate their profile or build professional goodwill to cushion a judicially confirmed finding of guilt, thereby allowing them to extract a net profit from their plagiarism. The viability of *In re Del Castillo* as an escape route increases the uncertainty of enforcement and lowers the relative cost of the academic infraction, diluting the deterrent effect of otherwise tough academic sanctions for plagiarism.[85]

Even if we disregard the above obiter, the principal material analyzed in law schools is the Court's own decisions. At the very least, *In re Del Castillo* creates a delegitimizing incongruence between a tough intent-neutral policy on plagiarism in general, which law schools may impose, and a lax standard that the Court has favored for "judicial plagiarism." If a standard of conduct is good for a judge of the highest court, what moral authority would a law school have to impose an even higher bar on its students?

Second, and perhaps more important, the Court has undermined the authority of the legal academy and thus neutered the main deterrent that can check legal scholars—that is, academic and professional embarrassment. One of the more extraordinary aspects of *In re Del Castillo I* was an order for the Court's Public Information Office to furnish the authors whose works were plagiarized with a copy of the decision, which is essentially an extended explanation of why *Vinuya I* did not misappropriate or misuse their works.[86] Hence, faced with the authors' protests and the wide academic consensus that *Vinuya I* was plagiarism par excellence, the Court rammed through its redefinition of plagiarism and, in doing so, effectively assumed the authority to overrule how the legal academy defined scholarly integrity.

Moreover, the Court's disciplinary action against the UP Law 37 clipped the academic freedom of law schools. The majority opinions in *In re UP Law Faculty* were an aggressive reminder to lawyers of the power of the Supreme Court over their licenses. Academics are trained to view the truth

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[85] *See* Matthew Woessner, *Beating the House: How Inadequate Penalties for Cheating Make Plagiarism an Excellent Gamble*, 37 PS: POL. SCI. & POL. 313, 318 (2004), who, in the context of clearly defining the penalty for plagiarism, asserts that "[d]eterrence is most effective when the consequences from action are stark, unambiguous, and salient"; David Cromwell, *Punishing the Pen with the Sword?: Colombia's New, Extreme, and Ineffective Punishment for Plagiarism*, 22 PAC. RIM L. & POL'Y J. 157, 174 (2013), *citing* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 471–531 (2004) who made the observation that "according to basic law and economics calculations, no matter how extreme the sanction, a law will not deter conduct if criminals do not expect to be prosecuted." *See also* Lat, *supra* note 14, at 31 on consistency of discipline.

[86] *In re Del Castillo I*, 632 SCRA 607, 636.

as their one true master, but *In re UP Law Faculty* reveals that those who are also lawyers are first servants of a super deity—the "dignity of the Court." Despite the overwhelming public support for them, the once vocal UP Law Faculty was traumatized into silence by the *Vinuya* saga, especially during the first few years after the show-cause order. To-date, the UP Law Faculty has yet to release a statement critical of a Supreme Court decision, instead relegating our frustrations to class discussions and letting our students carry the traditional burden of the institution.[87]

The imperiousness of judicial independence that the Court asserts over academic freedom is reinforced in the newly promulgated CPRA. Canon II, Section 32 of the CPRA, which is addressed specifically to lawyers in the academe, reads:

> Section 32. *Lawyers in the academe.* — A lawyer serving as a dean, administrative officer, or faculty member of an educational institution shall at all times adhere to the standards of behavior required of members of the legal profession under the CPRA, observing *propriety*, respectability, and decorum inside and outside the classroom, and in all media.[88]

Interestingly, this propriety (in the old Code of Professional Responsibility) was also alleged to have been violated by the UP Law 37, who were instructed by the Court to explain their failure to "refrain from any *impropriety* which tends to influence, or gives the appearance of influencing the Court."[89] This section of the CPRA is one of a number of new provisions directed to the academe,[90] including a prohibition on suspended or disbarred lawyers from "[t]eaching law subjects in any educational institution."[91] In contrast, both the *Vinuya* cases and the old Code of Professional Responsibility did not regulate who may teach—an essential component of constitutionally-guaranteed academic freedom,[92] according to the very

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[87] UP Law Student Gov't, *Statement on the Quo Warranto Proceeding* (May 11, 2018), *at* https://www.facebook.com/UPLSG/photos/a.652155251489045.1073741827.652140511490519/1659615724076321/?type=3&theater; *UP Law Students Join Mobilization after CJ Sereno Ouster*, UP LAW (May 15, 2018), https://law.upd.edu.ph/up-law-students-join-mobilization-after-cj-sereno-ouster/.

[88] CPRA, canon II, § 32. (Emphasis supplied.)

[89] CPR (1988), canon 13. (Emphasis supplied.)

[90] *See, e.g.*, CPRA, canon II, § 33.

[91] Canon VI, § 52.

[92] CONST. art. XIV, § 5(2). "Academic freedom shall be enjoyed in all institutions of higher learning."

jurisprudence of the Court.[93] In fact, the Court has recently recognized academic freedom even of law schools, to the point that while the Court is constitutionally empowered to regulate the admission to the *practice* of law, the decision of who may be admitted to the *study* of law remained with the degree-granting institutions.[94]

Court defenders may suggest that this is an overreading of *In re UP Law Faculty*. After all, the majority concluded by disclaiming any privilege from academic criticism, clarifying that "[a]ll [that] the Court demands is the same respect and courtesy that one lawyer owes to another under established ethical standards."[95] But in projecting humility by describing itself as the academe's peers who only deserve fraternal respect, the Court in fact downplays its character as a powerful public institution that is the fairest of target of academic criticism. At the same time, it imperiously tone-polices academic criticism when the tone itself may have independent value, especially for the gravest of errors and regardless of intent. As a dissent puts, "[o]n the supposed unpleasant tone of the statement, critical speech, by its nature, is caustic and biting. It is for this same reason, however, that it enjoys special constitutional protection."[96]

In sum, *In re UP Law Faculty* ultimately undermines the legal academy by setting a low bar for plagiarism; casting doubt on the legality and enforceability of their academic standards by signaling available defenses without appropriate nuances; diminishing the ability of the legal academy to check the Court; and reducing the moral authority of law faculties to define and enforce academic standards on integrity. As a saga, *Vinuya* created serious problems that predated the rise of AI and are continuing threats to ethical legal research in this new age.

IV. DISENTANGLING PLAGIARISM FROM FRAUD

Vinuya also reveals that at the heart of plagiarism lies a definitional problem on the role of intent. In her lecture, Lat subsumes "plagiarism" under intellectual dishonesty, which she in turn defines as "any *fraudulent* act performed by a student to achieve academic advantage or gain for oneself or

[93] Garcia v. Faculty Admission Comm., G.R. No. 40779, 68 SCRA 277, 285, Nov. 28, 1975.

[94] Pimentel v. Legal Educ. Bd., G.R. No. 230642, 918 SCRA 287, 435, Sept. 10, 2019.

[95] *In re UP Law Faculty II*, 644 SCRA 543, 642.

[96] *Id.* at 652 (Sereno, *J.*, *dissenting*).

others."[97] "Fraud" is a focus, particularly in her discussion of plagiarism as a "moral issue"[98] in Judeo-Christian morality and Islam,[99] as earlier summarized.

Yet Lat also correctly mentions that plagiarism is "unintentional."[100] This suggests an inconsistency if we were to go by legal definitions. Fraud has been defined by the Court as the "voluntary execution of a wrongful act, or a willful omission, knowing and intending the effects which naturally and necessarily arise from such act or omission," or "the deliberate and intentional evasion of the normal fulfillment of obligation."[101] The Court distinguishes fraud from "negligence" by the absence of deliberate intent,[102] which I take is consistent with "unintentional." To recall, the tenor of *Vinuya* is unintentional plagiarism is regrettable but not unethical.

Unfortunately, and as Bonoan correctly points out, the CPRA adopts a "fraudulent" test by alluding to plagiarism as "pass[ing] off"[103] instead of mere copying. However, the inclusion of negligent acts in plagiarism is consistent with best scholarly practice, which does distinguish between deliberate (intentional) and accidental plagiarism only for the purpose of the appropriate intervention.[104] During the *Vinuya* saga, the Philippine Law Journal released a rare editorial statement against plagiarism. In *Defend Legal Scholarship*, it castigated the Court's dangerous attempt to distinguish between "judicial plagiarism," in which lack of intent is an excuse, and "plagiarism in general," which is intent-neutral,[105] and presciently warned that:

> With the Court setting such a heavy burden in proving plagiarism, the defense of lack of malicious intent will most likely seep into

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[97] Lat, *supra* note 14, at 3, *citing*, CODE OF STUDENT CONDUCT. (Emphasis supplied.)

[98] *Id.* at 11.

[99] *Id.* at 11–12.

[100] *Id.* at 16.

[101] Legaspi Oil Co. v. Ct. of Appeals, G.R. No. 96505, 224 SCRA 213, 216, July 1, 1993.

[102] *Id.*

[103] CPRA, canon II, § 8; Bonoan, *supra* note 15, at 3.

[104] Chris Park, *Rebels without a Clause: Towards an Institutional Framework for Dealing with Plagiarism by Students*, 28 J. FURTHER & HIGHER EDUC. 291, 304 (2004). An institutional framework for plagiarism must "distinguish between deliberate and accidental plagiarism, to provide opportunities for students to learn from their mistakes and get appropriate study skill help, to clearly define roles and responsibilities for the different participants in the transaction and to have an institutionally based system but one that allows some discretion to markers and departments, where appropriate."

[105] *Defend Legal Scholarship*, *supra* note 63, at ii.

> investigations of plagiarism in the academe, where improper or omitted attribution *per se* is already difficult to detect.[106]

Because they labor under the same scholarly enterprise, the warning can be extended to investigations of plagiarism not just by faculty, but also students. It is therefore fortunate that legal academies have not given up so easily. In the Ateneo de Manila School of Law, students are required to affirm before they submit their Juris Doctor theses that:

> Notwithstanding any jurisprudence to the contrary, and in accordance with the exercise of the constitutionally recognized "academic freedom," plagiarism is identified not through intent but through the act itself: the objective act of falsely attributing to one's self (sic) what is not one's work, *whether intentional or out of neglect*, is sufficient to conclude that plagiarism has occurred. One who pleads ignorance, appeals to lack of malice or alleges poor instruction from teacher or superiors, are not valid excuses.[107]

The subtle reference to *Vinuya* by the Ateneo is admirable here and, as I will mention, presents a way forward for law schools.

Disentangling plagiarism from fraud is necessary for two reasons. First, in addition to the moral, legal, and practical reasons against plagiarism, which Lat mentions[108] and which reasons inure to the person committing plagiarism, there is an economic reason for its proscription. Plagiarism creates multiple layers of inefficiency as it unproductively duplicates work that no longer contributes to the body of literature. Incidentally, this is similar to the reason for prohibiting self-plagiarism, which is when someone "uses his/her own previously published work in a different form without citing the original work" or publishes "the same essential work in two different journals."[109]

Plagiarism also expends scarce academic resources for enforcement. School disciplinary investigations in the Philippines, including those for academic dishonesty, require compliance with various procedures which, although summary in nature, still involve various notices, hearings, and

[106] *Id.* at iii.

[107] ATENEO LAW SCHOOL HANDBOOK, *cited in* Ateneo de Manila School of Law, Certification of Non-Plagiarism (on file with the Graduate Legal Studies Institute). (Emphasis supplied.).

[108] Lat, *supra* note 14, at 32.

[109] Colleen Halupa & Doris Bolliger, *Student Perceptions of Self-Plagiarism: A Multi-University Exploratory Study*, 13 J. ACAD. ETHICS 91, 92 (2015).

investigative committees.[110] These tend to tax the already limited financial and human resources of universities which could have been expended for, among others, increasing the quantity and quality of research output and the production of similar public goods.

Most importantly, plagiarism in its various iterations undermines the entire scholarly enterprise by reducing confidence in and the reliability of academic literature and polluting the body of knowledge. *Vinuya I* is already a well-cited case in various landmark decisions of the Court involving foreign state immunity;[111] international agreements that grant a foreign military access to agreed locations;[112] the duty of the President to defend national territory;[113] and the negotiation of foreign loans—all albeit on its discussion of the President's foreign relations power, which was not plagiarized. If not for the notoriety of *Vinuya I*, its tainted discussions could have been readily cited and ossified in the Court's jurisprudence on state responsibility for war crimes. In any event, it is not hard to imagine *Vinuya I* being mainstreamed into the jurisprudence of the Court, increasing the likelihood of cross-contamination and its plagiarized portions slipping through the cracks.

On the international plane, decisions of courts, including the Philippine Supreme Court, are subsidiary means for the determination of rules of law.[114] Although *Vinuya I* is infamous in learned circles in international law, the field is large and notoriety fades over time. *Vinuya I* may well enter into the corpus of international legal materials through briefs, journal articles, and awards. It may be cited as an authority, initially for minor points,[115] but potentially for more consequential arguments later on. In turn, the proliferation of plagiarized works like *Vinuya I* will increase due diligence

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[110] These include the following: "(1) the students must be informed in writing of the nature and cause of any accusation against them; (2) they shall have the right to answer the charges against them, with the assistance of counsel, if desired[;] (3) they shall be informed of the evidence against them; (4) they shall have the right to adduce evidence in their own behalf; and (5) the evidence must be duly considered by the investigating committee or official designated by the school authorities to hear and decide the case." Alcuaz v. Phil. Sch. of Bus. Admin., G.R. No. 76353, 161 SCRA 7, 18, May 2, 1988.

[111] Arigo v. Swift, G.R. No. 206510, 735 SCRA 102, 146–47 n.40, Sept. 16, 2014.

[112] Saguisag v. Ochoa, G.R. No. 212426, 779 SCRA 241, 303–04 n.17, Jan. 12, 2016.

[113] Esmero v. Duterte, G.R. No. 256288, June 29, 2021.

[114] Statute of the International Court of Justice art. 38, ¶ 1(d), June 26, 1945, 33 U.N.T.S. 993.

[115] *See* Timothy Webster, *The Long Tail of World War II:* Jus Post Bellum *in Contemporary East Asia*, *in* JUST PEACE AFTER CONFLICT: JUS POST BELLUM AND THE JUSTICE OF PEACE 324 & n.72 (Carsten Stahn & Jens Iverson, eds., 2020), which cited *Vinuya I* to report the Philippine Supreme Court's dismissal of a petition brought by comfort women due to the political question doctrine.

costs in the production of new knowledge, as scholars would have to look past the secondary material, trace-back their citations, and individually check them for integrity. Viewed in this light, plagiarized works impose costs and produce negative effects that are borne not only by the participants to the transaction, i.e., the academic or student and their home institution, as earlier explained, but the larger scholarly ecosystem—in essence, a negative externality.

This economic reason against plagiarism meets the traditional justification for intent-neutral regulation, not unlike malum prohibitum offenses. For example, Philippine law penalizes the act of issuing bouncing checks not because they were issued fraudulently, but because they undermine the confidence in the banking system.[116] Similarly, plagiarism is worth prohibiting even without a moral, legal, or practical reason because it is an existential threat to scholarship as a whole.

Second, the stricter, uncompromising intent-neutral view of plagiarism may have positive externalities on the current excesses of legal scholarship, particularly in the Philippines. Other than factors like increased facility through AI, which both Lat[117] and Bonoan mention, a possible driver of plagiarism risk today is that students perceive that legal writing must necessarily be footnote-heavy. That style of writing suggests that to be scholarly and thus worthy of high marks or publication in certain law reviews, a paper must make irrelevant citations to irrelevant materials.

This approach does not only bury, or completely disregard the need for, an original idea[118]—the very essence of scholarly and academic writing—but it also pushes students to carelessly lift passages from existing literature especially when under time pressure. If one believes the explanation offered by the writer and researcher of *Vinuya I*, that is, that the deletion of the references to scholarly works was unintentional, this impulse to inflate discussions with secondary literature instead of focusing on original analysis may have precisely driven the supposedly accidental plagiarism of that opinion. Should law schools treat plagiarism as essentially malum prohibitum, i.e., intent-neutral, then it may just incentivize students to carefully consider the necessity of a source before even citing it.

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[116] *See* Griffith v. Ct. of Appeals, G.R. No. 129764, 379 SCRA 94, Mar. 12, 2002.

[117] *See supra* note 18 and accompanying text.

[118] In this respect, the PHILIPPINE LAW JOURNAL's new guidelines which provides a suggested word limit, is a parallel step in the right direction.

So how do law schools move forward, in light of *Vinuya* and the present scholarly landscape? The Ateneo's *Certification of Non-Plagiarism*[119] offers a possible way: schools should draft their own plagiarism policies, clarifying a higher standard founded on academic freedom and expressly disclaiming the defenses signaled in *Vinuya*, in a hopeful expectation that the Court will see the light and follow in due course.

V. CONCLUSION: AI AND THE FUTURE OF LEGAL RESEARCH AND THE PROFESSION

The proscription of plagiarism independent of intent is more urgent and compelling in light of advances in generative AI. Plagiarism's effects on the pollution of knowledge and the reliability of academic scholarship and its costs to society as a whole are supercharged by algorithms which, for all their ability to mimic and even surpass human intelligence, do not thus far reflect human intentionality and scholarly discernment.[120]

For instance, as to the pollution of the body of knowledge, while large language modules ("LLMs") are trained on enormous amounts of data and can perform natural language processing, i.e., understanding and generation, it is still "difficult for existing techniques to identify low-quality or misleading content."[121] LLMs may therefore rely on already plagiarized works in generating new material, which may in turn be the basis of further knowledge production. In this scenario, it is not simply the AI-generated material that becomes unreliable, but the derivative work itself (and their own second-order derivatives).

If generative AI is to be mainstreamed as a legitimate tool in research and knowledge production, students must be trained not only to avoid plagiarism but to detect it in AI-generated output. Given this, plagiarism in light of *Vinuya* also implicates students' training. The weakness of deterrence and the availability of unintentionality as an excuse may engender a carelessness in students and researchers who, when pressed for time, may

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[119] *See supra* note 107 and accompanying text.

[120] Kim, et al. have designed an AI model that can perform "commonsense moral decision making," but they equate moral judgments to "utility maximizing decision[s] over a function that computes trade-offs of values perceived by humans in the choices of the dilemma." Richard Kim et al., *A Computational Model of Commonsense Moral Decision Making*, *in* PROCEEDINGS OF THE 2018 AAAI/ACM CONF. ON AI, ETHICS, AND SOCIETY 198 (2018).

[121] Qingyao Ai et al., *Information Retrieval Meets Large Language Models: A Strategic Report from Chinese IR Community*, 4 AI OPEN 80, 87 (2023).

eschew original work or, when relying on generative AI, forego due diligence. Lat has identified the pressure to obtain good grades and unrealistic workloads and expectations as risk factors in student plagiarism,[122] which is equivalent to the risk of blind reliance on generative AI.

In discussions in Philippine legal academia, the fear that generative AI will exacerbate problems with plagiarism has led some to advocate banning the use of the technology for student course requirements, including for papers, dissertations, and similar scholarly undertakings. Yet it is a fact that the age of AI has arrived and, with it, new ethical issues in scholarship and practice. Bonoan outlines the most important challenges to legal ethics that AI brings, not just in research but also misinformation and automated legal advice.[123] Yet like Bonoan, I say "challenges," and not "threats," because AI can be a powerful tool for justice. For instance, as generative AI can efficiently produce the more templated, mechanical language that lawyers use for contracts and even pleadings, the technology can exert a downward pressure on the cost of legal services. Scholars have already anticipated the structural changes to law firms, particularly for associates and paralegals. If firms "[would] no longer need to hire fifty (50) associates to sift through contracts and conduct legal research,"[124] it would be reasonable to expect a proportionate decrease in the cost of legal services, adjusted for the cost of the AI solution.

Returning to her lecture, Bonoan highlights the uniqueness of AI issues in the legal profession, specifically on whether chatbots and "robo-lawyers" are engaged in the unauthorized practice of law.[125] I would only add that the use of generative AI in its current state also exposes human lawyers to ethical issues stemming from a reliance on potentially spurious information and their introduction in official records and proceedings. Canon IV, Section 1 of the CPRA requires lawyers to be "thorough in research, preparation, and application of the legal knowledge and skills necessary for an engagement[,]"[126] while Canon II, Section 11 prohibits them from making false statements, with an additional duty to "correct false or inaccurate statements and information made in […] any pleading, or any other document required by or submitted to the court, tribunal or agency, as soon as its falsity or inaccuracy is discovered or made known to him or

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[122] Lat, *supra* note 14, at 23, 27.
[123] *See supra* notes 35 & 36 and accompanying text.
[124] Sean Semmler & Zeeve Rose, *Artificial Intelligence: Application Today and Implications Tomorrow*, 16 DUKE L. & TECH. REV. 85, 90 (2017).
[125] Bonoan, *supra* note 15, at 11.
[126] CPRA, canon IV, § 1.

her."[127] With generative AI's well-reported hallucinations of fictitious cases and precedents such as in *Mata v. Avianca*,[128] to which Bonoan also alludes in her lecture, lawyers who use generative AI would have to contend with these ethical rules for any negligent use of the technology, specifically in client or court-bound output.

Notwithstanding generative AI's rapid advancement, I agree with Bonoan that it is unlikely for AI to completely displace the lawyer, but for a different reason and notwithstanding future improvements. As a crude premise, it is theoretically possible for AI to give fairer prison sentences than human juries in the United States, such as a more accurate prediction of recidivism based on large data and machine learning.[129] Closer to home, the capture and evaluation by AI-powered no-contact apprehension systems may produce a more accurate adjudication of traffic violations. Government actors may thus be open to the adoption of these technologies.[130]

However, there will be serious questions about the legitimacy of legal judgments completely generated by technology and without any cognitive human intervention, especially if they involve aspects that we often identify with life, liberty, and property. Although Donald Berman and Carole Hafner saw the potential of AI as early as 1989 in more routine legal decisions, both in advocacy and adjudication, they draw the line in it supplanting human decision-making:

> In the ideal case, legal decisions are made after lengthy study and debate, recorded in published justifications, and later scrutinized in depth by other legal experts. In contrast to this ideal, most day-to-day legal decisions are made by municipal and state court judges, police officers, prosecuting attorneys, insurance claims adjusters, welfare administrators, social workers, and lawyers advising their clients on whether to settle or litigate. These

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[127] Canon II, § 11.

[128] Mata v. Avianca, Inc., No. 1:2022cv01461, Op. on Sanctions (S.D.N.Y. 2023). *See also* Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES, May 27, 2023, *at* https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chat gpt.html.

[129] Marzieh Karimi-Haghighi & Carlos Castillo, *Enhancing a Recidivism Prediction Tool with Machine Learning: Effectiveness and Algorithmic Fairness*, *in* PROCEEDINGS OF THE EIGHTEENTH INTERNATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND LAW 210 (2021).

[130] *See* Charmaine Distor, Odkhuu Khaltar, & M. Jae Moon, *Adoption of Artificial Intelligence (AI) in Local Governments: An Exploratory Study on the Attitudes and Perceptions of Officials in a Municipal Government in the Philippines*, 8 J. PUB. AFF. & DEV. 33 (2021), which found that a test local government had generally positive attitudes towards the adoption of AI.

> decisions must often be made under severe pressures of limited time, money, and information. Expert systems can provide decision makers with tools to better understand, evaluate and disseminate their decisions. At the same time, it is important to reiterate that expert systems should not and cannot replace human judgement in the legal decision making process.[131]

Universities in the Philippines and abroad are currently conducting sensing and listening tours, consulting their stakeholders about their academic policies on generative AI. Law schools must participate in these discussions, but also recognize that a one-size-fits-all policy across all scholarly fields may be inefficient. Different fields deal with language in different ways, and in the case of the legal profession, the written word is not just the vehicle for our ideas, but it may be the law and the end itself. It is crucial for law schools to form law-specific policies that are grounded on the uniqueness of the legal profession and legal service, lest we be caught flatfooted.

In the final analysis, training students how to avoid the plagiarism in *Vinuya I* goes hand-in-hand with preparing them for professional and scholarly environments where AI will be widely used. It is not enough for the legal academy to emphasize the irrelevance of intentionality in plagiarism (contrary to *Vinuya I*, and as argued in this paper); it must also contextualize plagiarism in light of the digital tools that are or will be widely available. When law schools do one but not the other, our education of students for ethical research and practice is incomplete, and we plant the seeds for new *Vinuyas* in the age of AI and beyond.

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[131] Donald Berman & Carole Hafner, *The Potential of Artificial Intelligence to Help Solve the Crisis in Our Legal System*, 32 COMMUN. ACM 928, 928 (1989).